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Losing Entitlement to Claim and Resort to Dispute Resolution in Construction: Time Bar Provisions and the Turkish Approach

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Characterized as a topic strongly connected to the dispute resolution arena, time bar provisions appear at the top of the list of priorities with regards to disputes in the construction field. Among many others, a recent decision rendered by the High Court of Justice, Queen's Bench Division (*Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC)*) confirmed such position while demonstrating the importance of the structure of the procedural provisions and the result of non-compliance with them in construction contracts.

Specifically, clauses related to notice of claim create contractual obligations with regard to the procedure that must be followed by the contractor to be entitled to exercise a right to claim under the contract. The interpretation of such clauses will differ as to whether or not the nature of these provisions constitutes a condition precedent.

To recap briefly, the first approach to the effect of the time-bar clauses establishes that non-compliance with such notice periods will result in a contractor losing either its right to request an extension of time or to claim for adjustment of the contract price and, hence, its right to resort to the designated dispute resolution procedure for such claim. In other words, such time bar clauses are conditions precedent to a valid claim or right to dispute resolution. Furthermore, it is also generally established that clear and express mention that such entitlement may be lost is a requirement for such a clause to be interpreted to constitute a condition precedent.

The second approach is more specific as it deals with cases involving claims related to delay, where the delay has been caused completely or concurrently by the employer. The concept, which may be referred to as the "prevention principle", stipulates that in case any delay is attributable to the employer, the time bar provision may not result in loss of entitlement to claim, as one party

cannot insist upon the performance of a contractual obligation by the other if the former has caused the non-performance. This would suggest that the prevention principle should prevail over the contractual time-bar provision.

What did the decision in the *OHL vs. Gibraltar* case tell us? There is no doubt that the decision accepted that FIDIC clause 20.1 as constituting a condition precedent and therefore the ultimate outcome of non-compliance with such provision results in the contractor losing its entitlement to claim. Although the decision was on a FIDIC Yellow Book, such acceptance naturally may become applicable for the other books (i.e. the Red Book and the Silver Book) as the clause's formulation remains the same. On the other hand, we may refer here to the core idea on the risk allocation between the contractor and the employer as another substantial conclusion by the same decision. As set out in the judgement, Mr Justice Akenhead considers the interpretation of Clause 20.1 and states that "*I see no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer*". The cited part of the decision especially seems to seek a balance between the two main approaches which are otherwise either black or white on the issue; recognizing the condition precedent's nature but establishing a broad interpretation requirement rather than a strict one.

When it comes to the scrutiny of the Turkish approach, an analysis is to be made especially based on the decisions of the Turkish Supreme Court on time bar provisions under construction contracts, as there is no specific legislation governing the issue. Accordingly, we should determine whether or not Turkish law allows and/or regulates the parties' rights to establish time limits, thus constituting a condition precedent, the breach of which would result in the related claim(s) being time barred and, if so, to what extent.

The underlying principle under the Turkish law of obligations is freedom of contract, provided that the contractual provisions are not illegal. There is no restriction under Turkish law which would limit the parties' rights to structure the way they may or must pursue their contractual rights, including the establishment of conditions precedent in the form of contractual time limits.

Indeed, pursuant to this general principle, the Turkish Supreme Court ruled, in one of its decisions of 2001 (*Decision of the 15th Circuit, No. 2001/1032, of 26/02/2001*) that the structure for requesting time extensions is strictly regulated under FIDIC construction contracts to ensure international consistency and, for the purposes of preventing potential abuse on time extensions, it is of utmost importance that claims are raised in a timely manner and with proper substantiation. The Court concluded that the engineer's rejection of the contractor's time extension claims could not be considered against the contract provisions, due to the fact that such claims were not timely made nor substantiated in accordance with the contract.

Furthermore, the Turkish Code of Civil Procedure contains an established mechanism, a type of contract for such purpose: “contract on procedural matters” or “procedural contracts” under Article 193 of the Turkish Code of Civil Procedure (*Numbered 6100 and dated 12/1/2011; replacing Article 287 of the former Code of Civil Procedure, numbered 1086 and dated 4/7/1927*). Contracts on procedural matters, once concluded, have the effect of waiver of rights that are not included in such procedural contracts. In other words, a party may not initiate a claim in a manner which is not prescribed in, or which is against the manner described in, the concluded procedural contract.

Relevant provisions setting forth time limits under construction contracts were also considered as contracts for procedural matters by the case law of the Turkish Supreme Court. The Court elaborated that if in a construction contract it is established that the contractor should object to the payment certificates, timely and explicitly describing its objection and its grounds, and therefore sign the payment certificate with the indication of “objections reserved”, such provision will constitute a contract on procedural matters as per Article 287 of the Code of Civil Procedure, and therefore shall be taken into consideration by the court *ex officio*. The Court accordingly renders decisions whereby, in case the payment certificates are not objected to by the contractor, as described in the specific contract, the contractor shall be deemed to have accepted the payment certificates without any objections.

In a decision directly related to a contract based on a standard FIDIC type contract (*Decision of Turkish Supreme Court, 15th Circuit dated 17.09.2002 and numbered 2002/3931*), the Supreme Court held that it is an established principle that, in FIDIC contracts, the conditions for time extension requests are procedurally strictly regulated and any determinations on time extensions may only be made where such procedural regulations have been duly followed. The Court further set forth that by agreeing on Articles 44, 53 and 67 of the contract [FIDIC Fourth Edition, 1987], the parties indeed agree on a contract on procedural matters and accordingly the dispute shall be resolved strictly in accordance with these provisions.

A remark should be raised here concerning the explicitness of the time-bar provisions: the Court has established the case law mainly referring to the FIDIC type contracts before the 1999 edition, which did not contain explicit wording on loss of entitlement in case of non-compliance, but rather described the obligation to follow the procedural time limits. In other words, no express contract provision setting forth the loss of entitlement is needed to constitute an effective time-bar clause in contracts executed prior to the 1999 edition.

In conclusion, we note that *vis-à-vis* the major approaches on the nature of time-bar provisions, the Turkish courts’ approach is consistent and established. It follows a strict view on the word-for-word compliance with the time bar provisions without leaving room for any prevention principle to become applicable. Consequently, this approach makes Turkey a jurisdiction where

contractors must carefully consider compliance with notice clauses so as not to lose any right to claim or resort to dispute resolution.

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