Claim Notice: When Should The Contractor Notify?

Written by KJ Park

An approach followed by the case of OHL v Gibraltar[1]

On a project for a tunnel and dual carriageway, a variation instruction is issued on 1 June to widen a part of the dual carriageway. At the time of the instruction, that part of the carriageway is not on the critical path. Although it is foreseeable that the variation will extend the period reasonably programmed for constructing the dual carriageway, it is not foreseeable that it will delay the Works.

By the time that the dual carriageway is started in October, it is only then clear that the Works overall will be delayed by the variation. It is only, however, in November that it can be said that the Works are actually delayed. The conditions of contract used were those in the FIDIC Yellow Book[2].

When should the contractor give notice of claim for extension of time? (i.e. When is the contractor obliged to give notice of claim for extension of time before he will be precluded from claiming?)

Introduction

A well respected judge answered the question above in a recent case[3] in the UK by stating that whilst a contractor may be able to give notice at an earlier stage, the 28-day time period (for the purpose of establishing when the time-bar will operate to disentitle the contractor from claiming) only starts to run from November, i.e. when the Works are actually delayed.

This interpretation of Sub-Clause 20.1 is a favourable interpretation for the contractor and represents a different approach to the strict line taken by some English law judges. Perhaps this approach is more in tune with international perspectives[4].

Sub-Clause 20.1 Contractor's Claims

FIDIC, and many standard forms internationally used provide that the contractor must give a claim notice within a specified time limit or risk losing its entitlement.

In FIDIC, the first paragraph of Sub-Clause 20.1 [Contractor's Claims] states:

> *"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, 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-day after the Contractor became aware, or should have become aware, of the event or circumstance."*

Discrepancy between "considers himself to be entitled to" and "became aware"?

If you look into the detail, the first sentence states that the claim notice shall only be given if the contractor "considers himself to be entitled to extension of time or additional payment". This suggests that notice only needs to be given at the point when the Contractor has subjectively determined that it considers itself entitled to time and money. The second sentence provides the obligation to notify "after the Contractor became aware, or should have become aware, of the event or circumstance." Thus it is suggested that there is a discrepancy in this paragraph.

One commentator suggests that the time gap between 'became aware' and 'considers himself entitled' should be very short and the 28-day term starts after awareness of the event, but later than the time needed to consider the entitlement to a claim.[5] It is not clear when this commentator is suggesting the 28-day time period should start by

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reference to the Contractor's understanding of its entitlement to claim. If he is suggesting that the 28-day period is to start from the date when the Contractor subjectively considers itself entitled (as set out in the first sentence of Sub-Clause 20.1), it is possible that a Contractor could defer with impunity when the 28-day period should start to run by simply stating that it did not consider itself entitled to claim, something which leads to an unreasonable consequence.

To solve this discrepancy, in this article I propose a new approach following the decision of OHL v Gibraltar. Before explaining that approach, we need to review the key ideas of the judgment in that case in relation to a Sub-Clause 20.1 claim notice ('Notice of Claim').

The Judgment in OHL v Gibraltar

First, the judge confirmed that "the event or circumstance described in the first paragraph of Clause 20.1 in the appropriate context can mean either the incident (variations or exceptional weather) or the delay which results or will inevitably result from the incident in question."[6]

To understand the judgment, it is necessary to look at Sub-Clause 8.4 [Extension of Time for Completion] of the FIDIC contract, which identifies when and in what circumstances extension of time will be granted.

FIDIC Sub-Clause 8.4:

> *"The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claim] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following causes:"*

The entitlement to extension arises if and to the extent that completion "is or will be delayed by" the various events, such as variations, unforeseeable conditions or exceptionally adverse weather. This suggests that the Contractor is entitled to an extension of time either when it is clear that there will be delay (a prospective delay) or when the delay has at least started to be incurred (a retrospective delay). The wording provides "is or will be delayed"; not "is or will be delayed whichever is the earliest".[7]

The Judge's interpretation of Sub-Clause 8.4 when applied to Sub-Clause 20.1 was that the Contractor is entitled to extension of time when delays happen (November) or when it is clear that delays will happen (October), where those delays were caused by the variation instruction. The Contractor shall then give a 'Notice of Claim' under Sub-Clause 20.1 but not later than 28 days after the time when he becomes aware or should have become aware of the delays.

The judge concluded as below:

> *"Notice does not have to be given for the purposes of Clause 20.1 until there actually is delay (November) although the Contractor can give notice with impunity when it reasonably believes that it will be delayed (say, October)".*

A new approach proposed

In the given scenario of our question, it would be absurd if the judge limited the meaning of the event or circumstance to only the incident itself (i.e. variation instruction). Some commentators have agreed: "If this is not the case, the Contractor would be barred from making a claim in circumstances where no time or cost consequences occur within 28 days from the date on which the Contractor ought to have known of the matter."[8] Thus the event or circumstance in Sub-Clause 20.1 should mean either the incident or the results of the incident.

It is suggested that implicit in the Sub-Clause are three steps as follows:

1. The event or circumstance giving rise to the claim occurs;
2. The Contractor becomes aware (or should have become aware) of the event or circumstance;
3. The Contractor considers himself to be entitled to time and money caused by the event or circumstance.

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The judge in OHL v Gibraltar did not directly address this issue. He simply stated that for the condition precedent to bite, the event or circumstance giving rise to the claim must first occur and there must have been awareness by the Contractor of that event or circumstance. Considering the decision of OHL v Gibraltar and the above implied steps contained in the first paragraph of Sub-Clause 20.1, I would propose that the first sentence provides a condition, *i.e. considering himself to be entitled to time and/or money after awareness of the event or circumstance,* to send 'Notice of Claim', whereas the second sentence stipulates when the time period for notice starts and ends.

Thus, under the construction of the event or circumstance described in the first paragraph of Sub-Clause 20.1, a Contractor may have the option to send 'Notice of Claim' either when the incident giving rise to the claim occurs or when the results of the incident (i.e. delay) giving rise to the claim occur. Some authors propose that the Contractor's obligation to send the notice of claim under the first sentence is conditioned by the actual existence of a delay.[9] I think this is a proper way to interpret the Sub-Clause only as regards the 'circumstance (say, delay)'.

One may argue that if the first sentence means a condition, when the event happened (in our case, the variation order on 1 June), the contractor could not consider himself entitled to time because it was not foreseeable that it would delay the Works. Therefore, he was not in position to send the Notice of Claim under Sub-Clause 20.1 and the notice, if any, cannot be treated as the Notice of Claim under the Sub-Clause.

The condition, i.e. "considering himself to be entitled" is subjective and there is no objective test in the first sentence in Sub-Clause 20.1. So when an event occurs (i.e. receiving the variation on 1 June), it seems there would be no delay according to the programme on the day the event occurred but the Contractor might consider that the programme could be affected at some point in the future by the event. Accordingly, the Contractor can send the Notice of Claim under Sub-Clause 20.1 without any actual existence of delay (say, the circumstance) because he thinks himself to be entitled to time by the event.

However, it is suggested that the time bar under the second sentence of the first paragraph shall be started from the latest point, say, from the time of awareness of the circumstance (the delay) and not the event. As noted above, the wording does not say "the event or circumstance whichever is the earliest".

Conclusion

Sub-Clause 20.1 plainly gives rise to differing interpretations mainly because of the seriousness of the time-bar (condition precedent). The liberal judgement in OHL v Gibraltar, if followed by arbitrators or judges, may potentially give contractors a life-line which was previously not available. Advice to contractors, however, remains that notice should be given as soon as there is a chance that there is a claim. This will avoid the need for a rehearsal of these arguments before a court or tribunal.

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

2 FIDIC Conditions of Contract for Plant and Design Build 1999 (hereafter referred to as the 'FIDIC')

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

4 Time-bars revisited by David Thomas QC – Construction Law International December 2014

5 Axel-Volkmar Jaeger, Gotz-Sebastian Hok, FIDIC-A Guide for Practitioners,2010, P374

6 Para 312, Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028(TCC)

7 Para.312, Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028(TCC)

8 FIDIC Contractors : Law and Practice by Ellis Baker, Ben Mellors, Scott Chalmers, Anthony Lavers, 2009, P319"

9 The International Construction Law Review, Volume 33, Part 1, January 2016, P32 - The Notice of Claim under

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sub-clause 20.1 in a FIDIC contract governed by the Romanian Law

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