# FIDIC Latin America Users' Conference

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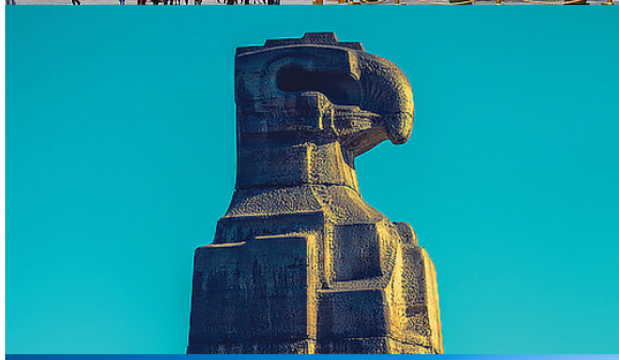

# Introduction

- What is a time bar clause and why is it important?
- What we are going to talk about?
  - Contractor claims under clause 20.1
  - Employer claims under clause 2.5
  - Comparison of how they are treated under common law and civil law – with particular reference to the laws of England, Brazil, Peru and Chile
- Do the clauses provide one party with more of an advantage than the other?

# Clause 20.1 Red Book

*"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 days after the Contractor became aware, or should have become aware, of the event or circumstance.*

*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. Otherwise, the following provisions of this Sub-Clause shall apply."*

# English law position on clause 20.1

- English law strictly enforces time bar provisions: properly drafted, they are treated as conditions precedent which must be complied with

- It sees the benefit of them as allowing:
  - The investigation of matters while current
  - The Employer to react e.g. withdrawal of instruction

    (*Babanaft International Co SA v Abant Petroleum Inc (The Oltenia) [1982]*; *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2) [2007]*).

# English law position on clause 20.1 cont'd

However, that isn't the end of the story…

- *Obrascon Huarte Lain SA v A-G for Gibraltar [2015] :*
  - two "bites at the cherry" at least in relation to delay claims?
  - form of notification?
- Waiver/estoppel (*City Inn v Shepherd Construction [2010]*)
- Contract amendments

# Clause 2.5 Red Book

"*If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor …*

*The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.*

*The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract …*

*… The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.*"

# English law position on Clause 2.5

Is it more generous to the Employer?

- Notice to be given "*as soon as practicable*" (rather than within 28 day longstop)
- No express disentitlement to claim if the notice isn't given in time

However:

- *NH International (Caribbean) v National Insurance Property Development Company [2015]*: the clause is more onerous than it looks…

# Summary – and an aside on the Gold Book

- Both Clause 20.1 and Clause 2.5 will be treated as conditions precedent
- So just as onerous for the Employer as it is for the Contractor – and arguably Clause 2.5 is more stringent
- There are arguments that can be deployed to soften the effects of these clauses
- See also the Gold Book approach (Clauses 8.4, 20.1 and 20.5)

# Brazilian law treatment of Clause 20.1

- *"Pacta sunt servanda"*: Clause 20.1 sets out what's required by way of notification and the consequences of a failure to notify and this will be enforced – effectively meaning that notification would be treated as a condition precedent to entitlement.

- However:-
  - Art. 421 of the BCC: "*The freedom of contract shall be exercised by virtue of and in the limits of the social function of the contract*."
  - Art. 422 of the BCC: "*The parties to a contract are obliged to maintain probity and good faith in the conclusion as well as in the performance of a contract*"

# Brazilian law treatment of Clause 20.1 cont'd

- Through the application of Arts 421 and 422, a tribunal would have a discretion to determine that the clause is an excessive or abusive restriction on the Contractor's right to bring claims and could therefore disapply it
- Any type of notification is sufficient – no prescribed form
- Art. 476: "*In bilateral contracts, neither contracting party may, before complying with its own obligation, demand compliance by the other party.*": scope for application in relation to clause 20.1?

# Brazilian law treatment of Clause 2.5

- In contrast to Clause 20.1, Clause 2.5 does not set out a specific time period for notification, nor is there wording equivalent to the second para of Clause 20.1; as a result Brazilian law is unlikely to treat compliance as a condition precedent to a claim.
- However, Arts 421 and 422 of the BCC and the principles of acting within the limits of the social function of the contract and in good faith again: a Contractor might argue that notification of claims is important especially in relation to claims for LDs and defects, and if the Employer knew of claims in this respect and failed to notify the Contractor in these circumstances it breached the good faith obligation and therefore the tribunal should disallow the Employer's claim

# Summary - Brazilian law

- Clause 20.1 is more onerous than clause 2.5, as clause 20.1 specifies a particular deadline together with the consequences of non-compliance

- However, the effect of clause 20.1 can be tempered by applying the principles of good faith and social function of the contract – and these principles may require timely notification of claims by the Employer in any event

# Chilean law treatment of Clause 20.1

- The provisions of Clause 20.1 require the Contractor to notify his claim in time and if he fails to do so the claim will be barred.
- Art. 1546 of the CCC: *"contracts must be performed in good faith and therefore they bind the parties not only in respect of the express obligations but also in respect of matters that arise from the nature of the obligations or that belong to them by law or by custom"*
- This principle reaffirms the contractual requirement for timely notification, as informing the Employer of the possibility of greater costs or impact would allow him to take steps to mitigate those costs.
- There are no requirements concerning the form of the notice but the Contractor must be able to demonstrate receipt by the Employer.

# Chilean law treatment of Clause 2.5

- Chilean law is unlikely to treat compliance as a condition precedent to a claim by the Employer (although claims must still be brought within the relevant limitation period).
- However, Art. 1546 of the CCC and the principle of acting in good faith: even absent the requirements of clause 2.5, a Contractor might argue that notification of claims is important especially in relation to claims for LDs and defects, and if the Employer knew of claims in this respect and failed to notify the Contractor in these circumstances it breached the good faith obligation and therefore the tribunal could disallow the Employer's claim
- This is especially so if the Contractor was not given the option to repair the defects found and they were repaired by a third party, or where the damage was aggravated by the delay in notifying.

# Summary - Chilean law

- Chilean law is more likely to treat compliance with the terms of clause 20.1 as a condition precedent to a claim than it is compliance with the terms of clause 2.5

- However the requirements of Art. 1546 may well require timely notification of claims by the Employer in any event – if such notification is not given the Employer may find that his claim is disallowed or reduced.

# Peruvian law treatment of Clause 20.1

- *"Pacta sunt servanda"*: Clause 20.1 sets out what's required by way of notification and the consequences of a failure to notify and this will be enforced – as Brazilian law, effectively meaning that notification would be treated as a condition precedent to entitlement.
- Art. 1362 of the PCC and the principle of acting in good faith: "*contracts must be negotiated, celebrated and executed according to the rules of good faith and the common intention of the parties*".
- However, this principle does not affect the application of this clause – it would not be regarded as excessive or abusive; nor are there any other principles that affect its application.
- Any type of notification is sufficient – no prescribed form.

# Peruvian law treatment of Clause 2.5

- Peruvian law would treat compliance as a condition precedent to a claim, but there are likely to be more disputes as to whether it has been complied with than there would in relation to claims under Clause 20.1 (given the lack of a specific longstop).
- Again Art. 1362 of the PCC does not affect this.
- No specific form of notice is required.

# Summary - Peruvian law

- Both the Employer and the Contractor would need to ensure that they comply with the requirements of Clauses 2.5 and 20.1 respectively, to make sure that they don't lose their claims.

- There is more uncertainty as to the requirements of Clause 2.5 and more scope for disputes as to whether it has been complied with - and as a result the Employer will need to analyse more carefully when its obligations to notify arise

# Summary

- Generally compliance with clause 20.1 is regarded as a condition precedent to a Contractor's claim
- There are varying degrees to which a Contractor faced with a time bar can invoke other principles – good faith under civil law and other principles under common law – to get round it
- However it is not easy to do so

# Summary cont'd

- There is a difference in approach as to whether compliance with clause 2.5 is a condition precedent to an Employer's claim

- However, for those jurisdictions where compliance might not be treated as a condition precedent, the principle of good faith may require timely notification in any event and failure to give timely notification may result in the Employer's claim being disallowed or reduced.

- So in all jurisdictions the notification requirements on both the Employer and the Contractor are quite strict, and failure to comply can have significant consequences – but are well balanced as between the parties.

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