

Homburger

Making Good Actual Expenses

Typology of Cases and Typical Difficulties when Dealing with Recovery of Actual Expenses

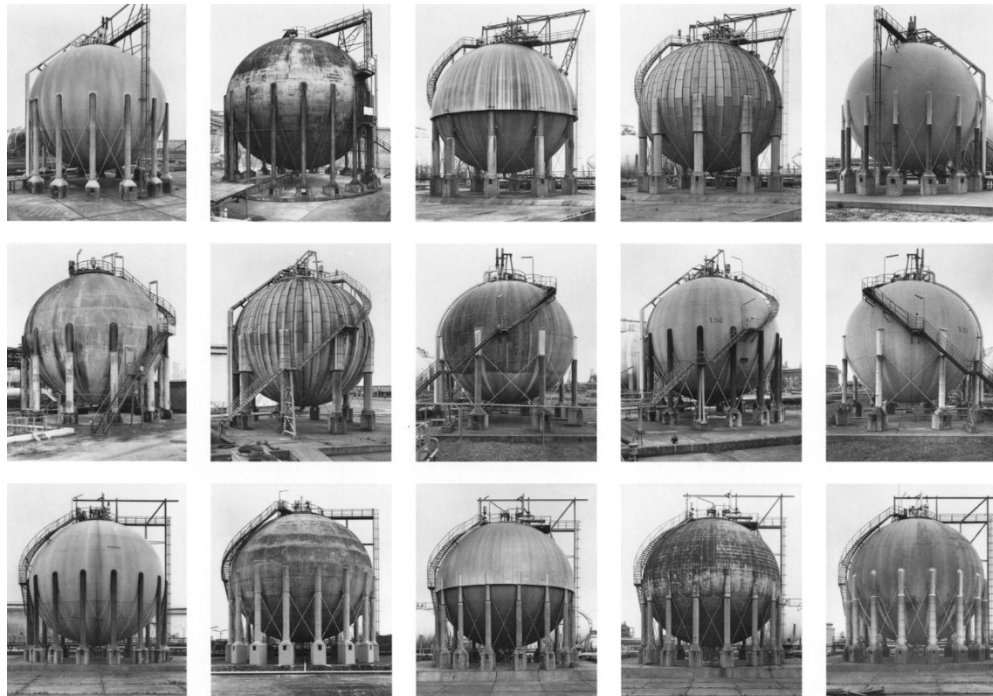
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ASA Conference - February 3, 2017

I. Actual Expenses



II. Typology



Typology of Cases

Claims for...

- Costs incurred in reliance on a contract that never came into being or is invalid (e.g. arts. 26(1) CO, 39(1) CO, *culpa in contrahendo*)
 - Negotiation and execution costs (travel, legal and notary costs, taxes)
 - Evaluation costs (market analyses, appraisals)
 - Costs of preparing own performance (loans, letters of guarantee, rental fees)
- Costs incurred performing a contract that was validly terminated or rescinded (e.g. art. 107/109 CO)
 - All costs of contract performance up until point of termination
 - Expenditures (e.g. purchases of goods and services)
 - Internal costs (e.g. cost of personnel time, overhead)
 - Profit margin?
 - Costs incurred due to termination

Typology of Cases (continued)

Claims for...

- Costs incurred due to delayed performance by other side (e.g. 103 CO)
 - Additional expenses during delay period (e.g. overhead, financing costs)
 - Costs to cover oneself during a period of delay (e.g. rental costs)
 - Costs owed to third parties (e.g. damages, liquidated damages)

- Costs of additional performance not covered by initial contract (e.g. change orders)

- Costs of performing the contractual scope of the breaching party
 - Costs of remedying defects (e.g. *Ersatzvornahme*)
 - Costs of completing the breaching party's scope of work in case of default
 - Cost of payments made on behalf of the contracting party (e.g. customs fees)

Typology of Cases (continued)

Claims for...

- Any other costs incurred due to a breach by the other party, e.g.
 - Costs of consulting lawyers, sending notices
 - Mitigation costs
 - Costs of parallel proceedings in breach of an arbitration clause
- Party and arbitration costs

Typology of Cases

Construction Contracts



- Claims by the contractor for costs:
 - Due to delay caused by the owner
 - Due to disruptions caused by the owner
 - Due to change orders
 - Of prior performance in case of valid termination
 - by contractor due to breaches by owner or
 - by owner for convenience
- Claims by the owner for costs:
 - Due to delays caused by contractor
 - For rectification of defects
 - Of prior performance in case of termination due to breaches by contractor
 - For completion of the project in case of valid termination due to contractor's default

III. Typical Challenges



Making Good Actual Expenses

How hard can it be?



Typical Difficulties

Getting started

- Understanding the requirements
 - The applicable law:
 - What expenses can you recover from whom?
 - *What* do you need to prove?
 - The applicable burden of proof: what do *you* need to prove?
 - The applicable standard of proof: *how much* proof is required?
 - The discretion the arbitral tribunal has (and is willing to exercise) in determining quantum (e.g., *art. 42(2) CO*)

- Identifying (all) expenses that were incurred and can be claimed

Typical Difficulties

External expenses

- Quantifying the expense
 - Generally unproblematic
 - Amounts usually concrete and identifiable
 - Some difficulties, e.g. where invoices cover multiple services
- Proving the expense
 - Documents primary source of evidence
 - Invoices, receipts, contracts
 - Challenges faced
 - Is proof of payment required or are invoices sufficient?
 - Sheer volume of documents can be overwhelming
 - Invoices with insufficient information
 - Translation
 - Organization of evidence

Typical Difficulties

Internal expenses

- Quantifying and proving
 - Total costs incurred in relation to a given project
 - Personnel and management costs
 - Number of hours spent?
 - Hourly rate?
 - Overhead costs
 - Research and development costs
 - Total costs of each additional day of contractor performance, including:
 - General Conditions
 - Home office overhead
 - Idle equipment costs
 - Escalation costs
- Proving the extent of project completion

Typical Difficulties

- Expenses incurred by affiliated companies
- Interest
- Currency and exchange rates
- Use of fact witnesses to fill evidentiary gaps
- Confidentiality concerns
- Double counting
- Balancing value of claim against the burdens of proving the actual expense

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Thank you for your attention.

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