TIME BAR CLAUSES IN CIVIL LAW AND COMMON LAW COUNTRIES

RECOMMENDATIONS TO POTENTIAL CLAIMANTS

INTRODUCTION

This article is written by an engineer and contract and site manager with more than 25 years of practical international contracting experience. Therefore, it presents the point of view of a technical expert and not of a legal expert. Along with theoretical aspects, emphasis is mainly put on the practical aspects such as: the duties impacting the time-bar clauses, the form a notice of claim should have and recommendations to the potential claimant.

WHAT IS A TIME BAR CLAUSE?

The lawyers and the contract managers do not have the same understanding of what a time bar clause is.

The Law Dictionary & Black's Law Dictionary 2nd Edition defines it as:

"*A clause in a contract that states a specific time period and deadline for the parties to bringing legal action or file for arbitration. After the time period lapses, the parties are barred from bringing suit in a court of law or filing for arbitration*."

A contract manager sees it as contractual clause intended to make the parties act under specific circumstances in a certain way and within a defined time limit. Failing to do so may jeopardize the rights that could have resulted from those circumstances.

The non-fulfilment of the terms of the clause opens the door to the other party to deny the claimant any rights to extension of time (EOT) and/or extra payments.

Most construction industry contracts contain such clauses. From the above, it may appear that both parties enjoy the same duty. In practice though, often it only addresses the time limit to claim against the employer. The time bar for the employer to claim against the contractor is indirectly and rather well defined through the duration of the guarantee, which is defined by the law and/or by the contract and that is in no way linked to the employers' (in)action.

ABOUT DUTIES IMPACTING THE TIME-BAR CLAUSES

By even only signalling the intention to claim (notice of claim), the other party is informed about events that could impact the completion of the contract. It allows an analysis of the events having potentially led to a claim, based on the most recent witnesses and evidence possible. And, consequently, it allows the parties take appropriate coordinated actions in order to manage and/or mitigate the impact of these events.

EXAMPLE 1. Contract for the construction of a motorway.

The geotechnical study provided by the Employer did not highlight a so-called geotechnical accident that requires a different embankment technique than that envisaged contractually. The Contractor noticed the situation, mentioned it in a meeting with the Engineer 40 days later (including a 25 days-period in which the works were stopped by the authorities for reasons independent from the Parties) but

started looking for alternative solutions immediately after it noticed the geotechnical situation. The Contractor identified 2 embankment techniques that allow to mitigate the effect of the geotechnical accident. One could be realised only under summer weather conditions and was cheaper. Another one could have been executed under any weather conditions (except frost) and was twice as expensive as the first one. The Engineer accepted the 2 solutions as feasible and referred to the Employer for decision as the budget for unforeseeable physical conditions would be overridden if the 2nd solution was applied and as waiting for the summer time (1st solution) would have had many administrative negative implications. The Employer refused making a decision, implying that the geotechnical accident could have been foreseen by the Contractor prior to the execution of the Contract and that the Contractor's eventual claim was time-barred.

Question: Did the Parties stick to their duties in order to allow the project to develop smoothly?

EXAMPLE 2. Windmills farm

The Contractor was supposed to mount the elements of the windmills on concrete foundations provided by the Employer. As the foundations were not ready cluster by cluster, but randomly, in order to optimize the use of its cranes, the Contractor concentrated on the erection activities postponing the mechanical and electrical fitting of the windmills. This sequence of works was not foreseen in the Contract and ass per consequence, the time between the erection and the completion of each windmill became longer as planned. The fitting implied the use of many copper elements. The price of copper having recently dramatically raised, thefts started occurring from the windmills that were not completely fitted and linked to the electrical grid. As the distances between windmills in fitting process were quite large and accessing them became difficult due to harsh winter conditions, the Contractor noticed the thefts sometimes weeks after they presumably happened. He immediately and regularly informed the Employer (there was no Engineer in the scheme) about the missing parts, by faxed letters. Purchasing new copper elements and getting them delivered on site implied several weeks if not months delay. The situation worsened when newly delivered parts were stolen again from the same windmills. When the Contractor gave formal notice of claim to the Employer for EOT and related costs, including those for the stolen

parts, the Employer considered it time-barred as the thefts were not noticed and the Employer informed about within the 28 days-period. The Contractor replied that the security of the site was not his duty under the Contract.

Question: Did the Parties stick to their duties in order to allow the project to develop smoothly?

EXAMPLE 3. Construction of a new dam.

The Contractor was supposed to purchase and use the products of 2 quarries located in the vicinity of the future dam. During the works, the local government decided to increase by 100% the taxes to be paid by the quarries on the sold products. Due to various administrative steps to be taken and to the uncertainty whether the new taxes were constitutional or not, 3 months have passed between the initial government decision and its implementation in the final form (very different form the initial one). The Contractor sent a notice of claim to the Engineer for extra costs reimbursement, 1 week after the implementation of the new taxes. Seized by the Engineer, the Employer considered the claim as time-barred. He also mentioned the Contractor should have purchased the remaining quarry products during the 3 months period and stock them on the site. The Contractor showed he asked for more room for stocking these products next to the site, but the Engineer refused to allow him to use extra room outside the site.

Question: Did the Parties stick to their duties in order to allow the project to develop smoothly?

The examples above stress the importance of the duties that lay mainly with the potential claimant, here the contractor.

Theses duties are of 3 types:

1. Duty of collecting and keeping contemporary records.

   Only a systematic collection of the records (minutes of meetings, plans, correspondence, photographs etc) and their easy-to-identify archiving allow for the best use of the said documents.

2. Duty of diligence.

The potential claimant should be vigilant and alert the other party in timely manner about events that could, at a later stage, prove problematic to the strict fulfilment of the contract.

3. Duty to act and react when the disturbing events are identified as such.

It is not enough to signal the events to the other party, but, similarly to the obligations of an insured entity in case of a sinister, the party that first realized the existence of the disturbing events should do its best to counteract the effects of the said events, individually or together with the other party.

1. Duty of collecting and keeping contemporary records

The human memory is not always very reliable, not to mention possible conflicts of interest that may also play a role in the accurate remembrance of a fact. And even when two memories happen to coincide on the recording of a deed, their subjective interpretations may have opposite effects. Therefore, contemporary written and pictographic documents (on-site inspection proofs) allow for an accurate, to a certain extent, description of the facts. Constituting such records' data bank requires a rigorous and logical organization from the very beginning of the project. Both main parties in a contract should make sure that this is the case. Keeping a safe electronic copy of the records by both parties should allow circumventing the destruction of the hard copies by flood or fire occurring on the site or in any other place where they may be stored. When a potentially disruptive event happens, referring to well archived contemporary records allows for effective information necessary to identifying the most appropriate intervention.

2. Duty of diligence

The bids for a contract are based on an ideal scenario. A scenario in which all partners will behave in good faith according to the law, to the good practice and to the terms and spirit of the bid. The same ideal scenario is later transposed into the contract terms. The spirit in which the contract is signed is that all stakeholders will (re)act in an exemplary manner to external and/or unpredictable events and will stick to their assigned roles. An ideal world where, for instance, the weather will allow the works to happen just as in the programme of works, where the deliveries will be done just in time and where the financing or the payments will meet the contractor's expectations or contractual obligations.

This never happens. Or very seldom.

Simply because of the complexity and of the life of a project over often many years, complexity and life that cannot be completely encompassed by the bidding and the contractual documents. Following the example of the butterfly movements that can lead to a devastating hurricane, a rather small and often inevitable deviation from the contractual scenario may lead to a major disruption to the progress of the project. It is a very challenging task to identify among the array of small deviations and events, which one may lead to large problems if not properly addressed in due time. Initiating a claim procedure (sending a notice of claim) for each and every deviation or event may result in a blockage of the procedure.

Therefore, the claimant (mostly the contractor as he is in close contact with the progress of the project) should have the capacity to diligently identify the deviations and events and also the experience to rapidly evaluate their disruption potential.

3. Duty to act and react when the disturbing events are identified as such

Once a potentially disruptive deviation or event is identified as such, all involved parties should coordinate their efforts in order to mitigate the impact of these events on the progress of the project. Failing to do so, may result in endless quarrels, and money and time will be spent on fixing the problems at a rather late stage instead of an early stage. Arbitrators and judges, by essence not specialists in the technical matter of the contract, and basing their decision on an expert opinion (expert that was not involved in the project) end up deciding on which party should have done what. By not taking concerted and rapid action, both parties fail to one of their most important duties.

WHY IS A TIME BAR CLAUSE USEFUL?

As long as the contract runs smoothly, there is no reason for a claim to be made. When such a reason appears, it means an event disturbed the balance between the rights and obligations of one party, the potential claimant. The fact that, willingly, or unwillingly, the potential claimant fails to formulate its claim as early and as detailed as possible, often leads to reducing the possibility to alleviate the subsequent prejudices to the project as a whole. In order to avoid such a situation, the contracts often impose on the party who is the closest to the deviation or to the event, to signal it to the other party. Many common law influenced standard form of contracts, identified the best way to ensure such an alarm is given in proper time, by recommending the "punishment" of the potentially claimant party through cancelling its rights to obtain an EOT or a financial compensation.

HOW SHOULD THE ALARM BE GIVEN?

In order to be effective, the terms of an alarm (notice of claim) should be easily understood by its recipient. Therefore, the message should be clear and unmistakable. It should refer specifically to the contractual clauses that are at stake. To be efficient, it should mention some of the potential disruptive effects if adequate measures are not timely taken. Its detailed substantiation may follow at a later stage, within a prescribed time limit.

At this stage already, the civil and common law practices differ.

The civil law practice tends to accept as an alarm, for example, even a note in the minutes of a meeting stating that something may happen due to a deviation from the contractual progress of the project. The arbitrator or the judge decide at a later stage whether the alarm was given properly and in due time or not. Thus, the outcome is not predictable.

The common law practice, in turn, requires an acceptable alarm to mention all the circumstances of the event, its possible effects on the progress of the project and on the costs, a detailed substantiation of the possible claim etc. The arbitrator or the judge can only note the date when the alarm was given and compare it to the contractual obligation. Therefore, the outcome is rather predictable.

In order to avoid interpretation problems concerning the admissibility of a claim, the safest for the claimant is to use a dedicated letter for each potentially disrupting event and clearly specify the contractual clauses concerned. Recalling events based on contemporary by all sides accepted records can only strengthen the case. At least a rough estimate of substantiation should also be part of the said letter. The detailed substantiation is supposed to follow when all the circumstances and foreseeable effects of the disturbing event can be accurately considered.

WHAT EFFECT HAS A LATE CLAIM ON THE CLAIMANT'S RIGHTS?

As stated in most contracts, the claimant loses its rights (financial or for an EOT) if the claim is incomplete or is made too late.

When is a claim considered "incomplete"?

Based on practical terms, a claim is incomplete if it does not allow to clearly identify its cause and the impact that the cause may have on the progress of the project or on the claimant.

Based on contractual terms, a claim is incomplete if it does not have a certain number of characteristics often clearly stipulated in the general or particular conditions. In common law practice, these characteristics have to be followed strictly. In civil law countries, the judge or the arbitrator is given the possibility to evaluate the "completeness" of a claim or if the content of the claim suffices to the purpose it's meant for.

When is a claim considered "late"?

Based on practical terms, a claim may be considered late if, for example, its cause cannot be fixed anymore, or without influencing the progress of the project or without a strong financial impact.

Based on contractual terms, a claim is late when it's filed in an appropriate form (see previous chapter) after the deadline specified in the contract. The contracts specify what are the circumstances and when does the "clock start ticking", also the way the deadline is calculated (eventually what is the exact deadline). As this kind of clause has many implications, often the contracts refer for this issue to the general conditions included in standard contract forms such as FIDIC, NEC, JCT, CCAG etc. Some of these standard contract forms even list (and therefore

limit) the kind of events that give right to a claim. It is to be noted that by their very nature, the same deadline imposed to events of different nature, does sometimes have little to do with the reality of the project.

EXAMPLE 4. The FIDIC Sub-Clause 20.1 states a 28 days-period for giving notice of claim. *The clock starts ticking when "…the Contractor became aware, or should have become aware, of the event or circumstance.". A Contractor was supposed to produce and install a large diameter turbine for a hydroelectric plant located overseas from where it was produced. A full range of tests were successfully performed in the presence of the Employer. Contractually, the Employer was in charge of the sea transport of the turbine. Once delivered to the hydroelectric plant, the turbine was installed, and new tests were initiated and successfully accomplished. Two months later, when the plant was inaugurated, and the turbine was supposed to perform under real conditions, abnormal vibrations have been noticed. The turbine was taken to a specialised test laboratory and underwent the same tests as after its production. The tests showed the axe of the turbine was not perfectly straight. After various investigations, it appeared the turbine has not been adequately harnessed during the sea transportation, that it moved during a storm and kicked other material in the boat's hold. The Contractor issued a notice of claim once the results of the last tests were known.*

Question: When does the clock start ticking for the 28 days?

Being "late" under common law

As Dante put it in its novel *The Inferno*: *…lasciate ogni speranza…* [*Abandon all hope…*]. Or actually: *Abandon (**almost**) all hope*. In other words, if the notice of claim or the claim itself are handed-in after the contractually specified deadline, the claimant gives up (almost) all hope to financial compensation or to an extension of time. The reason behind it being that by being late it jeopardized the possibility the employer had to fix the problem (quickly and cheaply) would

he have been informed in proper time about it. So that he would not have to compensate the contractor for its own losses and to have to pay extra money to solve a problem that evolved. The common law practice allows for a softening of this strict condition only when applying the prevention principle. This principle does not allow one party to benefit from its own breach of the contract.

EXAMPLE 5.

The Contractor was supposed to import and install on site a highly sophisticated infrared machinery. The import taxes were to be paid for by the Employer. The machinery arrived in due time at the customs and was blocked there until the taxes were paid. The Employer eventually paid them 4 months later. In the meantime though, for national security reasons, the government passed a law forbidding the import of such machineries. The Contractor could therefore not fulfil its contractual obligations and had to find an alternative solution. The alternative solution was found and approved by the Employer 3 months after the new law was passed. As the taking over was not possible without this machinery (or its substitute) installed, the taking over was delayed by more than 8 months. The Employer claimed for liquidated damages related to this delay (all the other works were finished in due time). The Contractor referred this claim to the Dispute Adjudication Board (DAB). The DAB decided that the concatenated delay was due to the initial late payment of the custom taxes by the Employer. And that a fault by the Employer (breach of the Contract) in the absence of any concurrent delays, should not lead to a penalty to the Contractor.

Being “late” under civil law

The Civil Code of the country is applicable, did the contractual terms not mention this situation. The role of the Civil Code is to ensure a balance between the rights and the duties of each party.

The civil law system addresses the contract as an expression of the parties' intention. The contract is considered in its spirit not only in its strict letter. The role of the arbitrator or of the judge is essential in weighing the importance of this clause to the solution of the claim. Generally speaking, the civil law considers this clause an obligation and not a condition precedent to lose its rights. An obligation that the potential claimant has towards the other party. If this obligation is not fulfilled, the judge or the arbitrator will decide upon the penalty (that can also be nil if it's purely financial). The non-fulfilment of this obligation does not automatically cancel the rights of the claimant.

Also, in evaluating the situation created by the non-respect of the deadline for claiming, the judge or arbitrator will presume that both parties have acted in good faith.

EXAMPLE 6. Construction of a 30-km new motorway.

According to the terms of the Contract, the stately owned Employer had to give the Contractor access to the site 30 days after the execution of the Contract. The site was composed of state owned land and of land that had to be expropriated from private owners. Because not all of the expropriations were done before the deadline, the Employer was unable to give full access to the site to the Contractor, but only to approximately 90% of it. The process of complete expropriation lasted more than 2 years. When the last plot of land was handed over by the Employer, the Contractor issued a notice of claim for an EOT and related costs as the exact terms of the Contract were not fulfilled by the Employer. The Employer replied that access was given to 100% of the site, but not the right of use. The DAB was requested to decide whether this situation gave the right to the Contractor for an EOT and the related costs. The DAB decided that the Contract was signed by the Employer in good faith, hoping that the land available was sufficient to the Contractor to perform the works until the remaining land was expropriated (contemporaneous documents show the expropriation process seeming very close to completion within 3 months after the execution of the Contract; later opposition made it last 2 years). The DAB also decided that the Contractor acted in good faith when executing the works on the available land, inquiring regularly about the development of the expropriations

and organizing its work based on the information received from the Employer. Finally, the DAB decided that the Employer did not act in good faith when not accurately informing the Contractor about the obstacles it encountered in the expropriation process and also by trying to make a semantic difference between giving physical access to the site and the right to use the site. The notice of claim was not considered time-barred as it was issued within 28 days after the Contractor was sure it had the right to use the entirety of the site.

One other aspect in ruling about the effects of passing a deadline, is that of avoiding that by applying it strictly, one party may find itself unjustly enriched.

EXAMPLE 7. Refurbishing and modernisation of a 25 km-long stretch of national road.

The Contract implied milling of the upper layer of asphalt and laying a new 4 cm thick layer. After milling and replacing the asphalt on almost 10 km of road, the Contractor noticed that the quality of the lower layers required also their replacement. After having requested and obtained the Engineer's agreement for doing so, the Contractor continued the modernisation of the remaining 15 km by replacing also the lower layers of asphalt. After 5 more kilometres, the lower layers proved again good enough not to need their replacement. On the very last kilometre the lower layers were also replaced. When working on this last kilometre, the Contractor issued a claim requesting to be paid for the replacement of the lower layers for km 11 to 15 and km 24 to 25. The Engineer considered that only the claim for the last kilometre was done in accordance to Sub-Clause 20.1, the claim concerning the stretch km 11 to 15 being time-barred. The case was submitted to a civil court. The judge ruled that the Employer should have been aware that the cost of milling and replacing of the upper layer was inferior to that of replacing all the asphalt layers of the road. By tacitly accepting the solution accepted by the Engineer, it accepted the related extra costs. By applying the time-bar Sub-Clause, the Employer would benefit from a road of higher quality without having paid for it, i.e. it would be unjustifiably enriched. The judged ruled in favour of the Contractor that was due by the Employer the payment of the value of the extra, non-contractual, works.

The considerations above do not exclude that the judge or the arbitrator does not relate to a reasonable deadline (not always the contractual one) when deciding whether a claim is time-barred or not.

Unlike in the common law practice, the judge or the arbitrator weighs the pros and the cons and ultimately decides on the applicability of the time-bar clause to a given claim.

RECOMMENDATIONS TO THE POTENTIAL CLAIMANT

- Read carefully the terms of the bid and negotiate well before signing the contract.

  The law governing the contract is essential in assessing the impact of the time-bar clause.

  Also, the particular conditions of the contract, like the small print in an insurance contract, are essential to clearly define to what kind of claims the time-bar applies and how the deadline is calculated (eventually for each kind of claim).

  Often, the questions asked to the employer with the corresponding answers are part of the contract. This is a good opportunity to open the door to leaner conditions for the time-bar clause.

- Appoint a contract manager or even an on-site team dedicated to anticipating disrupting events and communicating notices of claim and VOs.

  The permanent presence on-site allows for a higher probability to identify deviations and events that may lead to disruptions to the progress of the project. The members of a such a team should not be directly implicated in the day-to-day business, nor supervisors to the site managers, but rather weathered managers ready to advise the acting management, and spot and evaluate the potentially dangerous issues.

Their non-executive position allows for a more objective evaluation of the situations.

- Keep contemporary and updated records

As mentioned above, the structure of the documents accompanying the progress of the project (minutes of meetings, letters, emails, photos, plans and sketches etc), and of their approval and archiving circuits (both in hard-copy and electronic forms) should be implemented jointly by the parties involved in the project and that, from its very inception. A possibility would be to include this obligation in the terms of the contract. This way of proceeding will help the parties in supporting their positions in case of later disputes. No witness statement sometimes even 10 years after the deeds will be more reliable then a photograph or the contemporary minutes of a meeting.

- Follow the time limit mentioned in the contract

The best way to avoid discussions over the application of a time-bar clause is respecting the contractual terms. It may seem obvious, but the author witnessed several cases where the potential claimant relied upon the fact that the contract was signed under a civil law system and therefore expected the arbitrator to "interpret" the clause in its favour. Just as a reminder, the standard contract forms include the time-bar concept as follows: FIDIC in Sub-clause 20.1, ICE in clause 66, NEC 4 in clauses 61.1 and 61.3). Better prevent then cure!