

Conditions Precedent in Construction Claims - traps for the unwary?

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For many years, throughout the worldwide construction industry, contract draftsmen have struggled to find a means to require contractors to let employers know the time and cost consequences of events impacting on projects. These procedures have this perfectly legitimate purpose, but to have any real effect on the contractors' behaviour they can often have a potentially disproportionate result such that valid claims by contractors are denied by employers (or engineers on their behalf) for purely procedural failures. This article looks at typical examples of these clauses and considers how they might be assessed under the laws of the GCC in contrast to the common law.

A Typical Clause

Clauses which require a specific procedure to be followed in order to be entitled to make a claim are called "condition precedents". A very well-known example is Sub-Clause 20.1 of the FIDIC Red Book 1999:

"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...."

"If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause."

The wording is very clear and unambiguous. A Contractor can be under no illusions as to the intent behind this drafting.

The Position under the English Common Law

Over the last 20 years, the trend in the common law jurisdictions has been to uphold such clauses where the procedure is clearly expressed as a condition precedent to an entitlement.

In *Bremer Handelgesellschaft mbH v Vanden Avenne Izegem nv*, it was concluded that a notice provision should be construed as a condition precedent if:

- it states the precise time within which the notice is to be served; and
- it makes plain by express language that unless the notice is served within that time the party making the claim will lose its rights under the clause.

The purpose and commercial merit of such clauses was addressed in *Multiplex Construction v Honeywell Control Systems* where it was held that:

"Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; 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.”

Given that a significant number of GCC construction contracts are expressed to be subject to English law, contractors do need to be very aware of the very significant risks of failing to comply.

The Position in the GCC

Civil code jurisdictions may take a more lenient approach. However, the starting point for any analysis is the wording of the contract and what the parties have agreed to regulate their relationship:

Article 243 (2) of the UAE Civil Code states:

“With regard to the rights (obligations) arising out of the contract, each of the contracting parties must perform that which the contract obliges him to do.”

Further, Article 265 (1) states:

“If the wording of a contract is clear, it may not be departed from by way of interpretation to ascertain the intention of the parties.”

In Qatar, Articles 171 and 172 of Law No. 22 of 2004 state:

“Parties shall be bound by the terms they have agreed (provided such provisions are not contrary to public morals or mandatory provisions of local law) unless exceptional, unforeseen circumstances make performance of a particular obligation substantially onerous.”

The implication here is that, if the parties have agreed that a procedure is to be a condition precedent, then this agreement will be upheld. However, there are other Articles in the various codes, together with general principles of GCC law, which could be used to challenge this approach. Employers need to be aware of this.

Unlawful Disproportion

Article 106 of the UAE Civil Code states:

“(1) A person shall be held liable for an unlawful exercise of his rights.

(2) The exercise of a right shall be unlawful: [...]

(c) if the interests desired are disproportionate to the harm that will be suffered by others.”

It may be unlawful for a valid claim to be disallowed on the basis of a purely technical breach if the impact is disproportionate. This could be the circumstance where a contractor is deprived of its entitlement to time and/or money.

Unjust Enrichment

This principle is effectively saying that an employer cannot take the benefit of performance without accepting a reciprocal obligation to pay or grant an extension of time. Similarly, it could also be used to challenge the employer's entitlement to levy liquidated damages.

Article 220 of the Qatar Civil Code and Articles 318 and 319 of the UAE Civil Code provide that unjust enrichment is unlawful.

Article 318 states:

"No person may take the property of another without lawful cause, and if he takes it he must return it."

Article 319 (1) provides:

"Any person who acquires the property of other person without any disposition vesting ownership must return it if that property still exists, or it's like or the value thereof if it no longer exists, unless the law otherwise provides."

An employer may be prevented from relying on a condition precedent if the Employer has benefited and the only reason for not paying or granting time is the failure to comply.

UAE and Qatar courts would be reluctant to uphold the strict terms of the contract where it can be seen that either: (1) the requirement for a notice was complied with in a different form or (2) that strict imposition of the time bar would be an unlawful exercise of the employer's rights or cause unjust enrichment.

Penalty

GCC courts retain a discretion to amend the compensation to reflect actual loss. This is often encountered in respect of challenges by contractors to the sums agreed as liquidated damages. In a similar way, there might arguably be little or no loss resulting for an employer from a late or "incomplete" notice. Consequently, there is a possible argument available where the effect of the notice provision is to act as a penalty for a failure to serve notice.

Statutory limitation periods and conditions precedent

In common law jurisdictions there is no link made enforceable conditions precedent and limitation periods. In the GCC the position is far less clear.

Statutory limitation periods are prescribed as a matter of Qatari and UAE law. Therefore, in both jurisdictions, parties should treat them as principles of public policy that cannot be varied by contract.

Article 418 of the Qatari Civil Code stipulates:

"it shall not be possible to agree on limitation for a period other than those specified by the law."

Article 487(1) of the UAE Civil Code includes a similar though different provision. When coupled with the overarching obligations of good faith and unjust enrichment found in the civil codes of both countries, a court will be cautious when asked to deny a claim following an alleged failure to adhere to a contractual notice regime

A Change in Approach?

The interpretation of conditions precedent frequently causes disagreement between parties: contractors are accused of simply ignoring the procedures and providing employers with no information about events on site; employers and engineers are accused of rejecting perfectly valid claims for purely procedural failures. It is of course rare for either party to have complied fully with its obligations regarding notifications.

It has been suggested that a simpler approach might just be to dispense with these conditions precedent procedures so as to remove the debate.

This approach has received an element of support from FIDIC. For example, in the FIDIC Gold Book there is a clause, Sub-Clause 20.1(a) which gives a Dispute Board some discretion noting that:

“However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. If the DAB considers the circumstances are such that the late submission was acceptable, the DAB shall have the authority under this sub-clause to override the given 28-day limit and advise both the parties accordingly.”

Conclusions

Any legal system will try to deal with injustice, whether this is a contractor deprived of a legitimate claim or an employer who has major claims made against it at a late date without any contemporaneous warning.

Under English law the short point is that conditions precedent likely to be upheld on a basis of certainty and the purpose behind the clause. That said, parties relying on clauses will need to have been consistent and a failure on their part to follow other aspects of the contractual procedures may provide counter arguments to a strict interpretation. Reliance on exact compliance is potentially dangerous and it would always be advised to investigate the merits of any claim, even if the first argument is procedural.

Under the civil law the primary position is that the parties are bound by their contract. However, there is much more room for arguing, where the circumstances allow, that reliance by an employer on a failure to follow procedure is a breach of the obligation of good faith, unjust enrichment or a penalty.

There is an easy solution available to both contractors and employers to minimise disputes: read the contract and follow the procedures!

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