Time Barring In Construction Contracts: An Egyptian Law Perspective

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Introduction

Time bars and limitation periods are integrated in legal systems, including Egyptian law. Recently, time bars are also being introduced in construction contracts, especially in forms of contracts published by the *Fédération Internationale Des Ingénieurs Conseils* (FIDIC).

FIDIC Contracts are the most commonly used forms of contract in the vast majority of construction and infrastructure projects in Egypt. Such forms of contract include a mechanism that a contractor should comply with in order to submit a claim. The procedure includes a material element of notifying the Engineer of any event or circumstance giving rise to a claim that the Contractor believes entitles him to additional time and/or cost, within 28 days (unless the parties agreed otherwise) from the date the Contractor became aware (or should have become aware) of such event or circumstance. According to the FIDIC forms of contract, the Contractor's failure to comply with such notice requirement would render that the Contractor shall not be entitled to additional payment or extension of the Time for Completion and the Employer is discharged from all liability in connection with such claim.

While, on one hand, Egyptian law upholds the sanctity of the agreement of the parties, where the Egyptian Civil Code provides that the contract makes the law of the parties which cannot be changed except by agreement of the parties or a mandate of the law. On the other hand, contractual arrangements do not exist in vacuum and it is imperative to consider how provisions of Egyptian law reflect on such notice requirements under FIDIC.

Distinction between Limitation Periods and Time Bars

Egyptian law has set limitation periods for several rights where the expiry of such period renders a claim for a right extinct. With few exceptions, the limitation period under the Egyptian Civil Code (Article 374) is fifteen years, and seven years under the Commercial Code, where the latter applies to the scope of commercial transactions.

Historically, it is worth highlighting that the introduction of limitation periods was in essence made for the stability of transactions so that a creditor would not be able to claim a debtor indefinitely; a matter that would ultimately lead to instability. In general, limitation periods can be identified by several characteristics, mainly that the period tends to be long, is subject to suspension and such period is a matter of public order where it is not subject to amendment by way of agreement of the parties.

Further, Egyptian law has also integrated time bars under different codes, which is distinct from limitation periods in several aspects, including mainly purpose and duration. Where limitation periods were introduced for the stability of transactions, time bars are introduced in order to set a specific duration during which a person is entitled to exercise the right to claim. At the expiry of such duration, that person is barred from such claim. Notwithstanding purpose, time bars tend to be shorter than limitation periods.

While these are not the only points of distinction between limitation periods and time bars, scholars have set out an additional point of distinction between both, whereby in the event a period is set out to stabilize transactions, it is deemed a limitation period despite the possibility of such period being short. In contrast, where a period is set through which a person is entitled to exercise a right, it is seen as a time bar.

It is seen by scholars that another point of distinction between limitation periods and time bars is that limitation periods are set for rights that have already existed before the commencement of such limitation period. Conversely, exercising a right within a barring period is an inherent part of the right itself, whereby failure to exercise the right within such period renders the right extinct and non-existing.

An example under the Civil Code (Article 455) is the requirement that a buyer informs the seller in a contract for sales context of a defect in the subject of the contract within one month from the date of its appearance and file a claim at court within six months from the date of the notice. Failure by the buyer to do so deems the buyer barred from filing a claim. Further, in a re-measured construction contract context (Article 657), the contractor is required to serve a notice to the employer in the event of a considerable increase in the contract price, at the earliest practically possible date. Failure by the contractor to do so is a forfeiture of right to claim the additional cost.

In application of time barring provisions of the law, the Court of Cassation held that in relation to the warranty under a contract for sales, the notice period of one month is not a limitation period but is rather a time bar that the parties to a contract may agree otherwise whether by extending the notice period or decreasing as such, since its provisions are not of public order, unlike in the event of limitation periods (Petition No. 10909 of the 66th Judicial Year, Hearing 13 May 1999). Thus, there is a clear interpretation from the court that time bars are not a matter of public order, which allows the parties to amend them as such. However, the right to amendment of time bars is subject to some exceptions where parties cannot agree to time bars set out by law, as that would be a matter of public order in that event.

Conclusion

There are two schools of thought in relation to time bars in FIDIC forms of contract. First, it could be viewed as an amendment of the limitation periods set out under Egyptian law, which in turn renders such amendment as void due to its violation of a matter relating to public order. Second, it may in contrast be deemed as a creation of a time bar that does not exist within the legislation. Thus, the determination whether such notice requirement is a time bar or an amendment to limitation periods is a matter of debate between practitioners and scholars of the different schools of thought.

In conclusion, and while there is a distinction between time bars and limitation periods, the determination of the nature of FIDIC notice requirements is a matter that may be further established by way of court decisions or arbitration awards.

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