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Managing claims and avoiding disputes: time bars in an international context

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One of the questions that are most frequently asked about the 1999 FIDIC form of contract is whether the sub-clause 20.1 condition precedent (or time bar) will always be enforced. It is a question that will continue to be asked once the 2017 second edition of the Rainbow Suite gradually comes into use.

Under most formal contracts it is necessary for the Contractor to give notice of various matters as part of the process of seeking extensions of time and loss and expense. Depending on its terms, the notice provision will be treated either as a condition precedent or merely as a warranty, breach of which will typically sound in only nominal damages. Generally, in the UK, the JCT form imposes a condition that such notices must be given within a reasonable time. The question of what is a reasonable time was considered in *London Borough of Merton v Stanley Hugh Leach,*[1] in which it was said:

> *"[The contractor] must make his application within a reasonable time: It must not be made so late that, for instance, the architect can no longer form a competent opinion on the matters on which he is required to form an opinion or satisfy himself that the contractor has suffered the loss or expense claimed. But in considering whether the contractor has acted reasonably and with reasonable expedition it must be borne in mind that the architect is not a stranger to the work and may in some cases have a very detailed knowledge of the progress of the work and the contractor's planning."*

However, increasingly notices clauses are expressed as conditions precedent. In other words, a failure to comply with the requirements of the clause will result in a party being prevented from making what might otherwise be a perfectly valid claim. For example, core clause 61.3 of the new NEC4 forms states that when Compensation Events arise:

"The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if

- *the Contractor believes that the event is a compensation event and*
- *the Project Manager has not notified the event to the Contractor.*

If the Contractor does not notify a compensation event within eight weeks of becoming aware that the event has happened, the Prices, the Completion Date or a Key Date are not changed unless the event arises from the Project Manager or the Supervisor giving an instruction or notification, issuing a certificate or changing an earlier decision."

Similarly, the well-known key features of sub-clause 20.1 of the 1999 FIDIC form are:

- The Contractor must give notice to the Engineer of time or money claims, as soon as practicable and not later than 28 days after the date on which the Contractor became

[1] [1985] 32 B.L.R. 51.

aware, or should have become aware, of the relevant event or circumstance.

- Any claim to time or money will be lost if there is no notice within the specified time limit.
- Supporting particulars should be served by the Contractor and the Contractor should also maintain such contemporary records as may be needed to substantiate claims.
- The Contractor should submit a fully particularised claim within 42 days after becoming aware of the relevant event or circumstance.[2]
- The Engineer is to respond, in principle at least, within 42 days after receiving a fully detailed claim.
- The claim shall be an interim claim. Further interim updated claims are to be submitted monthly.
- A final claim is to be submitted, unless agreed otherwise, within 28 days of the end of the claim event.
- Any extension of time or additional payment shall take account of any failure or other prejudice caused by the Contractor during the investigation of the claim.
- Payment Certificates should reflect any sums acknowledged in respect of substantiated claims.

FIDIC has continued to follow this approach in 2017, with one very important difference. The 2017 second edition, at sub-clause 20.2, deals with both Contractor and Employer claims, setting out both a procedure for the notification and substantiation of those claims and the mechanics of the decision-making process to be adopted by the Engineer. In keeping with the approach of the new edition, the claims procedures are more detailed, including more time limits than the 1999 edition. They also cover all claims and not just claims for time and money as under the 1999 version.

The new sub-clause 20.2.1 will require that both the Contractor and Employer, if they consider they have a claim for payment or an extension of time, must give notice to the Engineer:

"as soon as practicable, and not later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance (the "Notice of Claim" in these conditions)".

This makes it clear that both the Contractor and the Employer must submit their claims during the course of the project. The initial notice at first instance does not need to indicate (for the very good reason that usually it cannot) the total extension or payment sought. The scheme of the FIDIC form is thus that where possible disputes should be resolved during the course of the project rather than waiting until the works are complete. The promotion of real-time dispute avoidance and resolution is an increasingly important theme to be found within the FIDIC form.

It is important that it is understood that compliance with the notice provisions is intended to be a condition precedent to recovery This, for example, therefore potentially provides either party with a complete defence to any claim if it is not started within the required time frame. Certainly all parties would be well advised to treat the notice obligations imposed on them in this way, whether or not they are working on a project where the civil or common law applies.

The traditional view at common law

Generally, in the UK the courts will take the view that timescales in construction contracts are directory rather than mandatory,[3] unless, that is, the contract clause in question clearly states that the party with a claim will lose the right to bring that claim if it fails to comply with the required timescale. In the case of *Bremer Handelgesellschaft mbH v Vanden Avenne Izegem nv*[4] the House of Lords held that a notice provision should be construed as a condition precedent, and so would be binding if:

[2] A sub-clause has been inserted into the FIDIC Gold Book 2008 which says that if the Contractor fails to do this within 42 days, his claim will lapse. Whilst the FIDIC Red Book 1999 does not go that far, the Contractor must still try and adhere to the deadline.
[3] *Temloc v Errill Properties* (1987) 39 BLR 30, CA per Croom LJ.
[4] [1978] 2 Lloyd's Rep. 113.

(i) it states the precise time within which the notice is to be served; and

(ii) it makes plain by express language that unless the notice is served within that time the party making the claim will lose its rights under the clause.

Under the FIDIC 2017 form, sub-clause 20.2.1 expressly makes it clear that:

"If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced…the Time for Completion…or the DNP…shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance…"

Further, the English courts have confirmed their approval for conditions precedent, provided they fulfil the conditions laid out in the Bremer case. For example, in the case of *Multiplex Construction v Honeywell Control Systems*,[5] Mr Justice Jackson (as he then was) held that:

"Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent."

The civil law approach

The position of time bars in construction contracts in civil law countries is different. Unlike common law, where non-adherence to a time bar provision appears to render a Contractor's claim invalid, many civil codes may take a more lenient approach.

Follow the contract

As a starting point, parties are to perform their obligations under the contract. To take the example of the UAE, Article 243(2) of the UAE Civil Code states:

"With regard to the rights (obligations) arising out of the contract, each of the contracting parties must perform that which the contract obliges him to do."

Further, Article 265(1) of the UAE Civil Code deals with contract interpretation and states:

"If the wording of a contract is clear, it may not be departed from by way of interpretation to ascertain the intention of the parties."

From the above and in the absence of any other circumstances, the Contractor may be required to conform with any time bars in the construction contract. However, in circumstances where it appears that the strict interpretation and imposition of the time bars would seriously prejudice the Contractor, the Contractor may rely on certain provisions of the UAE Civil Code to argue that a more lenient approach be adopted. These include:

Good faith obligation

Article 246(1) states: *"The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith."*

[5] [2007] EWHC 447 (TCC). The Judge's words were endorsed by HHJ Davies QC in the case of Steria Ltd v Sigma Wireless Communications Ltd [2008] CILL 2544 and also in the Scottish case of Education 4 Ayrshire Ltd v South Ayrshire Council [2009] ScotCS CSOH 146 where Lord Glennie was wholly unsympathetic to the suggestion that allowance should be made for the fact that notices given in compliance with conditions precedent might have been drafted by businessmen rather than lawyers, noting that: *"It is within judicial knowledge that parties to contracts containing formal notice provisions turn immediately to their lawyers whenever there is a requirement to give notice in accordance with those provisions. But even if that were not the case, there is nothing in clause 17.6.1 [of a Public Private Partnership or PPP Contract] that would not readily be understood by a businessman unversed in the law."*

So, for example, if an Employer was made aware of the Contractor's intention to claim in such manner, the Employer could be seen as acting in bad faith if he later argues that the Contractor did not meet the contractual time frame. Alternatively, a time bar provision may not be relied upon by an Employer in circumstances where he is in breach and was fully aware that his breach would cause delay to the project.

Unlawful exercise of rights

Article 106 provides that the exercise of a right shall be unlawful if it is disproportionate to the harm suffered by the other party. In particular, Article 106(1) states:

"A person shall be held liable for an unlawful exercise of his rights."

Further, Article 106(2)(c) provides:

"The exercise of a right shall be unlawful: (c) if the interests desired are disproportionate to the harm that will be suffered by others."

In view of the above and subject to the circumstances of the particular case, it may be unlawful for the Contractor's otherwise meritorious claim to be disallowed on the basis of a purely technical breach. Therefore, the Employer's reliance on the technical breach may be seen as an unlawful exercise of his rights.

Unjust enrichment

Articles 318 and 319 provide that unjust enrichment is unlawful. In particular, Article 318 of the UAE Civil Code states:

"No person may take the property of another without lawful cause, and if he takes it he must return it."

Article 319(1) provides:

"Any person who acquires the property of another person without any disposition vesting ownership must return it if that property still exists, or its like or the value thereof if it no longer exists, unless the law otherwise provides."

Therefore, an Employer may be prevented from relying on a time bar provision to avoid payment to the Contractor for works performed and for works from which the Employer has benefitted, particularly if the only reason for withholding payment is the lateness of the Contractor's claim.

However, as with the common law, everything depends on the circumstances of the case. That said, courts in the UAE would be reluctant to uphold strict terms of the contract where it can be seen that either the requirement for a notice was complied with in a different form or that strict imposition of the time bar would be an unlawful exercise of the Employer's rights or cause unjust enrichment.

As noted above, the position can vary from code to code. To take another example: Article 2 of the Turkish Civil Code imposes an obligation of good faith, and Article 77 provides that unjust enrichment is unlawful. However, the Turkish courts tend to take a strict view on time bars by virtue of Article 193 of the Civil Code,[6] which provides that a party may not initiate a claim in a manner which is not set down in the contract or which is against the manner set out in the contract.

[6] Freedom of contract rules: Article 26 says that parties may freely determine the contents of a contract within the limits prescribed by law.

An African view

Much Arab jurisprudence owes a significant debt to Egypt and the civil codes of almost all the Middle East countries are derived from the Egyptian civil code. Therefore it is likely that an Egyptian Tribunal would adopt a similar approach to that of the UAE. By way of a cautionary note, in 2005, in an arbitration case before the Cairo Regional Center for International Commercial Arbitration, a claimant Contractor failed to submit a notice of claim to the Engineer within the 28-day period stipulated. The Tribunal held that the contract was clear and binding on the parties and barred the claim. The Tribunal referred to Article 147 of the Egyptian Civil Code, which provides that the contract is the law of the contracting parties. The Contractor had caused its own difficulties by failing to comply with the notice requirements of the contract.[7] That said, of course, each case will depend on its own facts.

The South African Constitutional Court in the case of Barkhuizen v Napier[8] had to consider a time-bar clause in an insurance contract. It was argued that the clause was invalid or unenforceable because it unjustifiably limited the insured's constitutional right of access to court. The court held that there was:

"no reason either in logic or in principle why public policy would not tolerate time limitation clauses in contracts subject to the considerations of reasonableness and fairness".

Therefore, the majority of the Court found that the clause specifying a ninety-day time limit for issuing summons was not so *"manifestly unreasonable"* that it offended public policy. There was no evidence *"to suggest that the contract was not freely concluded between parties with equal bargaining power or that the applicant was not aware of the clause".*[9] An aggrieved party under the FIDIC form, would therefore have to show that the agreed 28-day notice period was *"manifestly unreasonable"*, which would not be straightforward given the comments of the Constitutional Court.

Are there ways round the condition precedent?

Is there the possibility that the Engineer, DAAB or arbitral tribunal might decline to construe the time bar as a condition precedent, having regard to the particular circumstances of the matter before it and the impact of the applicable law? On the strict wording of the Contract, the answer is no and parties should always try and work on this basis.

That said, it is often suggested that in civil code jurisdictions it can be possible to raise a successful challenge to time bars under the mandatory laws of such a country on the basis of the time bar being contrary to the notion of good faith or some other similar legal principle. For example, it has been suggested that a German court might interpret the Contractor's duty to give notice not as a condition precedent to give notice but as an obligation (*"obliegenheit"*) of the Contractor. This would mean that the Contractor does not lose the right to make a claim but that the Contractor must prove that his claims are valid and are not affected by his failure to meet his notice obligation in time.[10]

The general point being that it is wrong that a party who has genuinely suffered a loss might be prevented from bringing a claim in respect of that loss as a result of a technical procedural breach. Remember, as noted above, Article 246(1) of the UAE Civil Code says that the contract must be performed in accordance with its contents and in good faith.

The Scottish case of *City Inn Ltd v Shepherd Construction Ltd*[11] suggests that there may well be certain ways round the condition precedent. The core element of the dispute was whether or not the Contractor was entitled to an extension of time of 11 weeks and consequently whether or not the Employer was entitled to deduct delay damages. Clause 13.8 (of the JCT

[7] Case referred to by Kholousy, M.M. (2005) in "Arbitration cases: Awards rendered in arbitration cases before the Arabic centre for arbitration from 1/1/2002 to 31/12/ 2004", as cited by Noha Safik, Engy Serag and Others in their paper "Application of FIDIC Contracts under the Egyptian Civil Code".

[8] 2007 (5) SA 323 (CC).

[9] Ibid, paragraphs 64-66.

[9] Mauro Rubino-Sammartano, "FIDIC's clause 20.1 — a civil law view", Construction Law International, vol. 4, no. 1, March 2009.

[11] [2007] CSOH 190 and, on appeal, [2010] ScotCS CSIH 68. The dispute related to the construction of a hotel under a contract incorporating the JCT Standard Form (Private Edition with Quantities) 1980 as amended.

form of contract) contained a time bar clause requiring the Contractor to provide details of the estimated effect of an instruction within ten days. Lord Drummond Young characterised the clause thus:

"I am of opinion that the pursuers' right to invoke clause 13.8 is properly characterized as an immunity; the defenders have a power to use that clause to claim an extension of time, and the pursuers have an immunity against that power if the defendants do not fulfil the requirements of the clause."

However, the Judge also felt that an immunity can be the subject of waiver. In other words, the Architect and Employer had the power to waive or otherwise dispense with any procedural requirements. This was what happened here. Whilst the Employer (in discussions with the Contractor) and the Architect (by issuing delay notices) both made it clear that the Contractor was not entitled to an extension of time, neither gave the failure to operate the condition precedent at clause 13.8 as a reason.

The point made by the Judge is that whilst clause 13.8 provided immunity, that immunity must be invoked or referred to. At a meeting between the Contractor and Employer, the EOT claim was discussed at length. Given that the purpose of clause 13.8 was to ensure that any potential delay or cost consequences arising from an instruction were dealt with immediately, the Judge felt that it would be surprising if no mention was made of the clause unless the Employer, or Architect, had decided not to invoke it. Significantly, the Judge held that both Employer and Architect should be aware of all of the terms of the contract. Employers and certifiers alike should certainly therefore pay close attention to their conduct in administering contracts in order to avoid the potential consequences of this decision.

The Inner House agreed with Lord Osbourne, saying:

"silence in relation to a point that might be taken may give rise to the inference of waiver of that point. In my view, that equitable principle can and should operate in the circumstances of this case."

A new approach under common law?

In April 2014 Mr Justice Akenhead had to consider a case arising from disputes relating to a project to build a tunnel at Gibraltar airport. The case, *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*,[12] was unusual because the contract in question was in the 1999 FIDIC form. Usually disputes under the FIDIC form are heard in private, in arbitration proceedings. Needless to say the case raised a number of interesting issues, not least about the FIDIC condition precedent.

A reasonably broad approach

Amongst a number of claims, the Contractor, OHL, sought an extension of time of 474 days. The Judge decided that OHL was entitled to no more than seven days' extension of time (rock and weather). However, this was subject to compliance with sub-clause 20. It is important to note that it was accepted by OHL that sub-clause 20.1 of the 1999 Form imposed a condition precedent on the Contractor to give notice of any claim. The Judge held that properly construed and in practice, the *"event or circumstance giving rise to the claim"* for extension must occur first and there must have been either awareness by the Contractor or the means of knowledge or awareness of that event or circumstance before the condition precedent bites. Importantly, Mr Justice Akenhead said that he could see:

"no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer".

[12] [2014] EWHC 1028 (TCC). The case was considered by the Court of Appeal in 2015, but the appellate court made no comment on this part of Mr Justice Akenhead's decision, [2015] EWCA Civ 712.

In coming to this conclusion, the Judge made reference to sub-clause 8.4 of the 1999 FIDIC conditions, which sets out the circumstances in which the Contractor is entitled to an extension of time. Sub-clause 8.4 states that:

"The Contractor shall be entitled subject to Sub-Clause 20.1 ... to an extension of the Time for Completion if and to the extent that the completion for the purposes of Sub-Clause 10.1 ... is or will be delayed by any of the following causes ..."

Unlike its 2017 counterpart, sub-clause 20.1 of the 1999 Form did not call for the notice to be in any particular form and the Judge thought that it should be construed as allowing any claim provided that it is made by notice in writing to the Engineer, that the notice describes the event or circumstance relied on and that the notice is intended to notify a claim for extension (or for additional payment or both) under the contract or in connection with it. It must be recognisable as a *"claim"*. The onus of proof was on the Employer if he should want to establish that the notice was given too late.

In terms of claims for an extension of time, the Judge, by reference to clause 8, considered that the entitlement to an extension arises if and to the extent that the completion *"is or will be delayed by"* the various events, such as variations or *"unforeseeable"* conditions.

In particular he noted that the wording in sub-clause 8.4 did not impose any restriction such as *"is or will be delayed whichever is the earliest"*. This therefore suggested that the extension of time could be claimed either when it was clear that there will be delay (a prospective delay) or alternatively when the delay has at least started to be incurred (a retrospective delay).

To demonstrate the position, the Judge provided his own hypothetical example:

"(a) A variation instruction is issued on 1 June to widen a part of the dual carriageway well away from the tunnel area in this case.

(b) At the time of the instruction, that part of the carriageway is not on the critical path.

(c) Although it is foreseeable that the variation will extend the period reasonably programmed for constructing the dual carriageway, it is not foreseeable that it will delay the work.

(d) By the time that the dual carriageway is started in October, it is only then clear that the Works overall will be delayed by the variation. It is only however in November that it can be said that the Works are actually delayed.

(e) Notice does not have to be given for the purposes of Clause 20.1 until there actually is delay (November) although the Contractor can give notice with impunity when it reasonably believes that it will be delayed (say, October).

(f) The 'event or circumstance' described in the first paragraph of Clause 20.1 in the appropriate context can mean either the incident (variation, exceptional weather or one of the other specified grounds for extension) or the delay which results or will inevitably result from the incident in question."

Finally, the Judge commented that he doubted that this interpretation should in practice necessarily involve *"a difficult mental exercise"* on construction projects where, as was the

case here, an electronic critical path programme was being used. It should therefore be possible to determine fairly easily when delay was actually being suffered.

This suggested that the extension of time can be claimed either when it is clear that there will be delay (a prospective delay) or when the delay has at least started to be incurred (a retrospective delay). Thus notice does not have to be given until there actually is a delay. The Judge[13] in particular noted that the wording of the clause is not: *"is or will be delayed whichever is the earliest"*. The Judge further confirmed that the onus is on the Employer to establish that a notice is not given in time.

It should be noted that Mr Justice Akenhead was not saying that clause 20.1 was not a condition precedent, but rather that care should be taken when alleging that proper notice has not been given on time.

The importance of clear and commercial certainty

Indeed, judicial sympathy only goes so far. The importance of following the notice provisions to be found in any contract was confirmed in the 2017 case of *Glen Water Ltd v Northern Ireland Water Ltd*.[14] Although this was not a FIDIC contract, there was a condition precedent notice clause requiring claims for compensation to be submitted by Glen Water within 21 days of the occurrence of the event that had caused or was likely to cause delay and additional cost. Glen Water argued that its letter of 20 October 2009 and the discussions at a meeting held on 14 December 2009 were sufficient to satisfy the clause in question when looked at in proper context with all of the background taken into account, in particular that in advance of 20 October 2009, Glen Water had frequently expressed concern about Northern Ireland Water's maintenance of the existing assets, the subject of the claim. In reply, Northern Ireland Water said that on an objective construction the letter was concerned with the cooling water claim, something different. Here, Keegan J noted that:

"I do have some sympathy for the plaintiff's position because the failure to notify prevents a claim being made. That may seem harsh when commercial parties anticipated that a claim might come to pass. I should say that Mr Brannigan did leave no stone unturned in arguing this case. However, I have to decide the case within the parameters of commercial and contract law. The contractual terms are clear and commercial certainty is an overarching consideration. The evidence as to the commercial context and surrounding circumstances has not remedied the defect in the letter. It seems to me likely that the notification requirement was overlooked amid a mass of claims and in the midst of an ongoing process of discussions."

As notice had not been given within the time limits laid down by the contract, the claim was barred. The Judge was clear that any *"notification should be clear and unambiguous"*. Meeting minutes here did not constitute a proper notification of claim. Whilst the parties had had discussions regarding the potential claim event, the onus was still on the Contractor to have followed the contract and notify its claim formally.

The form a notice must take

There is also often discussion about the form that a notice must take. It was an issue of some importance in the *Glen Water* case, as the letter Glen Water was trying to rely upon in contrast to the other compensation event notifications was not clearly marked as such. Mr Justice Akenhead in the *Obrascon* case recognised that there is no particular form of notice required by the 1999 FIDIC form.

However, by virtue of sub-clause 1.3, it must be in writing. Further, and this is important, the notice must be recognisable as a *"claim"*. In this case, OHL had tried to rely on a monthly progress report. This is not unusual, especially where a Contractor has recognised that it

[13] In a similar way, Mr Justice Akenhead in the case of *Walter Lilly v Mackay,* [2012] EWHC 1773 (TCC), said that clause 26.1.3 of the JCT form should not be construed in a penal way against Walter Lilly. One reason for this was that the grounds which gave rise to the right to claim loss and expense were the fault and risk of Mackay.

[14] [2017] NIQB 20. Keegan J also endorsed the *Scottish Education 4 Ayrshire Ltd v South Ayrshire Council* case referred to in footnote 5 above.

failed to provide a particular notice under sub-clause 20.1. The problem for OHL was that the report relied upon for its adverse weather claim stated that: *"The adverse weather condition (rain) have [sic] affected the works"*. This made no reference to OHL being delayed and could not be said to amount to notice that a claim for an extension of time was being made. In the Judge's view, this was:

"clearly nowhere near a notice under Clause 20.1".

The Judge therefore ruled that OHL had failed to give notice of the exceptionally adverse weather within the 28-day period. The wording can be contrasted with the wording of OHL's claim in relation to unforeseeable conditions, where OHL had used the words: *"In our opinion the excavation of all rock will entitle us to an extension of time."* This, in the view of the Judge, clearly constituted a claim.

A typical amendment to the FIDIC form is to make it clear that the notice must *"describe itself"* as a notice under sub-clause 20.1. This would prevent the Contractor from relying upon other records, such as meeting minutes, if they have failed to serve a timely notice.

This of course mirrors sub-clause 20.1 of the Gold Book which states that:

"the Notice shall state that it is given under this Sub-Clause".

This is also an approach FIDIC have followed in 2017. By sub-clause 1.3(b), the second edition also aims to reduce disputes about whether a proper notice was given. Any party giving notice of a claim must do so in writing and make it clear that it is a Notice.[15] Parties should take care, as one possible result of the new clause is to lead to an increase in the number of (what might otherwise quite possibly be perfectly valid) claims that are rejected, as parties fail to comply with what might be seen simply as administrative requirements. Increased vigilance will be required.

The approach of Dispute Boards and Arbitration Tribunals

ICC Case 16765[16] provides an interesting example of how decision-makers can approach the FIDIC time bar. Here the parties had entered into a Yellow Book contract for a project for the rehabilitation of a water plant. The project was in Eastern Europe.

Notice of a claim for an extension of time was given on 3 January 2006. The Employer said that the Contractor should have been aware of the event or circumstances giving rise to the claim some 12 or even 18 months earlier. In turn, the Contractor said that sub-clause 20.1 was *"ambiguous"* and should be construed *"subjectively"* depending on when the Contractor considered the event in question would cause delays to completion.

The Dispute Board agreed with the Contractor, noting that the:

> *"drafting of SC20.1 is not elegant but reasonably construed it means that a Contractor must have reached the view that it is entitled to time ... before notice need be served ... [and] any delay caused to the Contractor must have become critical delay which could not reasonably be mitigated ... The point in time of the event or circumstance (from which the 28-day period commences) is the time when (actually or constructively) the Contractor reaches the view that it has an entitlement ... I would add that in construing the notice provisions of the contract, the benefit of any doubt must be given to the Claimant. It would be contrary to justice for [the Claimant] to be denied its right to claim under the contract or by the law by reasons of a limitation clause that was arguably ambiguous."*

[15] Under the 2016 Pre-release version of the Yellow Book, the Notice also had to make specific reference to the relevant contract clause This requirement was dropped as there was a body of opinion that it might lead to an increased number of disputes. It was an unnecessary layer of complication.

[16] See *ICC Dispute Resolution Bulletin*, 2015, issue 1, p. 101.

The Arbitration Tribunal disagreed:

> *"The majority of the Tribunal is of the view that the language of Sub-Clause 20.1 … is clear in respect of the Contractor's obligations … Sub-clause 20.1 was drafted specifically … to avoid doubt as to the date on which the 28 days should start running, and to avoid any subjective intention of that date … the 28-day time limit … does not run … from the day the Contractor considers itself entitled to an extension of time … but rather from the day the Claimant became aware or should have become aware of the event or circumstance giving rise to the claim …"*
>
> *"Second, compliance with Sub-Clause 20.1 … is not limited to the timing of the notice but also the content of the notice."*

Here the Tribunal agreed with Mr Justice Akenhead in the Obrascon case about the importance of the form and content of the notice. In coming to their Decision, the Tribunal reviewed the letters relied upon by the Contractor but decided that the issues raised were not the claims relied upon in the Contractor's extension of time claim.

An Australian alternative — penalty clauses

In Australia the High Court decision in *Andrews v Australia and New Zealand Banking Group Ltd*[17] (a case relating to the enforceability or otherwise of a banking overdraft facility and late payment fee) caused some commentators[18] to suggest that it might signal a possible end to the use of time bars in construction contracts. The key paragraphs of the decisions were 10 and 12. These are as follows:

"10 In general terms, a stipulation prima facie imposes a penalty on a party ('the first party') if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation. If compensation can be made to the second party for the prejudice suffered by failure of the primary stipulation, the collateral stipulation and the penalty are enforced only to the extent of that compensation. The first party is relieved to that degree from liability to satisfy the collateral stipulation.

…

12 It should be noted that the primary stipulation may be the occurrence or non-occurrence of an event which need not be the payment of money. Further, the penalty imposed upon the first party upon failure of the primary stipulation need not be a requirement to pay to the second party a sum of money."

When it comes to time bars, the essential reasoning went that if the time bar can be characterised as a penalty, then it may well not be enforceable. It might be possible to challenge time bars in the same way that delay or (liquidated) damages clauses are challenged. The standard AS 4000-1997 General Conditions of Contract does not at first blush seem to be a condition precedent. Clause 34 notes as follows:

"34.1 Progress

The Contractor shall ensure that WUC reaches practical completion by the date for practical completion.

[17] [2012] HCA 30.

[18] See for example Philip Davenport, "Andrews v ANZ and Penalty Clauses" (2012), *Australian Construction Law Newsletter*, 147, pp. 32, 35.

34.2 Notice of delay

A party becoming aware of anything which will probably cause delay to WUC shall promptly give the Superintendent and the other party written notice of that cause and the estimated delay.

34.3 Claim

The Contractor shall be entitled to such extension of time for carrying out WUC (including reaching practical completion) as the Superintendent assesses ('EOT'), if:

a) the Contractor is or will be delayed in reaching practical completion by a qualifying cause of delay; and

b) the Contractor gives the Superintendent, within 7 days of when the Contractor should reasonably have become aware of that causation occurring, a written claim for an EOT evidencing the facts of causation and of the delay to WUC (including extent).

If further delay results from a qualifying cause of delay evidenced in a claim under paragraph (b) of this subclause, the Contractor shall claim an EOT for such delay by promptly giving the Superintendent a written claim evidencing the facts of that delay."

This is frequently amended to such a degree that unlike the FIDIC form, the Contractor is required to notify the Superintendent within seven days of the date it becomes aware of an event likely to delay the works. It is not uncommon that such clauses can complete with quite detailed requirements about the nature of the information a Contractor has to provide and which make it clear that if notice is not provided then any potential entitlement to extra time is lost.

This requirement is often softened by a clause giving discretion to a Superintendent to award time, even if the Contractor has failed to comply with the time bar clause. In the 2002 case of *Peninsula Balmain v Abigroup Contractors*, the NSW Court of Appeal found that under the unamended AS2124 contract where Abigroup had not complied with the time bar clause, the court granted the extension of time and noted that a Superintendent *"is obliged to act honestly and impartially in deciding whether to exercise this power"*. That is provided the contract does not provide otherwise. For example, the contract might remove the obligation of fairness, and give the Superintendent the absolute discretion to award an extension of time (or not).[19]

This, however, appears to be something that has only been written about, rather than decided in the courts. The High Court in the ANZ case only said that the fees in question were capable of being characterised as a penalty, not that they actually were penalties. Indeed, in the subsequent 2016 case of *Paciocco v Australia and New Zealand Banking Group*,[20] after two appeals, the High Court, by a 4-1 majority, decided that the fee charged by ANZ on credit card accounts was not a penalty or otherwise unfair and/or unconscionable. In doing so, they took a wide or broad view of the factors that can be taken into account in deciding whether or not a clause is a penalty.

The majority took the view that the purpose of the bank fees was not to punish customers but to protect the legitimate interests of the bank in light of the conceivable loss it might suffer from late payment, with the result that the fees were not penalties even though the amount charged was in excess of the actual loss caused to ANZ by the particular breaches. The High Court noted that exceptions to the essential rule that parties are free to contract how they wish require good reason to be set aside by the courts, which was why Kiefel J

[19] Fenwick Elliott Grace, "Construction Law Update 804: Does the Superintendent have to be fair?"

[20] [2016] HCA 28.

referred to the question of whether the amount charged was *"out of all proportion to the interests said to be damaged in the event of default"*.

This focus on the interests of the party seeking to uphold the clause, suggests that the initial enthusiasm that the *Andrews* case might provide a further escape route from the time bar will prove to be misplaced in all but extreme circumstances.

A UK alternative — the Unfair Contract Terms Act

In the UK, where one or other party puts forward its standard conditions, then those standard terms of business must satisfy the requirement of reasonableness under the terms of the Unfair Contract Terms Act 1977 ("UCTA"). The reasonableness test itself is set out at s.11(1):

> *"In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act ... is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made ..."* [21]

In *Commercial Management (Investments) Ltd v Mitchell Design and Construct Ltd and Anr,*[22] the main Contractor (Mitchell) was engaged to design and build a warehouse in Erith, Kent. Mitchell appointed a groundworks subcontractor (Regorco) to carry out certain ground treatment works, known as vibro compaction, at the site where the warehouse was built. Ten years following practical completion, the tenant in occupation of the warehouse complained of settlement of the slab beneath the warehouse production area. As a preliminary issue, the court had to determine whether Regorco's time barring clause, contained within its standard terms and conditions, was incorporated, and whether the clause was subject to and complied with the provisions of the UCTA.

Did UCTA apply?

Time barring clauses can provide a party with a complete defence to what would otherwise be a perfectly valid claim. The clause Regorco sought to incorporate through its standard terms and conditions looked to provide such a defence to the claim against it:

> *"All claims under or in connection with this Contract must in order to be considered as valid be notified to us in writing within 28 days of the appearance of any alleged defect or of the occurrence (or non occurrence as the case may be) of the event complained of and shall in any event be deemed to be waived and absolutely barred unless so notified within one calendar year of the date of completion of the works."*

The clause required the notification of any claim for defective works to be made in writing within 28 days of the appearance of the defect and, in any event, to be notified within one calendar year of completion of the works. Failure to do so would result in any claim being time barred. The court distinguished the clause from the time bar imposed by clause 20.1 of the 1999 FIDIC Red Book on the basis that the FIDIC drafting requires a Contractor, who wishes to claim an extension of time or additional payment under the contract, to give notice as soon as practicable, and not later than 28 days after he becomes aware, or should have become aware, of the event or circumstance giving rise to the entitlement. Under the FIDIC drafting, it was noted that this was reasonable on the basis that:

> (i) Contractors on building projects generally know when a contract is in delay or whether the work has been disrupted and so giving notice of the relevant event within 28 days should not be unduly onerous; and
>
> (ii) time starts running from when the Contractor knew or ought to have known about the event.

[21] And the presumption is that exclusion clauses are not reasonable; s.11(5) provides that: *"It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does."*

[22] [2016] EWHC 76 (TCC).

In contrast, Regorco's time bar clause:

(i) applied to events after the parties were off site and to concealed works; and

(ii) time started to run from the date the defect appeared and not from when the other party knew or ought to have known about it.

Mr Justice Edwards-Stuart concluded that the clause was not reasonable, given the nature of groundworks undertaken by Regorco:

> *"It is, in my experience at least, rare for a failure of ground or piles to manifest itself in a period measured in months, rather than in years. Of course, there may be exceptional cases when the design or construction is so poor that failure occurs almost immediately upon loading, but I cannot recall such a case. In this case, the lapse of time was in excess of 10 years: whilst I would not suggest that such a long period is normal, it is more of the order that one would expect."*

The Judge went on to emphasise the practical difficulties of complying with such a time bar clause in the context of groundworks, where defects are unlikely to manifest for several years, or be hidden and not identifiable until years after problems have begun to appear. In these circumstances, it was concluded that it would not be reasonable to expect that the Contractor should comply with the 28-day time limit, or a one-year long-stop, imposed for bringing a claim for such defects. As a result, the clause would have been struck out under UCTA.

And what about the Employer?

Under the 1999 FIDIC form, the Employer is treated somewhat differently when it comes to bringing claims. Sub-clause 2.5 states that:

"If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract ... the Employer or the Engineer shall give notice and particulars to 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. ... 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 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."

This in itself is unusual as most contracts do not impose similar restrictions on Employers. Parties should take care to consider what their particular contract actually says. This provision is often excluded in whole or in part. In the case of *J Murphy & Sons Ltd v Beckton Energy Ltd*[23] the Yellow Book had been amended so that the reference to sub-clause 2.5 was removed from sub-clause 8.7 (which places an obligation on the Contractor to pay delay damages when there is a failure to comply with the time for completion). Usually under sub-clause 2.5, an Employer's claim for liquidated damages will first require the Engineer to determine the amount due under sub-clause 3.5. Here, the amended sub-clause 8.7 did not contain any reference to sub-clause 2.5 and simply fixed the sums payable in respect of liquidated damages.

Mrs Justice Carr considered that sub-clause 8.7 was a *"self-contained regime"* in relation to delay damages. As it set out the precise amounts due and fixed the time for payment or

[23] [2016] EWHC 607 (TCC).

deductions to be made, there was no need for anything further. The Judge also held that given the procedures, timing and calculation of sums due were different under sub-clauses 2.5 and 8.7, this strongly indicated that the correct approach was to treat sub-clause 8.7 as a separate regime from sub-clause 2.5.

Under sub-clause 2.5, of course, there is no similar provision to sub-clause 20.1 which says that any claim to time or money will be lost if there is no notice within the specified time limit. Therefore it had been considered that unlike with sub-clause 20.1, where a Contractor has 28 days to give notice, there was no strict time limit within which an Employer must make a claim, although any notice relating to the extension of the Defects Notification Period had of course to be made before the current end of that period.

However, Employers should take note of a 2015 Privy Council decision[24] where the court said that the purpose of sub-clause 2.5:

"is to ensure that claims which an Employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given 'as soon as practicable'. If the Employer could rely on claims which were first notified well after that, it is hard to see what the point of the first two parts of clause 2.5 was meant to be. Further, if an Employer's claim is allowed to be made late, there would not appear to be any method by which it could be determined, as the Engineer's function is linked to the particulars, which in turn must be contained in a notice, which in turn has to be served 'as soon as practicable'."

Although no definition of *"as soon as practicable"* was provided, this decision suggests that Employers too might be subject to a time bar, under the 1999 FIDIC form at least. Employers should further note that the case also highlights the requirement to provide particulars or other substantiation: again the absence of these could prove fatal to asserting a right of set-off.

Under the 2017 second edition of the Rainbow Suite, as noted above, both Employer and Contractor claims will be subject to time bars, in respect of both the claims themselves and the timing of the provisions of more detailed particulars. This change falls in the "balanced risk" category and, of course, contrary to the *NH International* case, it was never the view of FIDIC that sub-clause 2.5 was meant to be a condition precedent.

FIDIC: the future – the second edition of the Rainbow Suite

FIDIC first released details of its proposed revisions to the 1999 Yellow Book at its Users' Conference which was held in London on 6—7 December 2016. The second edition of the Rainbow Suite was formally released during the 2017 London conference on 5-6 December 2017.The changes to the contract set out in the second edition in many instances are clearly influenced by what can already be found in the 2008 Gold Book. For example, in the Gold Book, sub-clause 20.1(a) gives the Dispute Board an element of discretion, noting that:

"However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. If the DAB considers the circumstances are such that the late submission was acceptable, the DAB shall have the authority under this sub-clause to override the given 28-day limit and advise both the parties accordingly."

Sub-clause 20.1(a) of the Gold Book therefore enables a Contractor to submit to the DAB the details of any circumstances which may justify the late submission of a claim. The clause provides that if the DAB considers that the circumstances are such that the late submission was *"acceptable"*, the dispute board may override the condition precedent. No definition of

[24] *NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago)* [2015] UKPC 37..

"acceptable" has been given, so a Contractor is still best advised to operate as if the 28-day limit strictly applies. However, there is now some degree of latitude.

There are a number of reasons why late submission might be *"acceptable"*. The most likely one is that the Contractor will be able to say that the Employer and/or Engineer were aware of the issue which gave rise to the claim. For example, the problem might have been discussed at site meetings or inspections or even raised in the Progress Reports and the Contractor's Programme.

This approach has been followed to some degree in the 2017 second edition. The new sub-clause 20.2.5 provides that the Engineer may waive the effects of a failure to consider a claim because it is said to be time barred. The Engineer can take the following into account:

- whether or to what extent the other Party might be prejudiced by acceptance of the late submission;
- any evidence of the other Party's prior knowledge of the event or circumstance given in relation to the claim; and
- any evidence of the other Party's knowledge of the contractual and/or basis of the claim.

This then becomes part of the Engineer's Determination which can be reviewed by the DAAB.

FIDIC, in making the revisions to the 1999 Rainbow Suite, is looking to achieve:

- enhanced project management tools and mechanisms;
- clarity, transparency and certainty; and
- balance and reciprocity.

The approach can be seen in the changes being made to the notice provisions. In the new contract, clause 20 has been split in two so that claims (new clause 20) are separated out from disputes (new clause 21). One reason for doing this is to remove some of the perceived stigma from making claims. The act of making a claim is (and should be viewed as) a part of the contractual process and so it is something far different from engaging in a formal dispute. A claim is a request for an entitlement, and a dispute only arises if that claim is rejected or ignored.

One noticeable feature of the 2017 second edition is that it is approximately 50% longer, containing a number of deeming provisions and step-by-step processes for the parties to follow. This prescriptive approach sets out exactly what is expected of the parties. There are also more defined terms (90 up from 58). The new clause 20.2, which sets out the claims process in considerable detail, is one of the longest clauses in the Contract. The mere length of the new sub-clause is an indication that the process may not be a simple and straightforward one to follow.

Another theme of the 2017 second edition, as noted above, is the increased emphasis on real-time contract management and dispute resolution. In keeping with trends in contracts generally (including for example the 2011 FIDIC Red Book sub-contract), there are more detailed programming requirements.

There is a risk that the increased complexity of the claims process will place an increased burden on both the Employer and Contractor to follow these new administrative requirements. Further, there are more specified time limits within the revised contract which

incur sanctions if they are not followed. As a result, this may lead to an increased number of claims, as both Parties will need to try and ensure that they do not lose the right to make a claim. More claims do not necessarily mean more disputes. Of course, FIDIC themselves may have predicted an increase in claims and accordingly placed emphasis on dispute avoidance to counter such a possibility.

For example, the claims determination process encourages consultation. The Engineer is under a positive obligation to encourage the agreement of claims, must act "neutrally" between the Parties when making a determination of a claim (under what was previously clause 3.5) and does not need to obtain the Employer's approval[25] before making a determination that leads to the award of time or money.

The Dispute Board will also be given new powers which, if taken on board by the Parties, will enhance the Dispute Board's role in dispute avoidance. Indeed the proposed new name for the DAB — the Dispute Avoidance/Adjudication Board or DAAB — reinforces the importance of this role.

Sub-clause 8.4 of the 2017 second edition follows sub-clause 8.4 of the Gold Book, setting out a requirement that both Employer and Contractor *"endeavour to"* advise the other of any circumstances of which they are aware that may adversely affect the project, e.g. that might lead to an increase in the Contract Price or cause delay. This early warning system is used in other contracts,[26] and can be a valuable project tool. It is also a further mechanism whereby both parties will learn of the possible existence of claims at an early stage.

So, in short, the FIDIC time bar will remain in place as the 2017 second edition of to the Rainbow Suite gradually comes into use. Indeed, arguably the rules relating to the time bar have been tightened up by FIDIC. However at the same time, the enhanced claims procedures have been drafted to encourage consultation and promote dispute avoidance. Whether that leads to more or fewer disputes about alleged failures with the time bar in question remains to be seen.

Conclusion

Parties under the FIDIC form, as indeed with any construction contract, would be well advised to bear in mind the following:

- Take care when concluding contracts to check any time bar clauses governing claims.

- Appreciate the risk of not making a claim (even if to maintain goodwill) unless the other party agrees to relax the requirements or clearly waives them. This is perhaps especially the case where time bar clauses, if cautiously operated, may generate a proliferation of claims.

- Remember that the courts see the benefits of time bar provisions and support their operation. A tribunal might bar an entire claim for what seems like a technical reason by which time it will usually be too late to make a new, compliant claim.

- Indeed, even where the contract contains a clause such as sub-clause 20.1(a) of the Gold Book, potential claimants should not necessarily rely upon the other party already having the information they are required to provide.

[25] At least in the standard form.

[26] [2014] NICA 27.

Equally, those considering making claims should consider the following:

- The contract requirements apply to both the Contractor and the Employer;
- When is notice required?
- Who has to give notices?
- To whom should notice be given?
- In what form must the notice be given?
- What information must be provided with the notice?
- What are the response times?
- Are there any continuing notice obligations?
- Is there an agreement in place not to serve notices?
- What happens if you fail to serve a notice?

This will be particularly important now FIDIC has introduced its revised contracts. The changes will increase the importance of maintaining effective project management tools to ensure that the notice requirements of the contract (and the requirements to keep contemporary records to support claims) are followed.

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