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Insights

TIME BARS UNDER FIDIC 2017 – ARE MORE NOTICES THE ANSWER?

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Construction and engineering contracts often contain provisions specifying that, within a particular time, one party (traditionally the contractor) must notify the other (the employer and/or the contract administrator) of a claim or the likelihood that it might advance a claim. Sometimes these "time-bar" notice provisions are elevated beyond being merely an obligation, to the status of a condition precedent to being able to pursue a successful claim. If such provisions are enforceable, they can be severe: a failure to serve the required notice in the required timescale will be fatal, regardless of the merits of the underlying claim. A well-known example of such a provision is found in clause 20.1 of the 1999 FIDIC contracts.

Unsurprisingly, many contractors have found themselves needing to construct nuanced arguments to get around the "trap" of clause 20.1. As the default final dispute resolution mechanism in FIDIC contracts is arbitration, reported court decisions giving guidance on the specific language used are rare, although some (but most definitely not all) other widely-used standard forms contain similar provisions. There are, nonetheless, a stock of standard arguments that are typically deployed.

Common law jurisdictions: the prevention principle

The prevention principle applies in the situation where one party has been prevented from fulfilling its contractual obligations by the conduct of the other. In such circumstances the second party cannot benefit from its own wrong by asserting the failure of the first. In conceptual terms relating this principle to time-bar provisions is attractive. There is an manifest absurdity (not to mention injustice) in an employer being able to benefit (via delay damages) from delaying its contractor if the contractor didn't go through the token exercise of notifying the employer about what the employer had done (or not done).

In the well-known case of Gaymark Investments v Walter Construction Group, the Australian courts held that, where the underlying delay was an act of employer prevention, the contract would need to contain an express right for the contract administrator to overlook a contractor's failure to comply with a time bar and extend the completion date regardless. This was thought to represent the clear position in Australia, and arguments based on this case were, for a time commonplace in England (and indeed elsewhere) too.

However, it was felt by many that under English law any hurdles presented by the prevention principle were overcome by the existence of an extension of time mechanism and that any time bar issue was separate. The English court's line seemed to be that if conditions precedent work smoothly in financing and other transactions, there should be no objection to layering such a mechanism on top of the right to bring a claim in construction contracts. Also, some entitlements to time and money arise not as a result of a default or a prevention, but simply as a function of the parties' agreed risk allocation.

The English court's position has been reasonably consistent. As long as the provision operated under the usual rules governing whether a condition precedent was valid, that's what it was. The Obrascon Huarte Lain SA v HM Attorney General for Gibraltar case in 2014 was widely reported and commented on, but it was more notable for containing a rare judicial analysis of the FIDIC wording rather than representing a departure from the now settled position on conditions precedent and the understanding that, notwithstanding the prevention principle, a well drafted condition precedent will apply.

The Scottish courts in City Inn Construction Ltd v Shepherd considered notions of waiver by the employer in the event that a claim was contemporaneously engaged with, notwithstanding a lack of contractor notices. There could be a valid argument around FIDIC sub-clause 20.1 based on waiver or estoppel, but those arguments tend to be very fact specific.

It remains to be seen whether the recent trend towards enforcing "no oral variation" clauses at the expense of inferring contract amendments through conduct (Rock Advertising Ltd v MWB Business Exchange Centres Ltd) might negate such arguments. Although the published FIDIC 1999 contracts do not contain "no oral variation" wording, it is often added in via the Particular Conditions.

Civil law jurisdictions: good faith arguments

In civil law jurisdictions (for instance in some of the GCC countries) an approximation of the prevention principle is often based on civil code concepts such as the obligation to perform one's obligations in good faith, and the prohibitions on abusing one's rights or being unjustly enriched. Each of these arguments can be attractive, but have limitations and/or uncertainties. It might sound like bad faith to rely on technicalities where one party's entitlements might be extinguished, but the duty of good faith doesn't rewrite a party's express contractual obligations. Also, many jurists consider that abuse of rights rules do not refer to contractual rights but to general legal rights, and therefore are not applicable when relying on a time-bar. As to unjust enrichment, if a contractual provision has been freely agreed by two parties and its operation happens to enrich one of them, is there anything necessarily unjust about that outcome?

Different, perhaps more robust, arguments arise because, typically, there is a prohibition on parties contracting out of mandatory prescription/limitation periods. The argument goes that it cannot be agreed that one party will lose its rights if it does not bring its claim within a shorter period than the

one prescribed by law. Often these arguments do not distinguish between the enforcement of an existing entitlement and the conditions on an entitlement arising in the first place. There is no definitive view that they will succeed.

Solutions for prudent contractors

In general, a prudent contractor will seek to comply with the applicable notice provisions, rather than hanging its hat on iterations of the above arguments to get around a failure to comply with them. This makes sense under a FIDIC 1999-based arrangement, given that sub-clause 20.1 supplements other reporting obligations. For example there are requirements to issue monthly progress reports (sub-clause 4.21), which are actually supposed to refer to all the sub-clause 20.1 notices issued during the reporting period, and revised programmes to be issued whenever the previous programme is superseded by actual progress (sub-clause 8.3).

In the worst case, if these provisions have been followed, and the usual cycle of extra-contractual meetings have taken place and been well-minuted, it is usually possible to demonstrate that notice was given in any event – generally known as “constructive notice”. This is especially the case as, despite its consequence, sub-clause 20.1 (even taking account of sub-clause 1.3 requirements) has little to say about the form and content of any such notice.

But although efforts are made to comply, it is fairly widely felt that clause 20.1 remains an onerous and draconian imposition on contractors. Employers’ oft-cited justification for those provisions rings hollow. Most people involved in projects, or advising on them, will have heard stories of contractors being accused of being “overly contractual” for complying with notice provisions. In reality, given the consequences of not issuing them, it is surprising that contractors do not take a more scattergun approach to such notifications “just in case”. The notion that these provisions promote good project management and prompt the early resolution and mitigation of issues in co-operation between the parties is often quite far from happens in reality on projects, and if that is the true justification it seems surprising that sub-clauses 4.21 (Progress Reports) and 8.3 (Programme) were not given the same status.

FIDIC 2017: more notices

When FIDIC updated the Rainbow suite in 2017 practitioners were keen to see whether clause 20.1 would be retained, adjusted or deleted. The answer was perhaps surprising.

The time bar has been extended to apply to both parties equally. In itself this is not surprising, but early indications are that this has not gone down well with many employers – even though clause 2.5 of the previous editions, regulating employer’s claims, is widely thought also to act as a condition precedent – a view bolstered by the Privy Council in NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago).

The surprise comes in the new process, which fills a few pages of additional requirements. The engineer now has to serve a notice within 14 days if it thinks the claiming party has failed to serve its notice within the required 28 days. If the engineer fails to do that, the original contractor's notice will be deemed to have been valid. If the other party considers the notice should not be deemed valid even though the engineer failed to serve its notice, it can serve a further notice saying so – the engineer will then need to determine the issues raised in the dispute about notices as well as the underlying claim. It then has to notify the parties accordingly. This has prompted more than one person to quip that the next FIDIC editions will probably require the contractor to serve a further notice if it wants to contend that the engineer's notice about the employer's notice about the engineer's lack of notice about the contractor's original notice was invalid.

FIDIC has also closed the loophole (if that's what it was) of constructive notice. Sub-clause 4.20 (the updated provision for progress reporting) has, tucked at the end, the following:

"However, nothing stated in any progress report shall constitute a Notice under a Sub-Clause of these Conditions".

It is hard to avoid the feeling this is a step away from pragmatism.

A radical proposal?

Some perspective might be helpful. On the one hand it seems fair and reasonable to impose the same notification obligations on the employer as the contractor. Furthermore, that balance might even have a more subtle effect – perhaps not wanting its own compliance with notification provisions to be put under the microscope, an employer might think twice before raising technical compliance issues against the contractor.

But, on the other hand, heaping notices upon notices (upon notices) does not seem like an optimal solution. For one thing it does not give the parties any additional clarity, but rather it enables more arguments and disputes about process rather than substance to arise, and provides more traps for the unwary (or those who are focussed on executing the project).

Anyway, when it comes to formal disputes employers rarely rely solely on technical time bar points when defending contractors' claims – it would be quite reckless to do so because tribunals will often look for ways around these technical arguments so as not to kybosh a meritorious claim. So it is not as though the notice provisions save anyone any time – they are usually a distraction.

Against that context, would it not be easier to remove the time-bar altogether? Failure to serve a required notice could be a breach of contract; and if the other party were able to demonstrate that some prejudice resulted from a failure to serve such notices then that party could pursue the

argument. But in many cases failure to serve a notice will be a purely nominal or technical issue (which should put the whole thing into context).

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