MDA PRESENTS

FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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THE *OBRASCON HAURTE* RULING – FAMOUS FOR SOFTENING THE FIDIC TIME BAR. BUT, CAN IT BE APPLIED TO LOCAL CONTRACTS, IN PARTICULAR THE GCC?

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In the case of *Obrascon Haurte Lain SA v Her Majesty's Attorney General for Gibraltor*[1], the Queen's Bench Division of the Technology and Construction Court in the United Kingdonm provided its interpretation of Sub-Clause 20.1 (read with Sub-Clause 8.4) of the FIDIC Contract in respect of the notice requirements for contractors' claims. This interpretation provided some relief to contractors in respect of the application of the Sub-Clause 20.1 time bar, but can it be applied beyond the FIDIC contract and, in particular, to our local form of contract – the General Conditions of Contract (2015 edition) (the "*GCC*")?

Sub-Clause 20.1 (read with Sub-Clause 8.4) of FIDIC

Sub-Clause 20.1 states that if the Contractor considers himself to be entitled to any extension of the Time for Completion…the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

The traditional interpretation of this Sub-Clause was that once the event has occurred, the 28-day period to give notice commences. In the *Obrascon* case, Justice Akenhead broadened this interpretation, providing some relief to Contractors.

Justice Akenhead decided that properly construed, the event or circumstance giving rise to the claim for extension must first occur and there must have been either awareness by the Contractor or the means of knowledge or awareness of that event or circumstance before the conditions precedent (the need to provide a notice) bites.

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He held further that he could see no reason why the Sub-Clause should be construed strictly against the Contractor and no reason why it should not be construed reasonably broadly given its serious effect on what could otherwise be a good claim (for instance, breach of contract by the Employer).

Sub-Clause 8.4 states that the Contractor shall be entitled (subject to Sub-Clause 20.1) to an extension of the Time for Completion "*if and to the extent that completion is or will be delayed*" by various events.

Justice Akenhead held that because of the wording "*is or will*" an extension of time can be claimed either when the delay has been at least started to be incurred (retrospective delay) or when it is clear that there will be a delay (a prospective delay).

Justice Akenhead provided the following practical example of his interpretation:

> A variation is instructed in June to widen part of a dual carriageway. At the time of the instruction, this part of the carriageway is not on the critical path.
>
> At the time of the instruction, it was foreseeable that this instruction would extent the period programmed for the carriageway, but it is not foreseeable that it will delay the works overall.
>
> In October, it became clear that the works overall would be delayed. By November, the works were actually delayed.
>
> Notice was not required under the actual delay (November) although the contractor could have given notice when it believed that it would be delayed (October).
>
> The "*event or circumstance*" referred to in Sub-Clause 20.1 can mean either the incident (the instruction / variation) or the delay which results or will result.

So can this interpretation apply to the GCC?

<u>Sub-Clause 10.1 (read with Sub-Clause 5.12.1) of the GCC</u>

The GCC's version of Sub-Clause 20.1 is Sub-Clause 10.1, which states that the Contractor shall, within 28 days after the circumstance, event, act or omission giving rise to such a claim has arisen, or occurred, deliver to the Employer's Agent a written claim.

This Sub-Clause differs from Sub-Clause 20.1 of FIDIC in that the 28-day period does not run from when the Contractor became (or ought to have become) aware of the event or circumstance but rather from when the event or circumstance itself arose or occurred. In other words, Justice Akenhead's interpretation that the event or circumstance giving rise to the claim should first occur before the conditions precedent kicks in is already catered for in the express wording of Sub-Clause 10.1.

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Sub-Clause 10.1.2 of the GCC states that if the Contractor did not comply with the 28-day period because he was not and could not reasonably have become aware of the implications of the facts or circumstances concerned, the period of 28 days shall commence to run from the date when he should reasonably have become aware.

The "*implications*" is a reference to the delay. This Sub-Clause allows the 28-day period to commence on the date the Contractor should have reasonably become aware of the delay rather than the event itself. In other words, Justice Akenhead's interpretation that it must be clear that there will be a delay (prospective) is already catered for in the express wording of Sub-Clause 10.1.2.

Sub-Clause 5.12.1 of the GCC states that if the Contractor considers himself entitled to an extension of time for circumstances of any kind whatsoever which "*may occur that will actually extend Practical Completion of the Works beyond the Due Completion Date*", the Contractor shall claim in accordance with Sub-clause 10.1. This Sub-Clause talks about a consideration that a circumstance may occur that will extend practical completion. Accordingly, it is also prospective in nature.

Justice Akenhead's interpretation that an extension of time can be claimed when the delay has at least started to be incurred (i.e. retrospective delay) was based on the use of the present tense word "*is*" in Sub-Clause 8.4. There is no such wording in the equivalent clauses of the GCC.

Conclusion

The *Obrascon* case is not required to afford the Contractor the entitlement to only notify after the event has occurred or when it is clear that there will be a delay as the GCC already expressly allows this.

As for an entitlement to only notify when the delay has least started to be incurred (retrospective delay), Justice Akenhead came to this interpretation based on the specific wording of FIDIC which is not present in the GCC.

Furthermore, the *Obrascon* case is a case from the Technology and Construction Court of the United Kingdom and is thus not binding on parties to construction contracts in South Africa. Its findings are of persuasive value only. Therefore, no court, arbitrator or adjudicator is bound to adopt the interpretation of Justice Akenhead in any event.

However, given that South African construction disputes tend to be referred to adjudication or arbitration there is limited reported judgments thereon. Determiners of disputes often consider foreign law in reaching their decisions - particularly from the United Kingdom - as they have a court dedicated to construction matters.

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In my view, the *Obrascon* case can be used to support an argument that Sub-Clause 10.1 and 5.12.1 should not be interpreted strictly against the Contractor and should instead be construed reasonably broadly. But, I do not believe that the wording of the GCC allows one to go so far as to rely on *Obrascon* to entitle the Contractor to only submit a notice once the delay has already commenced.

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

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