

Doç. Dr. Cemile Demir GÖKYAYLA

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FIDIC 1999 RED/YELLOW/SILVER/MDB HARMONISED BOOKS 20 Contractor's Claims

- ✦ Claim Notice
- ✦ Detailed particular
- ✦ Engineer Decision
- ✦ DAB Decision
- ✦ Amicable Negotiations
- ✦ Arbitration (Litigation)

Hangi talepler için Claim Notice gerekir?

- ✦ *Any claim for additional time or additional payment*
 - ✦ Ödenmeyen hakediş alacakları?
 - ✦ Eksik ödenen/ödenmeyen fiyat uyarlaması alacakları?
 - ✦ Ek iş bedelleri?
- ✦ Ek süre
- ✦ İşin uzaması
- ✦ İşin hızlandırılması
- ✦ Force majeure
- ✦ Hukuk
- ✦ Somut olay

Hangi andan itibaren 28 gün?

- Talebe neden olacak olayın
 - Öğrenildiği
 - Öğrenilmesi gereken
- Kritik yörünge?
- Takvim/iş günü

28 günlük ihbar süresine uyulmamasının sonucu?

- ✦ Lack of Notice within 28 days
 - ◆ No entitlement to extension of time
 - ◆ No additional payment
- ✦ 20.1 geçerli mi?
- ✦ Hak düşürücü
- ✦ Y.15. HD, E. 2000/4429 K. 2001/1032 T. 26.2.2001

Olası karşı argümanlar?

- ❖ Kıta Avrupası Hukukları
 - ❖ Hakkın dürüstlük kuralına aykırı kullanılması
 - ❖ İş sahibinin biliyor olması
 - ❖ Sebepsiz zenginleşme
 - ❖ Zenginleşme var mı?
 - ❖ Vekâletsiz işgörme
 - ❖ Görülen bir iş var mı?
 - ❖ Genel işlem şartı?
 - ❖ Şaşırtıcı mı? Beklenmedik mi?

Bildirimnin Őekli?

- Yazılı
 - To Engineer
 - Cc Employer
- Talep iradesi?
 - hakları saklı tutmak?
 - Talep etme iradesi olmayan yazıŐmalar?
 - ileride bildirmekten bahsetmek?
 - szl bildirim?
 - toplantı tutanađı?
 - geri ekilen yazılar?
- ekinme! Bu bizzat iŐ sahibinin emri
 - Ek sre ve ek deme talep edeceđiz

Talep dosyası sunulmaması

- ✦ Haberdar olduđu/olması gereken tarihten itibaren 42 gn iinde
- ✦ 42 gn hak dřrc m?
- ✦ Dosya ieriđi:
 - ✦ Vakıa
 - ✦ Hukuki dayanak
 - ✦ Deliller (fotođraf; hakediř; yazıřma; uzman grř; hesap vs.)
- ✦ Bařarı řansı?

Engineer ne yapmalı?

✦ Tarafsızlık ve bağımsızlık

✦ Hakkaniyet

✦ Bilim

✦ Engineer Decision

✦ İtiraz

✦ İcrası

✦ Ödeme

✦ Revize iş planı

FIDIC 1999 RED/YELLOW/SILVER/MDB HARMONISED BOOKS 2.5 Employer's Claims

- 2.5 Employer's Claims
- **If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period the Employer or the Engineer shall give notice and particulars to the Contractor.** However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employers Equipment and Free-Issue Material], or for other services requested by the Contractor.
- **The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim.** A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.
- **The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period].**
- This amount may be included as a deduction in the Contract Price and Payment Certificates. **The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.**

Ne zaman ihbarda bulunulmalı

- FIDIC 20.1 28 gün İşsahibi için de geçerli mi?
- Jeremy Glover “*FIDIC an overview: the latest developments, comparisons, claims and a look into the future*”
 - unlike sub-clause 20.1, where a Contractor has 28 days to give notice, there is no strict time limit within which an Employer must make a claim
 - it is possible that the Applicable Law might just impose some kind of limit.

İngiliz Privy Council “NH International (Caribbean) v National Insurance Property Development Company” Kararı

- CMS Cameron McKenna *Employer claims and financial arrangements under the FIDIC Red Book*
- (...) *The court’s findings as to clause 2.5 will also be of general application to those FIDIC based contracts which retain the clause. In contrast to the Contractor’s obligation to notify claims under clause 20 of the Red book, the court’s decision may be seen as providing a level-playing field for Employer and Contractor claims alike. Indeed, the requirements for Employer claims may on the whole be stricter. Clause 20 provides for a maximum 28 day notification period in addition to the requirement found also in clause 2.5 for notification “as soon as practicable”. However, the present decision confirms that the notification of Employer claims, if they are to be valid for the purposes of set-off or otherwise, are also required to be accompanied by particulars specifying the basis of the claim, the clauses relied upon and substantiation of any amounts claimed. This can be contrasted with the position under clause 20 where more general notifications are often sufficient. For example in ObrasconHuarte Iain SA v A-G for Gibraltar, the English Technology and Construction Court upheld a Contractor’s compliance with clause 20 by reference to letters which stated merely that certain events would entitle the Contractor to an extension of time without further substantiation.*
- *Employers would be well advised to take note of the present decision and ensure that any claims arising during the course of a project are promptly notified to the Contractor. The court’s decision does not give guidance as to how the requirement for notifications to be made “as soon as practicable” is to be interpreted in the context of Employer claims. Employers should not assume, however, that the generality of this description means that a period of 28 days or longer will be allowed (to reflect the period in clause 20). Contractors may well seek to argue that briefer periods of notification are required in certain circumstances.*

Türk Hukuku

- TBK madde 474: İşsahibi, eserin tesliminden sonra, işlerin olağan akışına göre imkân bulur bulmaz eseri gözden geçirmek ve ayıpları varsa, bunu uygun bir süre içinde yükleniciye bildirmek zorundadır.
- Yargıtay 15. H. D. T. 21.04.2008, 3691/2624:
- Yargıtay 15. H. D. T. 23.3.2009 2057/1644
 - *Hemen/Derhal*

ihbarda bulunulmamasının sonuçları

- Jeremy Glover *“FIDIC an overview: the latest developments, comparisons, claims and a look into the future”*
- *The Employer cannot make any deduction by way of set-off or any other claim unless it is in accordance with the Engineer’s determination.*
- *Sub-clause 2.5 is a new “Contractor-friendly” clause. I say this because it is designed to prevent an Employer from summarily withholding payment or unilaterally extending the Defects Notification Period.*
- *One particularly important feature can be found in the final paragraph which specifically confirms that the Employer no longer has a general right of set-off. The Employer can only set-off sums once the Engineer has agreed or certified any amount owing to the Contractor following a claim.*
- *Unless the Employer follows the procedure laid down by this sub-clause, he cannot withhold or otherwise deduct any sums due for payment to the Contractor.*

Neden Claim Making Procedure?

- Tarafları zararı önleme/azaltma
- Uyuşmazlık çıkmasını engellemek
- Uygulama:
 - Sorumsuzluk kaydı işlevi
 - Yükümlülükten kurtulma