MDA PRESENTS

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Prevention is Cheaper than Cure

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UNFAIRLY TIME-BARRED? FIDIC 2017 TO THE RESCUE!

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The time bar…every contractor's nemesis.

Notices of claim have been included in standard forms of contract for some time now. The intention behind them is not to create a stumbling block for contractors, who have endured events that justify making a claim for an extension of time or additional payment, but is rather to provide all parties with sufficient opportunity to consider how best to proceed to avoid the risks and mitigate the costs associated with such an event. These notices are not only for the benefit of engineers/employers but also enable contractors to claim in an orderly and timely manner. These notices invariably have deadlines and along with these deadlines comes the dreaded time bar to claims.

It was only in the 1999 edition of FIDIC that the absolute time bar for failing to notify timeously was introduced. Sub-clause 20.1 explicitly excludes the Contractor's entitlement to claim if it fails to give notice of a claim within the prescribed period by stating that "*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*". Prior to that, and for example in the 1987 edition of FIDIC, the notice requirement was more of a condition precedent to a claim rather than an absolute time bar. The Engineer was only "*not bound*" to make a determination where the Contractor had failed to deliver its notice in time, thereby affording the Engineer some discretion as to whether to consider the Contractor's claim in the circumstances or not.

Although the time bar has a valid purpose, there are circumstances in which it could be considered to be unduly harsh and unfair. Engineers/employers rarely give these considerations the time of day given the "get out of jail free card" that an absolute time bar offers them.

There has been some sympathy expressed by the courts in various jurisdictions regarding time barring. For example:

- in South Africa, the Constitutional Court in *Barkhuizen v Napier*[1] considered a time bar clause in an insurance policy and held that the enforcement of an unreasonable and unfair time bar clause will be contrary to public policy and unenforceable;
- the Technology and Construction Court of England and Wales in *Obrascon Haurte Lain SA v Her Majesty's Attorney General for Gibraltar*[2] held that clause 20.1 of FIDIC is not to be construed strictly against the contractor but rather reasonably broadly, given its serious effect on any potential claim;
- in Australia the court in *Andrews v Australia and New Zealand Banking Group Ltd*[3] held that if a time bar clause can be characterised as a penalty then it may well not be enforceable.

In common law jurisdictions, where case law is binding, contractors may be afforded some relief by such judicial decisions. However, having to rely on several judgments, rather than the plain terms of the contract, is not ideal for any contractor. Doing so generally involves having to employ lawyers to decipher these judgments and determine their applicability to the facts at hand and then a lengthy argument (often via adjudication) with the engineer/employer to refute the time rebar.

In civil jurisdictions, there is a written code of law that is binding and judicial decisions are merely there to inform. In civil jurisdictions where principles of good faith are codified (such as the UAE), time bars could easily be held to be unenforceable – for example, where the employer is in breach and is fully aware of this but remains silent and tries to rely on a time bar to avoid liability. However, where principles such as good faith have not been codified, contractors find themselves having nothing to fall back on.

Furthermore, in both types of jurisdictions, it is the engineer making determinations about time bars. The law is not most engineers' forte and thus they tend to rely on the plain wording of the contract.

It is clear that under both common and civil law jurisdictions, contractors are in need of a contractual procedure to challenge the time bar, particularly where its application is undeservedly unfair.

Fortunately, the drafters of the standard forms of contract are realising this need. The 2017 edition of FIDIC, while keeping the time-barring provisions of the previous edition, includes a "Waiver of Time Limits" clause (sub-clause 20.3) This clause refers to the *"claiming Party"* and thus applies to both the Contractor and the Employer.

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1 2007 (5) SA 323 (CC).

2 [2014] EWHC 1028 (TCC).

3 [2012] HCA 30.

Under this new edition of FIDIC, the Engineer is obliged to notify the claiming Party where he believes that the claiming Party has not notified its claim in time. Where a claiming Party receives this notice from the Engineer and considers there to be circumstances that justify its late notice, it may apply to the Dispute Avoidance/Adjudication Board (the "DAB")[4] for a ruling under sub-clause 20.3. This application must be made within 14 days of receiving the Engineer's notice and must include supporting particulars as to why its late submission is justified.

The DAB shall then have the authority to waive the time bar. FIDIC 2017 has provided further clarification and guidance by stipulating circumstances which the DAB should consider (but is not limited to considering) in making its decision. These circumstances include:

- any prejudice caused to the other Party by accepting the late submission;
- any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the claim;
- the extent to which the Engineer may have already proceeded under sub-clause 20.2.5 [*Agreement or determination of the Claim*].

The DAB is to give its ruling in writing to both Parties, with a copy to the Engineer, within 28 days of receipt of the claiming Party's application.

If the claiming Party fails to apply to the DAB within 14 days, it shall be deemed to have accepted finally and conclusively that the notice of claim is not valid.

This new clause comes to the rescue of contractors in both common and civil law jurisdictions as there is now a contractual obligation to consider the fairness of a time bar (provided the contractor has adhered, ironically, to the timelines of the waiver clause). This will greatly assist where the Engineer and the Parties are not astute to the laws of their jurisdiction and the application thereof to time bars. Such Parties will be able to merely point to the words of the contract. However, within the time waiver application itself, there may still be a need for reliance on the abovementioned case law and codified principles of good faith so as to justify why a notice was late.

Although this inclusion cannot guarantee fairness in all cases, it at least provides a claiming Party with a second chance and shows that the FIDIC drafters' intention was never for time bars to benefit Employers only or to be abused and applied unfairly, as they often were under the 1999 edition.

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4 In terms of sub-clause 21.1, the DAB shall be appointed within a period of time of the Contractor receiving the letter of acceptance, as stated in the Contract Data.