The Risk of Relying on the *Obrascon* case's ruling on Sub-Clause 20.1 Claim Notices

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Contractors are sometimes concerned about the politics of their FIDIC 1999 Sub-Clause 20.1 notices. Some Contractors may consider that serving Sub-Clause 20.1 notices may send the wrong message, particularly in the honeymoon period when the works have just begun. However, the consequences of failing to serve a timely claim notice are so dire that doubtless the issue is regularly on every Contractor's mind.

The case *of Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*[1] in the Technology and Construction Court of England and Wales provided some welcomed relief to many Contractors worldwide who may now attempt to rely on its finding on the timing of claim notices when postponing service of these crucial notices.

Mr Justice Akenhead decided that the notice may be served "*either when it is clear that there will be delay (a prospective delay) or when the delay has been at least started to be incurred (a retrospective delay).*"[2] He relies on the wording of Sub-Clause 8.4 which states that entitlement to an extension of time ("EoT") under Sub-Clause 20.1 arises when completion "is or will be delayed" by any of the listed causes. He observed that Sub-Clause 8.4 did not expressly say "*is or will be delayed whichever is the earliest,*" meaning that the question is not which of these two moments arises first. He also argued that the "*serious effect on what could otherwise be good claims*" is reason enough to interpret Sub-Clause 20.1 broadly.

The judgment uses the following example to illustrate its point: a variation is instructed in June but it is not until October that the Contractor becomes aware that it will cause delay to completion and then not until November that there is actual delay. Based on this, the Contractor does not have to serve the notice until the delay is actually incurred although it may serve the notice before when it becomes aware of any future delays to completion.[3]

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However, the *Obrascon* judgment is only binding in England and Wales and, albeit authoritative, it is merely persuasive in other jurisdictions where the use of FIDIC standard forms is extensive. Consequently, a word of caution should be advanced to all Contractors hoping to rely on claim notices served after the 28 days period from the moment they become aware of a delay; there is an alternative argument to the judgment that, if well presented, may persuade a DAB, an arbitral tribunal or a local judge to decide differently.

[1] [2014] EWHC 1028 (TCC) (16 April 2014).

[2] *Obrascon*, paragraph 312.

[3] *Obrascon*, paragraph 312(e).

Purposive justification for narrow interpretation

The purpose of the Sub-Clause 20.1 notice regime whereby the notice serves as a condition precedent to the claim is to deter Contractors from submitting notices late in the game, in particular, where there are potential time and cost repercussions that could result from these notices. The incentive to serve timely notices works as a contract administration tool with teeth. That is, a system that provides the parties with certainty as to the time and cost implications of the project. The inclination towards certainty is found in Sub-Clause 8.4 which allows the entitlement to an EoT to arise prospectively.

However, the *Obrascon* case stretches the meaning of Sub-Clause 20.1 thereby watering down the incentive. If, for instance, the timeframes in the judgment's example are stretched further so that the time between the moment the Contractor becomes aware and the moment the delay is incurred is longer, by say 6, 9 or 12 months, the benefits of having an early warning system would be lost. The purpose of the 28 day notice period in Sub-Clause 20.1 is not to serve as a trap for Contractors' claims but to serve as a mechanism for maintaining certainty and finding quick solutions to problems as soon as they first show up. Lots could be achieved by the Employer working with the Contractor in these 6, 9, 12, etc. months in order to mitigate the impending delay. That time may be wasted if the notice is served when the delay actually occurs.

Contractual justification for narrow interpretation entitlement

The logic behind the *Obrascon* decision relies on the proposition that entitlement pursuant to Sub-Clause 8.4 may arise twice, that is, when the Contractor reasonably believes that there will be delay and then again when the delay occurs.[4] The alternative argument is that entitlement only arises once per event or circumstance because, the fact that the moment when a Contractor becomes aware of a delay and the moment of its resulting delay may be separated in time does not mean that they are each also two different moments that entitle the Contractor to a claim.

In other words, whereas entitlement to an EoT may arise either when completion *will* be delayed or when completion is delayed, this does not mean that there are two different moments in time when entitlement may arise for each time a Contractor suffers delay, i.e., a prospective moment and a retrospective moment. There is only one delay. A delay to completion, whether it lasts days, weeks, months, etc., is the event or circumstance in respect of which entitlement arises. It therefore follows that entitlement to an EoT arising from that event or circumstance can arise only once.

For the avoidance of doubt, the situation where there are continuing on-going delays may be different. A Contractor in such circumstances may not be barred from claiming future delays even if the Contractor fails to serve the notice within 28 days of the first day of delay. In those situations, the Contractor only becomes aware of the delay on each of the days it is delayed from executing the works due to, for instance, lack of access. In the scenario discussed in the *Obrascon* case, the Contractor becomes aware of the delay before the delay is actually incurred.

The *Obrascon* judgment mentions that Sub-Clause 8.4 does not expressly state that, between the prospective and retrospective options, it should be the earliest. However, the acknowledgement of these two options merely responds to the fact that some delays will be foreseen and others will not and the draftsman intended to include the prospective option for the same reason that there is a 28 day timeframe to notify it, because the contract attempts to solve delay problems as quickly and economically as possible, i.e., the earlier the better.

In situations where delay is prospective, i.e., time for completion "*will be delayed*", entitlement arises when the Contractor foresees the delay to completion. Mr Justice Akenhead's example is one of these situations, i.e., the Contractor became aware of the delay to completion in October. In situations where delay is not foreseen, entitlement arises when the delay actually occurs. But for both of these situations, entitlement arises only once and a Contractor's entitlement arises either prospectively or retrospectively, but not both.

[4] *Obrascon*, paragraph 312(e), explains that notice may be served at either of these moments.

Contractual justification for narrow interpretation: the 28 day period

The first part of the relevant sentence in Sub-Clause 20.1 states that *"[t]he Notice shall be given as soon as practicable."* This responds to the purpose of the strict Sub-Clause 20.1 notice regime whereby the intention is that the Employer is informed of a potential claim as soon as reasonably possible.

The second part of the relevant sentence in Sub-Clause 20.1 states that "*[t]he Notice shall be given … not later than 28 days after the Contractor became aware, or should have become aware, of the event or* circumstance." The Sub-Clause provides a starting point and an end point for the period of time within which the Contractor must comply with the condition precedent. It also provides one single period of no more than 28 days for the Contractor to comply. The exactness of this period is illustrated by the first sentence of the second paragraph of Sub-Clause 20.1 which states the Contractor will lose its entitlement if it does not send the notice within a period of 28 days.

The starting point is when the Contractor becomes aware or should become aware of the event or circumstance. Even in a situation where the incident and the delay are separated in time, the Contractor can become aware (or should become aware) only once. The Contractor cannot become aware (or should become aware) twice of the certainty that time for completion will be delayed. The text in FIDIC does not expressly state "*whichever is the earliest*" because, as mentioned above, it is implied that entitlement arises only once.

The end point is therefore 28 days from this moment. One of the complications to which the *Obrascon* judgment's ruling gives rise is that, if there are two moments when the Contractor can become entitled, then there are two 28 day periods within which the Contractor can serve its notice of claim. If a Contractor becomes aware of the fact that the incident will cause delay to completion in October but can serve the notice either in a 28 day period starting in October or another 28 day period starting from November, the period of time becomes one of 56 days. Furthermore, this would also mean that, if the prospective position and the retrospective position are separated by months, i.e., in October the Contractor becomes aware that the incident will cause delay in March of the following year, the *Obrascon* interpretation would allow a 28 day period starting in October followed by a period of about 4 months when the Contractor will be time bared from serving the notice but then followed by another 28 day period during which the time bar is somehow lifted. It is arguable that this odd result is not what the Sub-Clause 20.1 regime could have intended. There is only one 28 day period in respect of the entitlement that results from the relevant delay to completion.

This interpretation should not be the cause of any additional trouble for the Contractor. The Contractor should be quite capable of sending a Sub-Clause 20.1 notice the moment when it becomes aware that there will be delay, for example, because an updated programme has put the delay on the critical path. Furthermore, the notice itself is not a complex document that could be seen as requiring any extensive research and drafting. Notices are usually one or two pieces of paper containing, as the judgment prescribes,[5] (1) some description of the event or circumstance and (2) that the purpose of the notice is to notify the Engineer of a claim under the Contract arising out of an event or circumstance. Furthermore, at the moment when the Contractor becomes aware that completion will be delayed, it will already have all the elements needed to allow it to send the notice. Finally, the Contractor is not even required to follow up with a claim if it later chooses not to.

Conclusion

Therefore, whereas the *Obrascon* argument rightly responds to the dire consequences that may follow late service of a notice of claim, the interpretation may be perceived as contravening the main commercial purpose that lies behind the strict notification regime in Sub-Clause 20.1. That is, in order to allow a more controlled administration of the contract, provide certainty to the Employer, and help the parties solve any delay difficulties with as much anticipation as possible, the Contractor must serve its notices as soon as practicable. Furthermore, the language used in the provisions of Sub-Clauses 8.4 and 20.1 support this view as it is implied that entitlement to a claim can arise only once and the Contractor can only become aware of this entitlement once.

[5] *Obrascon*, paragraph 313.

Therefore, in circumstances where the Contractor becomes aware of a delay that will happen in the future, the Contractor would be required to serve the Sub-Clause 20.1 notice within 28 days from this moment and cannot wait for the moment when the delay occurs for a second 28 day period.

Please get in touch at gabriel.muleroclas@howardkennedy.com with your thoughts or to discuss any concern