8 Negotiations in the Event of Performance Disruptions: Demand Management

He who knows the goal can decide He who decides finds peace He who finds peace is certain He who is certain can consider He who considers can improve
Confucius (551 B.C.–479 B.C.)

Contents

Summary

Non-conformities are non-conformities of the contractually agreed specification features and properties of a product (Dathe and Helmold, Erfolgreich im Chinageschäft. Strategien und Handlungsempfehlungen für kleinere und mittlere Unternehmen (KMU). Springer Gabler, Wiesbaden 2018). In this context, claim management or supplement management have a central role in negotiating these missing properties (Helmold and Terry, Lieferantenmanagement 2030, Springer Gabler, Wiesbaden 2016). Subsequent claim management is also called claim management or regression. Unless specified and agreed in contracts, subsequent claims are usually made after services have been rendered and deliveries have been made due to deficits in quality, quantity, time, type of delivery or due to other deviations from the originally agreed condition. However, they can also be made by the supplier (delivering company).

M. Helmold et al., *Successful Negotiations*,
https://doi.org/10.1007/978-3-658-35701-6_8

8.1 Performance Disruptions and Subsequent Claims Management

Defects in performance are characteristics or performance features of the product which have been contractually agreed by the customer and supplier but which have not been provided. In German legal terms, this is referred to as a material defect. Material defects are usually defective design, defective manufacture or defective materials. In addition to material defects, there are other performance defects such as early or late deliveries, deliveries to a place not agreed upon or missing functions (Helmold 2013). Performance failures are often called non-conformities (English: Non Conformities, (Vidogah and Ndegukuri 1988) in companies (Dathe and Helmold 2018). In this context, claim management or supplement management have a central role in negotiating these missing features (Helmold and Terry 2017). Subsequent claim management is also called claim management or regression (Helmold 2013). Unless specified and agreed in contracts, subsequent claims are usually made by the customer (the procuring company) after the service has been provided and delivery has been made due to deficits in quality, quantity, time, type of delivery (customer subsequent claims). However, subsequent claims can also be made by the supplier (delivering company) (supplier subsequent claims). Claim management is a discipline that has so far been little described in research or teaching, as numerous authors describe (Helmold 2013; Wenxin et al. 2017).

In supplier management, the aim of supplement management is to clarify by mutual agreement the consequences of events in the course of the project that could not be foreseen when the contract was concluded. After an order has been placed by the client with the contractor, changes, supplements or extensions usually occur, especially in large projects. Possible reasons are usually delivery failures, delays or quality deviations (Vidogah and Ndegukuri 1988). In their study, Hendricks and Singhal found out that performance problems in the supply chain can reduce the value of a company by up to 40% (Hendricks and Singhal 2005), so that the primary goal of claim management is prevention, as numerous authors state (Helmold 2013; Wieland and Wallenburg 2012; Hendricks and Singhal 2005).

Delivery failures due to force majeure such as floods and earthquakes are also regressed. In cases of force majeure, subsequent claims are also legally enforceable under certain conditions (Helmold 2013). In particular, claims for damages can be asserted in the case of deficiencies in coverage and prevention, for example in the case of gross negligence. Changes or extensions covered by the contract do not lead to subsequent claims. If this is not the case, the contractor can make a subsequent claim for the additional costs incurred by him to the party causing the change or extension (Vidogah and Ndegukuri 1988; Helmold 2013). Examples include:

- Lost profits due to production downtime
- Costs of removal of defects and repair
- Costs incurred in connection with troubleshooting (including shunting costs)
- Damages due to a default in performance

- Late or premature delivery
- Storage costs for early deliveries
- Transport costs for returning the goods for repair
- Packaging costs for new packaging
- Administrative costs for processing the subsequent claim

8.2 Demand Manager (Contract Manager)

In principle, the goal of every company should be to avoid subsequent claims, but studies show that in national and international companies, performance characteristics are often not fulfilled 100% in goods transactions, so that disputes arise (Helmold 2013). This is where a contract or claim manager can be used to assist with contracts and negotiations of buyers or sellers (Helmold 2013). His task includes the creation of contracts in cooperation with purchasing and sales staff.

In addition, the contract manager is responsible for the preparation of claims from a technical and commercial point of view, including the determination of contractual and legal bases for claims and the securing of claims against suppliers, customers or insurance companies. The contract manager supports the purchasing or marketing department in the execution of claim management from the settlement to the warranty phase, especially in the area of delivery disruptions and checking the contractual and legal basis for claims. The requirement profile and the necessary competencies of a contract manager are shown in Fig. 8.1. In addition to knowledge of national and international contract law, it is usually necessary to understand technical issues and translate them into a subsequent claim (Helmold 2013). In addition to legal training (academic training as a lawyer or business lawyer), contract managers should have moderation and project management skills, as subsequent claims are usually drawn up and checked on an interdisciplinary basis, i.e. with the knowledge of several departments (Helmold 2013).

8.3 Phases in Subsequent Claims Management

In the case of performance failures, the phase model shown in Fig. 8.2 can be used, which suggests a structured and systematic way of dealing with subsequent claims (Helmold 2013). In the case of non-delivered performance characteristics and notification by purchasing or sales, subsequent claims can be made as follows: In phase 1, the supplementary claims manager is involved and consulted. In phase 2, this manager examines the extent to which performance characteristics deviate from the purchase contract through discussions with the functions involved, such as purchasing, sales, development or quality management (Helmold 2013). He also documents the facts. In addition to elements such as the purchase contract, specification, performance description, date of occurrence of the event, evidence of deviations, description and justification, the documentation includes the evaluation of

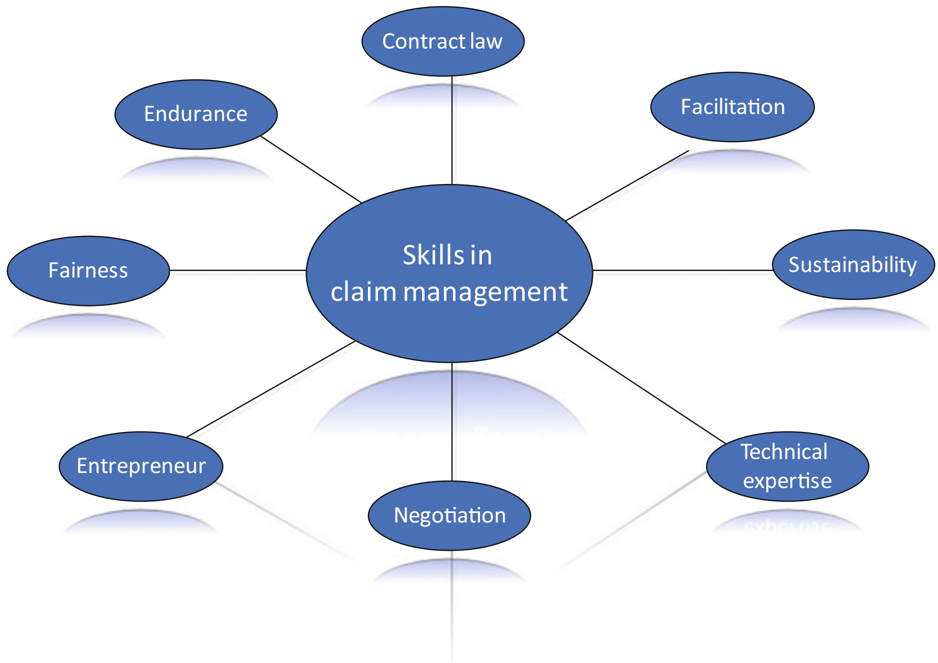

Fig. 8.1 Requirement profile of the contract manager. (Source: own representation)

the subsequent claim and the probability of a subsequent claim success from a legal perspective (Helmold 2013). Here, invoices, witness statements, photographs, correspondence or expert opinions can serve as evidence. Modern organisations have centralised and electronic recording of additional expenses on a separate cost account, whereas conventional organisations choose the paper route. Phase 3 then deals with the post-claim strategy. Often executives want to be compensated for all expenses and therefore make claims for all associated costs such as lost production, rework and administration of the additional claims. This can lead to millions of dollars in expenses in the case of production line outages and can economically bankrupt suppliers, so a strategy becomes necessary (MIK 2017; Helmold 2013). Subsequent claims can be made in different ways:

- Replacement deliveries after assertion of the subsequent claim
- Conversion of the purchase contract and refund of the purchase price
- Claims for compensation for all the costs of replacement
- Claims for compensation of all direct costs such as replacement or repair
- Claims for compensation of all associated costs such as production downtime, rework and administration of subsequent claims
- Offsetting a subsequent claim against future orders
- Offsetting a subsequent claim against existing orders

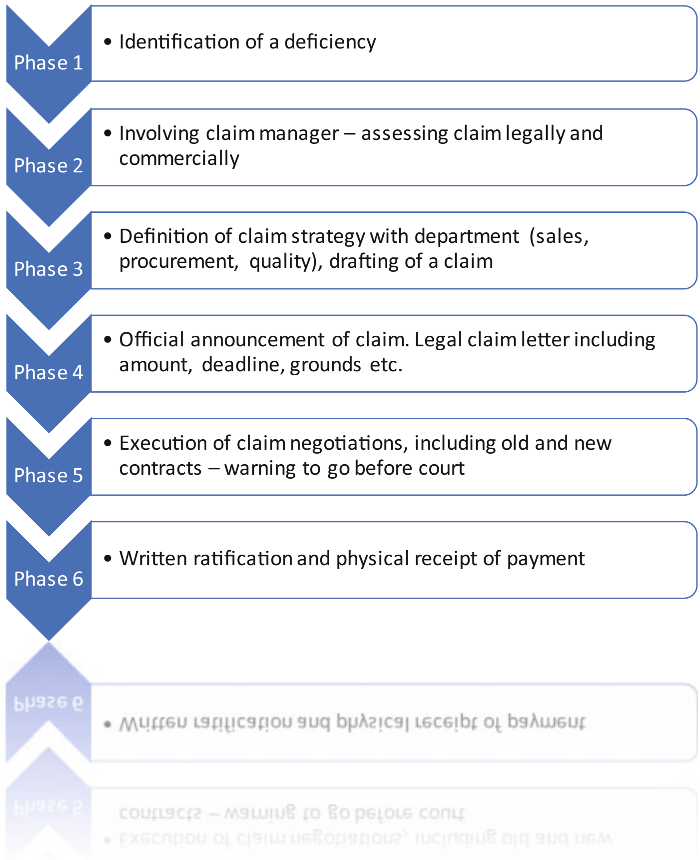

Fig. 8.2 Phase model in demand management. (Source: own representation)

Phase 4 starts with the assertion of the subsequent claim with the customer or supplier with the transmission of the subsequent claim and the setting of a deadline to react to the subsequent claim. Here it is important to consider deadlines and hierarchical levels so that the subsequent claim is also legally valid (Helmold 2013). Phase 4 is therefore a step that requires expert legal knowledge.

Phase 5 is the actual negotiation of the subsequent claim with the other party. After successful negotiation, phase 6 must then ensure that the agreement is ratified. With ratification, the monetary or material compensation takes place (Helmold 2013).

8.4 Recommendations for the Management of Subsequent Claims

Subsequent claims management is a central issue for many companies, but should always be implemented with a sense of proportion. Therefore, it is advisable not to involve lawyers, who have a negative impact on the relationship management between customer

Table 8.1 Subsequent claims management

Recommendations for innovative demand management:
Claims or subsequent demands always have the goal of improving performance, and not to achieve ostensible savings.
Companies should employ contract managers who are active in supplementary claim management. A position of 80,000 EUR p.a. is expected to pay for itself within a short period of time
Companies should pursue their claims far-sightedly in their strategy. Example: Waiving a claim in order to achieve cost reductions and savings in the next project
Subsequent claims are used as a strategic tool in negotiations
Subsequent claims and the negotiations must not burden the business relationship
Claims should be evaluated and analysed realistically, and in relation to the actual damage
Lawyers, especially external lawyers, should remain in the background and not intervene in the negotiations
Companies should take out insurance to protect themselves against subsequent claims

and supplier, when negotiating subsequent claims. The use of lawyers causes high costs, so this step should be well weighed (Helmold 2013). Claims or subsequent claims are always aimed at improving performance and not at making ostensible savings. Companies should employ contract managers who are involved in post-claims management. A position of 80,000 EUR p.a. is likely to pay for itself within a short period of time. Companies should be far-sighted in their receivables strategy. For example, waiving a claim in order to reduce costs and make savings in the next project. In this context, other concessions are also negotiable, e.g. provision of service personnel or free replacement. Post-claims are used as a strategic tool in negotiations and should therefore be well documented so that sufficient evidence and material is available in the negotiations. Subsequent claims and the negotiations should not be a burden on the business relationship. Lastly, it is recommended that claims and post-claim values are evaluated and analysed realistically, and in a reasonable proportion to the actual damages (Helmold 2013). Table 8.1 summarises the recommendations for innovative claims management.

References

Dathe, T. & Helmold, M. (2018). Erfolgreich im Chinageschäft. Strategien und Handlungsempfehlungen für kleinere und mittlere Unternehmen (KMU). Springer Gabler Wiesbaden.

Helmold, M. (2013). Claim-Management in der Praxis. Was tun bei Leistungsstörungen in der Lieferkette. In: FM-Logistik. Ausgabe 1–2/2013. S. 76–77.

Helmold, M. & Terry, B. (2017). Global Sourcing and Supply Management Excellence in China. Springer Singapur.

Hendricks, K.B., & Singhal, V.R. (2005). An empirical analysis of the effect of supply chain disruptions on long-run stock price performance and equity risk of the firm. In: Production Operations Management, 21 (5), 501–522.

MIK (2017). In: Spiegel Online. Lieferausfälle BMW und Bosch verhandeln über Schadensersatz. Die Lieferprobleme Ende Mai haben für Bosch ein teures Nachspiel. Denn BMW will den Schaden ersetzt haben, der durch den dadurch erzwungenen Stopp der Produktion entstanden ist. Es geht um Millionen. Abgerufen am 26.5.2017. http://www.spiegel.de/wirtschaft/unternehmen/bmw-und-bosch-verhandeln-ueber-schadensersatz-wegen-lieferausfaellen-a-1156486.html.

Vidogah, W. & Ndegukuri, I. (1988). Improving the management of claims on construction contracts: Consultant's perspective. In: Construction Management and Economics 16(3):363–372. February 1998.

Wenxin, Shen et al. (2017). Causes of contractors' claims in international engineering-procurement-construction projects. In: Journal of Civil Engineering and Management 23(6):727–739. August 2017.

Wieland, A. & Wallenburg, C.M. (2012). Dealing with supply chain risks: Linking risk management practices and strategies to performance. In: International Journal of Physical Distribution & Logistics Management, 42 (10), 887–905.