The Evolution of Notice Provisions in the FIDIC Suite

Simon Hughes QC is a well-known FIDIC specialist who has conducted FIDIC contract arbitrations in over 25 countries. He co-authors (with Jeremy Glover) a leading commentary on the Red Book, which has recently been published in its 3rd edition as a Red/Yellow Book commentary on the 2017 Amendments.

Introduction

One of the most notable trends in successive editions of the FIDIC Red Book is the increasingly onerous and prescriptive nature of the notice requirements. This article analyses the evolution of notice provisions from the 1987 FIDIC 4th Edition to the recent 2017 Edition. The failure to comply with such provisions can prove fatal to a claim and so contractors should make every effort to ensure compliance with them. There remain, however, some potential means by which a contractor may still bring a claim despite failing to give notice within the prescribed time.

The Purpose of Notice Provisions

Whilst notice provisions are often regarded as punitive only, the modern view is that they are a legitimate means of controlling chains of supply/claims management. That trend is reflected in the increasingly detailed notice provisions.

Seppälä gave an insight into the rationale behind the introduction of the more stringent notice provisions in the 1999 forms:

> *"The notice of claim alerts the Engineer and the Employer to the fact that the Employer may have to pay the Contractor additional money or grant him an extension of time by reason of a specified event or circumstance. The requirement to keep contemporary records is intended to ensure that there will be contemporary documentary evidence to support the claim. Once a notice of claim has been given, the parties can then agree on the particular contemporary records the Contractor must keep, to avoid future argument, and there may still be time for the Engineer to instruct alternative measures to reduce the effects of the claim. When claims are notified early, they may be resolved early, in the interests of both parties."*[1]

The judiciary has also made clear that notice provisions serve a valuable purpose. Jackson J, as he then was, famously remarked in *Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited (No. 2*[2]*)*:

> *"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."*

Nevertheless, rules aimed at ensuring discipline within the supply chain are open to abuse and/or excessive use. The increasingly prescriptive nature of the notice provisions in the FIDIC forms represents an attempt to prevent and/or limit such abuses.

The 4th Edition Red Book

The 1987 form, still much used in the UAE, contains relatively simple notice provisions.

Sub-Clause 1.5 provides that a notice must, unless otherwise specified, be in writing.

Clause 44 deals with extensions of time and provides that in the event of one of the circumstances described in (a)-(e) being such as *"fairly to entitle the Contractor"* to an EOT, the Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of such extension and notify the Contractor accordingly.

Clause 53 is headed the "Procedure for claims". Sub-Clause 53.1 provides:

> *"Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen."*

A failure to comply with Sub-Clause 53.1 results in the contractor's entitlement being limited to the amount which the engineer or arbitrator considers to be verified by contemporary records (Sub-Clause 53.4).

The 1999 Red Book

The 1999 Red Book introduced significant changes in relation to notices and the claims procedure.

Sub-Clause 1.3 covers communications and provides that notice must be in writing and delivered by hand (against receipt), sent by mail or courier, or transmitted using any agreed electronic means of communication set out in the Appendix to Tender.

Whilst the newly introduced Sub-Clause 2.5 is titled 'Employer's Claims', it is in fact a contractor-friendly clause. It is designed to prevent an employer from summarily withholding payment or unilaterally extending the Defects Notification Period (DNP). Under Sub-Clause 2.5 the employer has to give notice and particulars to the contractor if he considers himself entitled to any payment under any Clause of the Conditions or otherwise in connection with the contract and/or to any extension of the DNP. Importantly, such notice only has to be given *"as soon as practicable"* after the employer becomes aware of the event or circumstances giving rise to the claim.

Sub-Clause 20.1 imposed a time bar on contractor's claims and caused serious concerns amongst contractors. Frank Kennedy of Carillion, Chairman of the European International Contractors Working Group on Conditions of Contract, described the time bar as 'unduly harsh'.[3] The reason for such criticism was that, under Sub-Clause 20.1, 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 aware, or should have become aware of the relevant event or circumstance. This time limit is more stringent than that imposed on employers. A failure to give notice within this time limit results in any claim for time or money being lost.

Even if a claim is notified within the 28-day period, a contractor still has to submit a fully particularised claim within 42 days of expiry of that period. The engineer then has to respond within 42 days or another agreed period.

Akenhead J provided clarification on a number of points in relation to Sub-Clause 20.1[4]:

(a) A Notice must be intended to notify a claim for extension and/or additional payment and must be recognisable as a claim. He held that a progress report stating *"the adverse weather condition (rain) have [sic] affected the works"* was nowhere near a notice whereas a letter stating *"the foregoing will entitle us to an extension of time"* would be sufficient. This should have spelled the end of the still frequently encountered argument that progress reports or meeting minutes constitute a Notice;[5]

(b) The words *"is or will be delayed"* in Sub-Clause 8.4 give rise to an entitlement to claim an EOT at two distinct points. Either when it is clear that there will be delay (a prospective delay) or when the delay had already begun to be incurred (retrospective delay).[6] A contractor is therefore entitled to notify a claim for an EOT within 28 days from the occurrence of either prospective or retrospective delay.

(c) The time bar represents a condition precedent and so a failure to comply with the prescribed time limit results in the employer being discharged of any liability. Indeed, Akenhead J held that the contractor had not given an appropriate Notice and so was not entitled to an EOT.

Sub-Clause 20.1 was drafted broadly as demonstrated by the Contractor having to give a notice if he considers himself entitled to "any" EOT and/or "any" additional payment under "any" Clause of the Conditions or *"otherwise in connection with the Contract"*. Such broad drafting has unfortunately failed to prevent contractors from advancing questionable ways around the notice provisions such as claiming that variations are not covered.

1 Christopher Seppälä, - Contractor's Claims Under the FIDIC Contracts for Major Works, paper given at the International Construction Contracts and Dispute Resolution Conference in Cairo, April 2005. Paper available on FIDIC website.

2 BLR 195 TCC, [2007] Bus LR D109, [2007] CILL 2458, [2007] EWHC 447 (TCC) and 111 Con LR 78

3 Frank M Kennedy, 'EIC Contractor's Guide to the FIDIC Conditions of Contract for EPC Turnkey Projects (The Silver Book)' (2000) International Construction Law Review Part 4 531

4 *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC)

5 Ibid at [313]

6 Ibid at [312]

2017 Red Book

A notable addition to the 2017 book is the introduction of a definition for a 'Claim'. 'Claim' is defined extremely broadly to mean *"a request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works."*

Sub-Clause 1.3 requires the written notice to be identified as a Notice. This provision means that meeting minutes or progress reports cannot constitute a Notice unless they are identified as such.

Sub-Clause 20.1 has been redrafted to provide an exhaustive regime for claims that applies to both employers and contractors. Sub-paragraphs (a) and (b) refer to employer's and contractor's claims that were previously found at Sub-Clauses 2.5 and 20.1 of the 1999 edition.

Sub-paragraph (c) refers to a claim for another entitlement or relief. The guidance provides that such other relief may include matters such as the interpretation of a provision of the contract or a declaration in favour of the claiming party. The final paragraph of Sub-Clause 20.1 sets out a separate procedure for a claim under sub-paragraph (c).

Sub-Clause 20.2 provides that either party must follow the procedure contained in the sub-clause if he considers himself entitled to any additional payment, a reduction in the Contract Price (in the case of an employer) and/or to EOT (in the case of the contractor) or an extension of the DNP (in the case of an employer) under any Clause of the Conditions or otherwise in connection with the contract.

The first paragraph of Sub-Clause 20.2.1 is tighter than its equivalent in Sub-Clause 20.1 of the 1999 book since it requires the Notice to describe the event or circumstance giving rise to the *"cost, loss, delay or extension of DNP"*.

The intention behind Sub-Clauses 20.1 and 20.2 appears to be to provide an exhaustive regime applicable to any potential claims. This regime should spell a definitive end to the argument that claims for damages, as claims for breach and not under the contract, are not caught.

The 28-day time limit remains and a failure to comply with it still absolves the other party of liability. The remainder of Sub-Clause 20.2 provides a far more prescriptive claims procedure that both parties as well as the engineer must heed.

Sub-Clause 20.2.5 provides the engineer with a significant new discretion to treat late notice or late service of the fully detailed claim as valid, taking into account the circumstances. Potentially relevant circumstances are set out in the sub-clause. Sir Rupert Jackson recently noted that Sub-Clause 20.2.5 will require the engineer to consider reasonableness and proportionality when exercising this discretion.[7] Considering the clarity with which the time bar is set out, it is difficult to see how the claiming party could justify the lateness of the Notice except where there is some ambiguity as to when the period began to run from. Such arguments are likely therefore to hinge on when the claiming party became aware or should have become aware of the event or circumstance giving rise to the claim.

Are There Any Ways Around the Time Bar?

The answer to this question will depend on the facts but also on the governing law of the contract. In England & Wales the only credible arguments to avoid the time bar appear to be those based on waiver and estoppel. In civil law jurisdictions, good faith or other provisions in the relevant civil code may provide a means to escape the application of the time bar.

Waiver/Estoppel

The Scottish case of *City Inn Ltd v Shepherd Construction Ltd*[8] held that an employer has the power to waive or dispense with procedural requirements. The court of first instance held that waiver had occurred as a result of the employer and architect both making clear that the contractor was not entitled to an extension of time but failing to invoke the condition precedent clause that would have barred the claim. The Inner House affirmed this decision with Lord Osbourne stating:

> *"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."*

Such an argument could potentially fly in England & Wales but any waiver argument inevitably rests on the specific words and/or conduct of the employer: close analysis of the facts is central to success with waiver (and estoppel) arguments.

An argument in estoppel could also arise as a result of the words and/or conduct of the employer but the contractor would also have to satisfy the court/tribunal that he relied on the employer's words/conduct and such reliance was detrimental. Henderson LJ endorsed the following formulation of the requirements of promissory estoppel: a party must freely make a clear and unequivocal promise or assurance that he will not enforce his strict legal rights, the promise must be intended to affect legal relations or be reasonably understood by the other party to have that effect, and, before it is withdrawn, the promisee must alter his position such that it would be inequitable to permit the promisor to withdraw the promise.[9] An estoppel argument is likely to encounter disputes as to whether there was a clear and unequivocal promise and whether the contractor changed his position in reliance on the alleged promise.

Good Faith/Relevant Civil Code Provisions

A similar argument can be made in civil jurisdictions by relying on good faith provisions contained in the relevant civil code.

Article 246(1) of the UAE Civil Code provides that the contract must be performed in a manner *"consistent with the requirements of good faith."* Further, Article 70 is a manifestation of the maxim *venire contra factum proprium* and states that *"no person may resile from what he has (conclusively) performed."* As a result of these provisions, arbitral tribunals in the UAE can be reluctant to permit an employer to argue that claims are inadmissible due to the failure to comply with notice requirements where the employer has failed to raise the notice point before the commencement of the arbitration or where the employer has consented to the claims being adjudicated by the engineer on their merits.

Similarly, much Arab jurisprudence owes a significant debt to Egyptian jurisprudence which appears to recognise such principles. The Cairo Court of Appeal has held that:

> *"In arbitration, and by virtue of the doctrine of good faith which permeates commercial practice, the doctrine of estoppel, which is known in Arab legal terminology as the rule of 'non-contradiction to the detriment of others', has been firmly established."*[10]

A contractor should also be aware that the relevant civil code may provide a means to bring a claim despite the time bar being enforceable. For example, in Poland the Supreme Court suggested that the time bar present in Sub-Clause 20.1 of the 1999 book did not deprive the contractor of the opportunity to claim, pursuant to art.405 of the Civil Code, the return of the undue benefits that the employer obtained at the contractor's expense, i.e. the performance of additional work.[11]

Compliance Should Always Remain the Priority

Contractors should not be lulled into thinking that the availability of such arguments renders compliance with the notice requirements inessential. Such arguments are by no means certain to succeed. Only compliance with the notice provisions can definitively ensure that a claim is not time-barred.

Conclusion

FIDIC's introduction of the time bar in the 1999 Edition ensured that contractors must be acutely aware of the need to comply with notice provisions. FIDIC's drafting of the relevant provisions in the 1999 and 2017 Editions should serve to discourage contractors from running weak arguments such as that variations are not covered by the provisions. If contractors are in the undesirable situation of having failed to comply with notice requirements, concerted efforts should be made to consider whether, in light of the governing law of the contract and the particular circumstances of the case, arguments based on waiver, estoppel, good faith or provisions of the relevant civil code are capable of success.

7 Sir Rupert Jackson, Notices, Time Bars and Proportionality, a talk to the Hong Kong Society of Construction Law on 21 September 2018

8 [2007] CSOH 190 and on appeal, [2010] CSIH 68

9 *Harvey v Dunbar Assets plc* [2017] EWCA Civ 60; [2017] Bus. L.R. 784

10 Cairo Court of Appeal, Cases Nos 35,41, 44 and 45 of JY129 (Commercial) (Consolidated), 5 February 2013

11 Judgment of the Supreme Court of 23 March 2017, case no. V CSK 449/16