



Second Edition

Construction Claims & Responses

Effective Writing & Presentation

ANDY HEWITT

WILEY Blackwell

Construction Claims & Responses

effective writing & presentation

This book is dedicated to Kim, Nik and Nina.

Construction Claims & Responses

effective writing & presentation

Second Edition

Andy Hewitt

Hewitt Construction Consultancy Claims Class

WILEY Blackwell

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About the Author

Andy Hewitt is a construction contracts and claims consultant who has over 40 years' experience in the construction industry in the UK, Africa and in the Middle East. In addition to many projects in the UK, he has worked on projects in Nigeria, Sudan, Bahrain, Saudi Arabia, Jordan, Oman, Tanzania and the United Arab Emirates.

Andy has held senior commercial and project-management positions with contractors, subcontractors and consultants, including several years operating his own consultancy practice in the UK, which provided quantity surveying, estimating and project-management services. He has been involved in a wide variety of construction projects including super high-rise, airports, hospitals, residential, hotels, shopping malls, industrial buildings, heavy civil engineering, marine works, process plants, pipelines, desalination plants and royal palaces.

One of the most enjoyable periods of Andy's career was when he was employed as a claims and contracts consultant by J.R. Knowles, one of the most prestigious international consultants in this field. During this period he discovered that his background on both the contractor's and the client's 'side of the fence' in commercial, contracts and project-management positions gave him the ability to look at the issues objectively and to manage and to resolve the often adversarial nature of claims in a proactive manner to achieve resolutions acceptable to the parties. During this period he was involved in several iconic projects in the United Arab Emirates including the world-famous Burj Al Arab hotel in Dubai.

During the past decade, Andy has been employed in positions as project director, contracts manager and commercial manager on many prestigious projects in the Middle East. In these roles he has had the responsibility of both preparing and determining many claims. The often poor quality of the claims and determinations that have come across his desk during this time, many of which have exhibited a lack of understanding of many basic concepts and requirements of the subject, inspired him to share his experience on the subject with the industry by way of this publication.

Currently, Andy is the principal of Hewitt Consultancy services, a small, specialist practice offering claims, contracts, dispute management and adjudication services to contractors and employers.

Following feedback from the first edition of this book and after several invitations from companies to provide training on claims related issues, Andy realised that there was a significant gap in the market for education and training on the subject. This led him to develop a tutor-assisted distance learning course on construction claims and several two-day intensive training courses on subjects relating to claims. These courses are marketed internationally under the banner of Claim Class.

Andy now splits his time between Europe and the Middle East and is involved in consultancy work as well as providing education and training in many countries.



Hewitt Construction Consultancy provides two distinct services to clients: consultancy work, which is principally provided by Andy Hewitt, and education and training which is provided under the Claims Class banner.

Consultancy services include the following:

- Claim preparation
- Claim review and defence
- Claim enhancement and presentation
- Contractual advice
- Contract administration set up and advice
- Dispute adjudication
- Dispute management
- Arbitration support
- Dispute board membership
- Education and training

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Foreword

I was pleased to be asked by Andy Hewitt, a former colleague, to write the Foreword to his book.

The first thing that strikes one, having read the first few pages, is the easy style Andy has adopted, which made my task a pleasure. It is also obvious from the outset that the author has had a great deal of hands-on experience of preparing and responding to claims, and this oozes from the pages.

First and foremost this book is international in its outlook and will be useful for those involved in claims on a worldwide basis. In the early part of the book, Andy recounts his need when preparing his first claim for a 'Claims for Dummies' type of book which he couldn't find. This is not a book for dummies, but is essential reading for anyone who is preparing a claim for the first time. For those of us with experience aplenty, the book provides an excellent aide memoire and will ensure that nothing is missed.

The book is without a doubt fully comprehensive and goes through the preparation of a claim from A to Z. In each chapter Andy tells the reader of matters which he intends to cover, then provides the detail and ends up reviewing what had been written. In any campaign, – and the preparation submission and negotiation of a claim is something of a campaign – it is essential to have a strategy, and this is dealt with at the outset.

Claims may relate to variations, delays caused by the employer and neutral events which could involve extensions of time, prolongation costs, acceleration and disruption, all of which are fully explained.

Claims are nearly always prepared by reference to the conditions of contract. The book refers to the FIDIC conditions, but this should not put off those who are involved with contracts where other standard conditions apply. The comprehensive nature of the book would easily enable the reader to slot the advice provided on its pages into other standard conditions of contract. The book leaves nothing to chance when referring to the conditions that are applicable when preparing a claim.

The need for a stand-alone claim, accompanied by all documents referred to therein, is stressed as being essential if the claim is to be taken seriously and to result in a satisfactory settlement. Nobody who has the task of reviewing a claim has the appetite for wading through

mountains of files to find documents that relate to the claim. The claim must be user friendly and be in more than one volume to ensure that when reading the claim it is easy to follow documents to which the claim relates. These may seem fairly basic matters, but I would say that in excess of half the claims prepared fail to follow this simple procedure.

Andy goes on to deal with what he considers to be the essentials of a successful claim CEES Cause, Effect, Entitlement and Substantiation. By way of illustration the book provides in detail the CEES of a delay and disruption claim on an 84-dwelling project where six of the houses are delayed and disrupted by work undertaken on behalf of the employer on the access road. There is also an example claim of an extension of time and additional payment for prolongation arising from a variation in respect of the redesign of an electrical transformer room on a multi-storey project.

The style and formatting of the claim document is dealt with down to such detail as the content and layout of the cover to the claim. Finally, Andy deals, from his experience, with how a response to a claim should be undertaken in a professional manner.

I like the book and have no hesitation in recommending it to students, beginners, those involved on a day-to-day basis with time and cost on projects, as well as the seasoned claims consultants.

It will certainly have a place on my bookshelf to allow me, having prepared a claim, to ensure that I haven't missed anything.

Roger Knowles



INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Overview

People who deal with claims within the construction industry inevitably do so after qualifying in some other profession, usually engineering, design, commercial management, contracts management or project management. Launched in 2015, the Institute of Construction Claims Practitioners (ICCP) recognises that, in order to properly prepare, respond to or manage claims, a level of professional expertise must have been achieved within what has become a specialist sector of the industry.

Claims and subsequent disputes can run into huge sums of money and it is considered that the owners of such sums should be afforded a level of confidence that those responsible for dealing with such matters on their behalf, whether employees or consultants, are suitably qualified and experienced.

The ICCP's mission is to maintain a professional institute, whereby suitably qualified and experienced professionals are awarded a recognised qualification related to the claims discipline.

Professional Standards

The institute sets professional standards for its members to ensure that institute members are suitably qualified and experienced at the specific membership level awarded.

The institute also encourages and assists members to constantly improve their professional standards and knowledge and to strive to achieve membership at the next level within the institute.

Information Sharing

The claims profession, especially when compared to other professions within the construction industry, is in its infancy. Consequently, research and reference material is often in short supply. The institute maintains a knowledge centre of information where papers, case studies, articles and presentations are made available to the members for reference. Members also have access to information on relevant books and higher education and training courses. A members' magazine is also published which contains information relevant to this sector of the industry, and future plans include the launch of a members' discussion forum and an annual conference.

Criteria for Membership

There are three grades of membership within the institute:

Associate (AICCP)

Member (MICCP)

Fellow (FICCP)

The level of membership is dependent on qualifications in other industry disciplines, together with specific and verifiable experience within the claims sector of the industry.

Further Information

Institute of Construction Claims Practitioners

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After the first edition of *Construction Claims & Responses* was published, I was pleasantly surprised at how well it was received and by the fact that many readers took the trouble to contact me to say how useful that they had found the book. In many instances, people also inquired if I could recommend any educational or training courses to further enhance their knowledge of the subject. At the time, I was obliged to advise that, while there were several university degrees and training courses on construction or contract law, as far as I was aware, there was nothing that provided education or training specifically on the practical aspects of claim and response preparation as is covered in this book. The realisation that there was a significant gap in the market and that there was a need for education and training on the subject inspired me to take the subject of the book to the next level and consequently, Claims Class was born.

Claims Class now offers various education and training courses on matters associated with construction claims including:

Construction Claims Distance Learning Course

This tutor-assisted course comprises seven modules that cover all the subjects included in this book. The course requires an average of 150 hours of study and students can take as long as they wish to complete the course. Tutorials are provided to assist the students to complete each module and each student is assigned a tutor who acts as a mentor, grades assignments and provides feedback and advice. After the completion of each module, students are provided with model examples of how the assignment work could have been completed. The course examples provide a valuable source of future reference material.

Claims Class has so far had students enrol on the course from more than twenty-five nationalities from all over Europe, North and Central America, Eastern Europe, the Middle East, Africa, South East Asia, China and Australia. Feedback from those who have completed the course has always been excellent.

Intensive Training Courses

Claims Class offers two-day courses on subjects that are aligned with construction claims, including claims and responses, delay analysis and the FIDIC contracts. The exact subject matter is changed in accordance with demand. These courses are presented by highly qualified and experienced presenters and are broken down into various modules. In order to enhance the learning experience, delegates are divided into groups that are required to study and discuss various assignments throughout the course and present the findings to the class for further discussion.

The courses take place in various international locations, and Claims Class has presented such courses to hundreds of delegates in locations such as Abu Dhabi, Bahrain, Doha, Dubai, Dublin, Johannesburg, London and Singapore. Claims Class is always looking for opportunities to present these courses in new locations. As with the distance-learning course, delegate feedback is always excellent.

In-House Training

When companies have a requirement for training, it is sometimes more convenient and economical for Claims Class to go to them. Claims Class can either offer an existing training course to be delivered at the client's premises, or tailor-make a bespoke course to cover the specific requirements of the client.

Further Information

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The Knowles Group for providing me with some of the most rewarding and enjoyable years of my career and for the opportunity to learn the craft of claims.

I also wish to thank the Fédération Internationale des Ingénieurs-Conseils (FIDIC) for kindly allowing me to reproduce sections from their publication *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, First Edition 1999*.

In this book, the Employer, the Engineer, the Contractor and Subcontractors are referred to in the masculine gender in conformity with standard FIDIC practice. The author wishes to emphasise that the book is intended to address female readers on an equal basis with their male colleagues and that all references throughout the book to the masculine gender are only for convenience in writing.

Chapter 1

Introduction

Why is it Necessary to Produce a Fully Detailed and Professionally Presented Claim or Response?

Imagine that you have been invited to an interview for a new job. This job is a real step up the career ladder and could enable you to move to a better house in a new area where your children would be able to attend a really good school. The job would be stimulating and interesting, and this is the chance that you have been waiting for to prove yourself professionally. When the time comes for the interview, you would undoubtedly take care of your appearance – wear a good suit and ensure that your shoes were polished. You would also probably have spent time thinking of how best to convince the interviewers that you are the ideal person for the job and would have rehearsed answers to the questions that you expect to be asked. If you thought that there may be some negative aspects to your qualifications or experience, lack of specialised experience for part of the job for example, you would probably have thought about how you could put a positive perspective to the interviewers, maybe by stressing some other aspect of your experience which could be easily drawn upon to overcome the perceived disadvantage. In short, given the rewards for success arising from the results of the interview, any person in this position would do their very best to sell themselves to the people making the decision.

Why then, do many of those people or companies responsible for presenting or reviewing claims, which often equate to considerable sums of money, not take similar pains to ensure that their submissions are presented in a professional and thorough manner; that they contain all the relevant and necessary information; and that they answer questions that will probably be asked by the reviewer of the claim? During the past several years, I have spent a considerable proportion of my time reviewing claims, and I can honestly say that during this time I have received very few submissions for which I have not had to raise queries or request additional particulars to be submitted. In some cases

I have simply rejected the claims as presented because they do not fulfil the basic requirements to prove that, on the balance of probabilities, the claim has any merit. Many of the submissions have consisted of a two-page or three-page letter enclosing a haphazard, dog-eared collection of documents which leave the reviewer to try to follow the logic of the claim and make his own conclusions. Well, I am sorry, but my job in such circumstances is to produce a determination, and however impartial I try to be, it is human nature that if my life is made difficult or if I am expected to do the claimant's work for them, I am hardly likely to be predisposed to giving the benefit of the doubt to the person who has brought about this state of mind. I probably would not offer a job to someone who turned up for an interview in a pair of scruffy old jeans with no real idea of how they could make a success of the position either.

Taking the point of view from the other side of the fence (and I am blowing my own trumpet a little here), I have also put together sound claim documents with reasoned and substantiated arguments to demonstrate clear entitlement and quantum, only to have them rejected out of hand by way of a few sentences with no real reasons being given for the rejection. Such responses are, if anything, even less professional than producing a bad claim document, because they are likely to lead to a costly dispute.

The aim of a claim is to persuade the respondent that, on the balance of probabilities, the claimant has entitlement under the contract and/or at law, and to succeed in this, the facts of the events on which the claim is based need to be presented in a logical manner and they need to be substantiated. The contract and, if necessary, the law should be examined to demonstrate that the events give cause to entitlement. If the claimant has been at fault in any way or if there are weaknesses in the claimant's case, then these should be considered and arguments made as to why such things should not affect the case. The same considerations should be taken into account when reviewing a claim. Has the claimant reasonably proved each element of his case and is he entitled to an award of all, or possibly part, of the claim and if not, why not? Such determinations should be clearly written in the response and the reasons for the conclusions should be adequately demonstrated and substantiated. The respondent needs to be equally persuasive that his arguments are well founded if he is to convince not only the claimant, but also the project owner of his findings, which he will need to do if the situation is to be settled and a dispute avoided.

Salespeople are taught that the first rule in selling is to get the customer to like them – the phrase used is 'selling yourself' and the principle here is that people do not want to buy from people that they don't like. We have all been in a situation whereby we grudgingly buy