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FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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FIDIC:

Introduction

In all construction contracts, claims and the right to claim play a significant role in the contractual relationship between the Employer and the Contractor¹.

Clause 2.5 of the FIDIC 1999 Red Book is a recent development, requiring the Employer to give notice and particulars to a Contractor *"if the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract..."*

This is the first time that the FIDIC contracts have explicitly protected the Contractor against such unilateral action by the Employer. However, the Employer and Contractor are still treated very differently as evidenced below.

Sub-Clause 2.5 requires the Employer to, *inter alia*, give notice of his claim *"as soon as practicable"* after the Employer *"becomes aware of the event or circumstance giving rise to the claim"*. No specific time frames are prescribed.²

¹ *The FIDIC Forms of Contract Third Edition, Nael G. Bunni (Blackwell Publishing 2005) at page 293*

² *It should be noted, however, that the Prescription Act No. 68 of 1969 will still apply*

In order to determine whether or not compliance with Sub-Clause 2.5 creates a condition precedent to the Employer acting in accordance with the remainder of Sub-Clause 2.5 one should consider how Sub-Clause 2.5 differs in its wording from Sub-Clause 20.1, more specifically, the time bar clause.

Do the Requirements of Clause 2.5 of the FIDIC 1999 Red Book constitute either a Condition Precedent, or a time bar, to the Employer making his claim? A comparison to Clause 20.1.

In terms of Clause 20.1, notice is initially required from the Contractor *"describing the event or circumstances giving rise to the claim"*. Such notice must be given *"as soon as practicable"* and then more particularly *"not later than 28 days after the Contractor became aware, or should have become aware"* of the

particular event or circumstance. The obligation to notify claims of which the Contractor *"should have become aware"* could be seen to be fruitful ground for negotiation and dispute. This particular phrase is not evident in Clause 2.5.

If the Contractor fails to give notice within the 28-day period the Time for Completion shall not be extended, and no additional payment shall be made. Further, if the notice of claim is not submitted timeously, the Contractor will be time barred from submitting such claim, no matter how valid the claim is.

Arbitrators around the world have been faced with the difficult task of deciding whether or not the time bar clause is effective as a complete defense to Contractor's claims. If a time bar clause is held to be ineffective, in the absence of any extension of time award, the Contractor's time for completion will be at large. This, in turn, will mean that the Employer loses

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his right to claim liquidated damages, which right will be replaced with a right to un-liquidated damages based on a new completion date.³

On the other hand, if the time bar clause is held to be effective, such a clause can act as a complete defense to a Contractor's claim.

Arbitrators have to weigh up the "interpretation" arguments to defeat the time bar clauses, with the "prevention principle" arguments against the fact that parties should be free to negotiate the terms of commercial arrangements between them, and in so doing, bind themselves to the terms of their agreements.

In short, the "interpretation" argument is one that was considered in *Bremer v Vanden Avenne*⁴ where it was considered whether or not a time bar clause is drafted as a condition precedent. It was held that for a notice requirement to rank as a condition precedent, the clause must state *the precise time for service and make it plain by express language that unless the notice is served within that time, the party required to give notice will lose its rights under that clause.*

The "prevention principle" provides that where a Contractor has failed to perform a condition of a contract, the Employer cannot rely on its non-performance, if it was caused by his own wrongful act (for example, the late provision of access to the contractor). Conflicting case law on this topic make it a "grey area", with some cases leaning in favour of the prevention principle, and others not.

It is submitted by Hamish Lal⁵ that the jurisprudential tension between the time bar clauses and the prevention principle can be resolved by arbitrators if they accept the following analysis:

- 1. That the "prevention principle" is a rule of construction and not a rule of law so that express terms (such as ... FIDIC clause 20.1) can simply exclude its operation; or*
- 2. That the "prevention principle" does not apply because the "proximate cause" for the contractor's loss is not one by the employer but the contractor's failure to operate the contractual machinery such that there is no act of prevention by the employer"*

It is Lal's opinion however, that arbitrators should not be too swayed by the "time bar" versus "prevention principle" argument, but rather focus on the parties' freedom to contract. In this case, if parties have agreed on a time bar clause in their contracts, they should be bound by these.

Clause 2.5 further provides that *"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."* The purpose of this Sub-Clause is to offer better protection to the Contractor and thus preventing any unreasonable action by the Employer. While the use of the word *"shall"* in this Sub-Clause seems to imply that the Employer has to follow the process set out in the Sub-Clause before it takes any action against the Contractor in terms thereof, based on the arguments set out above, it is clear that no conditions precedent exist in this Sub-Clause, signifying that the Employer will not lose any rights to claim against the Contractor due to non-compliance therewith.

While this Clause is "contractor friendly" in that it prevents the Employer from withholding payment summarily, it is clearly a lot less onerous than Clause 20.1. Clause 2.5 provides a much simpler claims mechanism and no

³The Rise and Rise of the "Time Bar" clauses" Hamish Lal, The International Construction Law Review, Informa UK Ltd 2007 at pages 120 - 123

⁴ [1978] 2 Lloyd's Rep 109 at 113, 130 (HL)

⁵ The Rise and Rise of the "Time Bar" clauses" Hamish Lal, The International Construction Law Review, Informa UK Ltd 2007 at page 128

time bar, presumably because in the majority of situations, the Contractor should be in a better position to know what is happening on Site, and hence be in a better position to know if and when a claim will arise.

Conclusion

Although both claims procedures (under Clause 2.5 and Clause 20.1) commence with an event / circumstance entitling a party to make a claim pursuant to the provisions of the Contract, the intermediate steps are different. The sanction and notice requirements imposed on a Contractor are far more onerous than those imposed on the Employer.

It is clear that the drafters of FIDIC intended Clause 20.1 to be a condition precedent, however contractors have been attempting to sway arbitrators against this interpretation by the use of the “interpretation” argument and “prevention” principles. This has worked in some jurisdictions, however the parties’ freedom to contract will most likely trump any other argument put forward by the Contractor.

The lesson here is that as a Contractor who has agreed to a time bar provision in the claims clause of your contract, ensure that you stick to the timelines prescribed therein. The consequences of failing to do so will be dire.

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