Panther Pounces on Late Notice: Dubai court disagrees with *Obrascon* on time-bar under Sub-Clause 20.1 of FIDIC 1999

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Contractors who fail to issue their FIDIC 1999 Sub-Clause 20.1 notices on time are easy prey.

In a brutal decision for contractors, the Dubai International Financial Centre (DIFC) Court of Appeal has revisited the question as to when a Sub-Clause 20.1 notice should be given (in particular, when the 28-day notice period starts to run) and has challenged the findings of Mr Justice Akenhead in *Obrascon Huarte Lain SA v Attorney General for Gibraltar*.

Introduction

When should a FIDIC 1999 Sub-Clause 20.1 notice be given?

Sub-Clause 20.1[1] states:

> "If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance".

In other words: (1) if the Contractor considers that it is entitled to an extension of the Time for Completion and/or any additional payment; (2) it must give notice (a) as soon as practicable, or (b) 28 days after becoming aware of the event or circumstance, or (c) 28 days after it should have become aware of the event or circumstance. Therefore, there is both a subjective and an objective test.

The purpose of the 28-day notice is to alert the Engineer and the Employer that a claim for an extension of time and/or additional payment will or may be made, and to identify the event or circumstance giving rise to the claim. Although the event or circumstance might be known to the Engineer and the Employer, it may not be obvious to the Engineer and Employer, without such notice, that the Contractor considers itself to additional time and/or payment as a result of the event or circumstance. The notice gives the Engineer and the Employer the opportunity (while the problem is still live) to find a solution or mitigate its effects (if possible), make financial arrangements and/or gather relevant contemporary information. It also allows the Employer and the Engineer to stop claims from stockpiling and/or fermenting. This is supported in

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[1] FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (First Edition, 1999).

Sub-Clause 4.21(f) which requires the Contractor to include a list of notices given under Sub-Clause 20.1 in each and every progress report so that the Engineer and Employer can keep track of the Employer's potential exposure.

The notice may be short and to the point. It is not the communication in which the Contractor must set out the details of its claim. In the FIDIC 1999 editions, there is no precise form specified for the notice other than that it must be in writing, describe the event or circumstance, and be intended to notify a claim for extension of time and/or additional payment under or in connection with the Contract. There is no requirement for a massive amount of detail or analysis at that stage.

The consequences of not giving such a notice within the prescribed time period are severe. The notice is widely accepted to be a condition precedent to the entitlement to additional time and money. In other words, the claim will be time-barred if the notice is not given within 28-days.

Sub-Clause 20.1 states:

> "If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply".

It has been said that this provision applies even when the event or circumstance giving rise to the claim is caused by the Employer, for example Sub-Clause 8.9 [Consequences of Suspension], and/or when the Employer was already aware the event or circumstance would inevitably give rise to a claim. In the FIDIC 2017 editions it is now expressly provided that allowances may be made where there are circumstances which justify the late submission of the notice. In common law countries, it has been argued that a party should not be able to take advantage of its own wrong to avoid a contractual obligation; this is referred to as the 'prevention principle'. However, the English Court of Appeal decision in *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744 appears to have settled the position that the prevention principle is not a general rule of law and cannot be used to override clear contractual provisions. The position may be different in other countries, particularly civil law jurisdictions.

Obrascon Huarte Lain SA v Attorney General for Gibraltar [2014] EWHC 1028 (TCC)

The question of when a Sub-Clause 20.1 notice ought to be given was addressed in detail by Mr Justice Akenhead in *Obrascon Huarte Lain SA v Attorney General for Gibraltar*.

Mr Justice Akenhead did not construe Sub-Clause 20.1 strictly against the Contractor. In his view, Sub-Clause 20.1 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.

He decided that properly construed and in practice, (1) the "event or circumstance giving rise to the claim" for an extension of time must occur, and (2) there must then have been either awareness by the Contractor or the means of knowledge or awareness of that event or circumstance before the condition precedent bites. This is widely accepted.

In considering when the event or circumstance giving rise to the claim for an extension of time claim arose, regard was had to Sub-Clause 8.4 which identifies when and in what circumstances such extension of the Time for Completion will be granted.

Sub-Clause 8.4 states:

> "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 20.1…is or will be delayed by any of the following causes…"

Mr Justice Akenhead noted that Sub-Clause 8.4 does not say "is or will be delayed whichever is the earlier". This led Mr Justice Akenhead to conclude that the entitlement to an extension of time arises if, and to the extent that, the completion "is or will be delayed" by the various events, such as variations or unforeseeable conditions. He said that the extension of time may 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 i.e. an actual delay).

Mr Justice Akenhead then provided a hypothetical example [paragraph 312]:

> (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.'

In other words, Mr Justice Akenhead held that the Contractor has the option of giving a Sub-Clause 20.1 notice either when it is clear that there will be delay (which is not disputed), or when the delay has at least started to be incurred.

Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC [2022] DIFC CA 016

The DIFC Court of Appeal revisited the question as to when a Sub-Clause 20.1 notice should be given.

The Employer (Panther) contended that most of the Contractor's delay events were not notified to the Engineer within 28-days of the time when the Contractor became aware or should have become aware of the event or circumstance relied on for the claimed extension of time. It emphasised that this was a commercial deal entered into between two sophisticated legally advised identities, and that the terms of that deal must take precedence over wider interests of fairness, i.e. what would be a fair outcome.

The Contractor (MESC) argued that it did not have to give 28-days' notice until the critical delay had started, relying on the construction placed on Sub-Clause 20.1 by Mr Justice Akenhead in *Obrascon* [paragraphs 312-313] and made particular reference to paragraph (e) of his example above.

In respect of the 28-day notice requirement, the Court of First Instance held that time ran from the date when the Contractor was aware or ought to have been aware of an event or circumstance that could give rise to a claim for an extension of time, regardless of whether there was or had been any actual delay by that time. In coming to this view the judge (Sir Richard Field) was aware that he might be differing from the construction placed on Sub-Clause 20.1 by Mr Justice Akenhead in *Obrascon*.

In the Court of Appeal proceedings, the Employer argued that the 28-day notice requirement is triggered when the Contractor becomes aware (or ought to have become aware) not of the delay or likely delay but of the event or circumstance giving rise to the claim for an extension of the Time for Completion. In other words, the 28-day notice requirement is triggered regardless of whether there was or had been any actual delay by that time.

Counsel for the Employer distinguished between:

1) the entitlement to an extension of the Time for Completion which arises once it becomes apparent that the Contractor will incur delay (for example, because of a variation) or if the Contractor actually starts to encounter delay (such entitlement to be

found in Sub-Clause 8.4 and referred to in the first line of Sub-Clause 20.1): and

2) the trigger for the 28-day notice when the Contractor was aware or ought to have been aware of the event or circumstance which caused the delay (such trigger to be found in the fifth line of Sub-Clause 20.1).

Whilst the time it becomes apparent that a Contractor will incur delay may be a subjective criterion, in a dispute, adjudicators and arbitrators will be sceptical of professions of ignorance by experienced contractors.

Counsel for the Employer accepted that if the Contractor does not make a claim because, at that time, it does not appreciate that the relevant event or circumstance is going to cause a critical delay, no one can suggest the 28-days starts to run. Giving the Contractor that benefit is fair enough, but it does not support the Contractor's position that notice is not required until the Contractor actually starts to encounter delay.

Counsel for the Employer contended that Sub-Clause 8.4 does not need to say that the entitlement to an extension of time will arise if completion is or will be delayed "whichever is the earlier" because Sub-Clause 8.4 is expressly stated to be "subject to Sub-Clause 20.1" which triggers the 28-day notice period. Sub-Clause 8.4 ought not circumvent the clear wording of Sub-Clause 20.1 as that would amount to "the tail wagging the dog".

Counsel for the Employer advanced that the error Mr Justice Akenhead made (if any), was suggesting that the Contractor can choose between the trigger for the 28-day notice being (1) the delay itself, or (2) the event or circumstance which causes the delay.

Counsel for the Employer acknowledged that the notice regime in Sub-Clause 20.1 has consequences for the Contractor, but that is what the clear wording of the Contract provides.

The Court of Appeal agreed with the Court of First Instance and found that the 28-day notice requirement is triggered when the Contractor becomes aware (or ought to have become aware) not of the delay or likely delay but of the event or circumstance giving rise to the claim for an extension of the Time for Completion.

In reaching this decision, the Court of Appeal set out its own hypothetical example [paragraph 45]:

> "Delay to the contractual Time for Completion only occurs in fact when the works are not completed by the contractual completion date. The construction advanced by Akenhead J would mean that in, say, a three year project, if an event occurred during the first year which resulted ultimately in the works overrunning by a month or two after the Time for Completion in year three – and there would be no actual delay to the Time for Completion until then – then the 28-day notice under Sub-Clause 20.1 would only have to be given within 28 days of the moment in year three when Time for Completion passed without the works being completed. That would render Sub-Clause 20.1 – which is designed to ensure that claims are notified and dealt with swiftly – entirely ineffective for its purpose".

Discussion

It is notable that none of the judges in the DIFC Court of Appeal were construction lawyers. Mr Justice Akenhead was a long-standing construction judge of the specialist Technology and Construction Court (TCC) in London. The Court of Appeal's hypothetical example will make little sense to many construction lawyers. Actual delay can occur on day one of a project if it is on the critical path; it does not occur only once the contractual completion date has passed. Prolongation costs, for example, are calculated at the time the delay impacts the programme period once the Time for Completion has passed.

It is true that many were surprised in 2014 by Mr Justice Akenhead's actual delay approach but his rationale was clear: Sub-Clause 20.1 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.

The DIFC Court of Appeal is a ruthless decision for contractors. Counsel for the Employer explained the

benefits of the 28-day notice (as set out in the Introduction above) and suggested that this is "the direction of travel", that there has been a change in culture, and that "the movement of FIDIC" is towards more and more notice requirements with significant consequences with implied reference to the FIDIC 2017 editions. This clearly overlooks the express provision in the third paragraph of Sub-Clause 20.2.2 of the FIDIC 2017 editions, which states that allowances may be made where there are circumstances which justify the late submission of the notice, recognising the injustices perpetrated in the name of Sub-Clause 20.1.

Whilst The FIDIC Contracts Guide (First Edition 2000) does not comment directly on the effect that such wording may have on the Contractor, The FIDIC 2017 Contracts Guide (Second Edition 2022) does. It states [page 504]:

> "Although the sanction for failing to comply with the 28-day time limit may seem disproportionately harsh, and perhaps unfair to the claiming Party, it has been drafted by FIDIC to ensure that the claiming Party is incentivised to give a Notice of Claim as soon as possible after the event/circumstance has occurred. This is in order that the Engineer under the RB2017/YB2017 … has the maximum opportunity to investigate the event/circumstance and, most importantly, the effects of the event/circumstance on the Works and/or on the claiming Party at the time that the event/circumstance happened, or as soon as possible thereafter; and in the context of both Parties' performance of their rights and obligations under the Contract at that particular time…."

However, as stated above, in the FIDIC 2017 editions this is tempered by the possibility of waiver of the time-bar if late submission is justified. For example: if or to what extent the non-claiming Party would be prejudiced by acceptance of the late submission; and/or if there is any evidence of the non-claiming Party's prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars.

The FIDIC 2017 Contracts Guide (Second Edition 2022) states [page 506]:

> "It is important to note that, even if a Notice is given under this Sub-Clause by the Engineer [to inform the claiming Party that the Claim is time-barred] … the claiming Party is entitled to continue to pursue his/her Claim, even if he/she disagrees with such Notice or if he/she 'considers there are circumstances which justify late submission of the Notice of Claim' … In that case, the last paragraph of [Sub-Clause 20.2.2.] entitles the claiming Party to proceed by submitting his/her 'fully detailed Claim' … but requires him/her to include with that submission the 'details of such disagreement or why such disagreement or why such late submission is justified (as the case may be)'. This means that any challenge by the claiming Party to the time-barring of his/her Claim by the Engineer/other Party, must be taken into consideration when the Claim is being agreed/determined under Sub-Clause 20.2.5 … which also includes three types of circumstances which may be taken into account…"

Conclusion

The best solution is a practical one: contractors must identify the importance of notices, and their timing, from the start of the project. If in doubt, send a notice.

Failing this, given the conflicting authorities, there are likely to be extensive arguments over the wording of Sub-Clause 20.1. The Contractor may need to deploy overarching principles under the governing law, such as good faith. However, how successfully such arguments will be is difficult to predict. For example, in the English courts it is now generally accepted that the prevention principle cannot be used to override clear contractual provisions. The position may be different in other jurisdictions, particularly civil law

jurisdictions. We can advise on the best alternative solutions.

The industry, including FIDIC, is well aware of the damage and injustice that the Sub-Clause 20.1 time-bar can inflict. The Obrascon decision went some way to mitigate that. The 2017 editions show that FIDIC has repented the harshness of the 1999 forms. The DIFC Court of Appeal ruling is a step in the other direction.

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