The use of time bar clauses in standard form EPC contracts is common. How effective are such clauses for managing contractors’ claims for extensions of time and additional payment, and what challenges will there be in enforcing a time bar clause?

What is a time bar clause?

Almost all EPC contracts will contain a contractual mechanism for giving the contractor an extension of time to complete the works, by extending the contractual completion date upon the occurrence of specified events. EPC contracts will usually also provide for such events to trigger the contractor’s right to claim additional payment. Additionally, the contract may specify a date by which the contractor must notify the employer or contract administrator of any claim it has (for time and/or money). A time bar clause provides that if the contractor fails to serve the requisite notice within the specified period it will, in theory, become time barred from claiming any extension of time or additional payment.

Time bar provisions of the type described above can be found in most standard form EPC contracts. The FIDIC major works contracts\(^1\) include a time bar provision at Clause 20.1, which is set out as follows:

> “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 Employer, 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…”

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\(^1\) The FIDIC 1999 suite of contracts – Conditions of Contract for Construction (Red Book), Conditions of Contract for EPC/Turnkey Projects (Silver Book) and Conditions of Contract for Plant and Design-Build (Yellow Book).
For a project executed under FIDIC conditions, there will be a clear requirement for the contractor to provide the employer with notice of its claim no later than 28 days after it becomes aware of the relevant event. The second paragraph of Clause 20.1 makes the contractor’s compliance with the 28-day requirement a condition precedent to any entitlement it may have to additional time or money under the contract. Most bespoke EPC contracts will include similar provisions.

Why are time bar clauses used?

The principle purpose of using strict time bar clauses, such as that provided for by Clause 20.1, is to improve the administration of the contract. By ensuring a hard deadline for the contractor to notify it of any events which may give rise to a claim, the employer is alerted to the contractor’s claim at an early stage. This allows the employer to evaluate the claim, and also take any steps to work with the contractor to mitigate the delay. It should also help to avoid a build up of contractor’s claims during a project, which historically has often led to a final account dispute between the employer and contractor.

This process imposes a more proactive contemporaneous approach to dealing with unexpected events when they arrive, and providing cost and programme certainty and transparency. An effective time bar clause can be used as a tool for achieving a more collaborative approach between the contractor and employer in relation to claims for additional time and money.

Will my time bar clause be effective?

Condition Precedent

The starting point to determine whether a time bar clause will be enforceable by the employer against the contractor is to understand whether compliance with the clause is a condition precedent to the contractor’s claim. When considering this question, the English courts have typically taken the view that the notice requirements in construction contracts are directory, not mandatory, and that a contractor may not lose its entitlement to a claim, unless the contract expressly states that a non-compliant contractor will lose its rights to additional time and/or money.

However, within standard form EPC contracts time bar clauses will usually be drafted such that they have the necessary elements of a condition precedent. Clause 20.1 of the FIDIC Silver Book is a good example of a provision intended to be a condition precedent as:

(i) the clause specifies the time period within which notice must be served by the contractor; and

(ii) the clause expressly states the consequences of the contractor’s failure to serve notice of its claim within the relevant time (i.e. that the contractor will lose its rights against the employer).²

In a recent decision, Obrascon Huarte Lain SA v Attorney General for Gibraltar⁴, it was accepted by counsel for the contractor that Clause 20.1⁴ did impose a condition precedent on the contractor. It is very likely that should Clause 20.1 be challenged before a court or arbitral tribunal it will be interpreted as in Obrascon Huarte. Therefore for projects carried out on FIDIC conditions, the parties should treat strict compliance with the provisions of Clause 20.1 as a condition precedent to the contractor’s claim. Clauses with similar features as Clause 20.1 are likely to be interpreted in the same way.

The Contractor’s Notice

The next issue to consider is what information the contractor will be required to give to the employer in its notice of a claim for additional time and/or money. Whilst it is open for parties to specify in the contract exactly what details must be included in the contractor’s notice, not all EPC contracts do so. We have advised on EPC contracts where critical path analysis (amongst other demands) is required within 28 days of an event giving rise to an extension of time arising. Often, EPC contractors will find such demands challenging.

In the absence of requirements set out in the contract, the English courts have generally considered that the contractor is only required to give the best information it is reasonably able to do so, and only information which is available to the contractor at that time.⁶

In Obrascon Huarte, the TCC considered that for Clause 20.1:

“… one should construe it as permitting any claim provided that it is made by notice in writing to the Engineer, that the notice describes the event or circumstance relied on and that the notice is intended to notify a claim for extension (or for additional payment or both) under the Contract or in connection with it. It must be recognizable as a “claim”.⁷

Obrascon also looked at when time will start running for the purposes of the contractor serving its notice under the time bar clause. The TCC concluded that there must have been awareness of the circumstance, or the means of awareness of the relevant circumstance, before the condition precedent will bite. Furthermore, the time bar clause should not be construed strictly against the contractor in this respect. The burden of proof would instead be on the employer seeking to argue that a notice had not been given in time.

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² See Brmer Handelsgesellschaft mbH v Vanden Avenne Izegem PVBA [1978] 2 Lloyd’s Rep. 113 as to the rules on condition precedents.
‘Prevention Principle’ Arguments

It is often suggested that a contractor may seek to avoid the strict application of a time bar clause by arguing that, irrespective of its own non-compliance with the provision, the prevention principle may still defeat an employer’s claim for liquidated damages where the delay is caused by an occurrence which is the employer’s responsibility under the contract.

This line of argument has support from a series of Australian decisions which considered that the prevention principle could result in time bar provisions being defeated. However, this approach is not one that would necessarily be followed by an English court or by an arbitral tribunal. In City Inn Ltd v Shepherd Construction Ltd, a Scottish case, the court took a robust view of the contractor’s obligation to time bar provisions, and whilst the court did not, on the facts, decide whether the prevention principle would operate, it considered the contractor to have an obligation to comply with the provisions of the time bar clause, unless waived by the employer (or as on the facts, the employer’s architect).

In the Adyard Abu Dhabi case, referred to above, the court accepted the argument that the contract contained provisions entitling the shipyard to an extension of time, therefore the prevention principle was displaced. Hamblen J stated that:

“However, as Jackson J stated in the Multiplex v Honeywell case, the prevention principle does not apply if the contract provides for an extension of time in respect of the relevant events.”

9 [2003] BLR 468
10 [2011] EWHC 848 (Comm) at paragraph 243

Conclusion

The time bar clause will continue to be a feature of most EPC contracts for major projects, and provides a useful tool for the employer in the administration of the contract, ensuring certainty and transparency of time and cost.

From the contractor’s perspective, it should not be an overly onerous obligation provided that the contractor is alert to the requirements of the clause. There can also be upsides for EPC contractors in efficiently managing and prospectively agreeing the time/money effect of change as and when it occurs. Time bar clauses should work to the advantage of all parties to the project by ensuring the early notification of circumstances giving rise to potential claims, conducive to a cooperative approach between the parties.

A strict approach to time bar clauses is likely to be preferred by courts and arbitral tribunals, as were it to be found that the prevention principle did override time bar provisions, this would create a possibility of abuse by the contractor. It has been identified that if the prevention principle were to be applied in such cases, it would enable the contractor to disregard the time bar provision, and set time at large under the contract, without recourse by the employer.11 Such an outcome is clearly not satisfactory in light of a time bar clause negotiated between commercial parties.

11 Multiplex Constructions (UK) Ltd v Honeywell Control Systems (No 2), para. 103

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