Commencement of Arbitration and Time-Bar Clauses

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1. INTRODUCTION

This article considers how English courts construe time-bar clauses and whether there is an advantage in having an arbitration clause in a contract where there is a time-bar clause. It is now common to find time-bar provisions in many of the major forms of construction contracts. They appear in NEC 3, in the FIDIC suite of contracts and the ICE forms. Sub-clause 20.1 of the FIDIC forms of contract, for example, creates a time-bar that gives a Contractor just a mere 28 days to put in a notice of a claim for additional cost or an extension of time. Given that the effect of a failure to issue a 28-day notice is an apparent bar on any claim, it is unsurprising that time-bar clauses have been the subject of much consideration and review. Recent decisions in the courts show that these clauses are being construed strictly. This has led one leading English lawyer, in a paper on the FIDIC forms of contract, to comment that quite possibly there are no ways round a sub-cl.20.1 notice.[1]

2. TIME-BAR CLAUSES AND THE COURTS

Recent cases have focused on whether time-bar clauses are valid where the employer has caused the delay but the contractor then fails to submit a notice within the prescribed period in which to bring the claim. In such cases the issue has been whether the employer should be able to deduct liquidated damages. Litigants challenging the validity of a time-bar clause have argued that the employer should not be able to rely on such a clause, because to do so would result in the employer taking advantage of its own wrong. The opposing argument was that the employer did not prevent the contractor from giving the notice and therefore the time-bar provision should be enforced.

In *Alghussein Establishment v Eton College*[2] the House of Lords held that a party may not benefit from its own breach of contract.[3] This is often referred to as the "prevention principle" and was applied to construction contracts by the Court of Appeal in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*,[4] which held that:

> "[A]n Employer cannot hold the Contractor to the contractual completion date, if the Employer has by its act or omission prevented the Contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the contract date is replaced by an implied obligation to complete within a reasonable time."

There is an isolated Australian authority which supports the view that a contractor can rely on the prevention principle in order to avoid the effects of its own failure to give notice of a claim for additional time. In *Gaymark Investment Pty v Walter Construction Group*[5]

[1] Jeremy Glover, *FIDIC: an Overview. The Latest Developments, Comparisons, Claims and Force Majeure* (published on *http://www.fidic.org* [Accessed September 10, 2009]).

[2] *Alghussein Establishment v Eton College* [1988] 1 W.L.R. 587.

[3] See *Roberts v Bury Improvement Commissioners* (1870) L.R. 5 C.P. 310 at 326; *Holme v Guppy* (1838) 3 M. &W. 387 at 389; and *Ludgate Administration No.1 Ltd v Northern & Shell Media Ltd* [2002] EWHC 1023 (Comm).

[4] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 B.L.R. 111.

[5] *Gaymark Investment Pty v Walter Construction Group* (2000) 16 B.C.L. 449; [1999] NTSC 143.

the parties entered into a contract which contained a time-bar clause. The arbitrator found that there were delays to completion which were due to acts of prevention caused by the employer. The arbitrator further held that, although the contractor had failed to give the requisite notices for an extension of time, the "acts of prevention" by the employer rendered time at large. The arbitrator then went on to conclude that the contractor had a reasonable time to complete the works and that it had in fact completed within that reasonable time. Bailey J. in the Supreme Court of the Northern Territories upheld the arbitrator's conclusions.

Courts in other jurisdictions have taken a different approach. In *City Inn Ltd v Shepherd Construction Ltd,*[6] the Scottish Court of Session held that the giving of the notice was a condition to the right to claim an extension of time and money. The contractor had elected not to give the notice and was therefore not entitled to either time or money. The reasoning of the court was that the instruction might not have delayed the works or have had a financial implication. It was for the contractor to decide whether the instruction would have a time and cost implication and if so it was obliged to give a notice. The Inner House of the Court of Session was not, however, asked to and did not consider the prevention principle and its application.

Recently the English High Court in *Multiplex Construction v Honeywell Control Systems*[7] endorsed the view that time-bar clauses are valid and should be upheld. Jackson J. held that contractual terms requiring a contractor to give prompt notice of delay served a valuable purpose as they enabled matters to be investigated while they were still current. He also regarded such terms as valuable because they sometimes gave the employer the opportunity to withdraw instructions when the financial consequences became apparent. He doubted that *Gaymark* represented English law[8]:

> "If *Gaymark* is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large."

Jackson J.'s analysis was adopted by Davies J. in *Steria Ltd v Sigma Wireless Communications Ltd*[9]:

> "Generally, one can see the commercial absurdity of an argument which would result in the contractor being better off by deliberately failing to comply with the notice condition than by complying with it."

Davies J. concluded that the prevention principle did not mean that the failure by Steria, the sub-contractor, to comply with the contractual notice requirement for an extension of time put the time for completion at large.

These cases were considering time-bar clauses where the claims were litigated. However, the position is different where the claim is arbitrated and under both the Arbitration Act 1950 and Arbitration Act 1996 there are provisions which entitle a court to extend time for commencing an arbitration where a party has failed to commence a claim in breach of a contractual time-bar clause.

3. TIME-BAR CLAUSES UNDER THE ARBITRATION ACT 1950

The Arbitration Act 1950 s.27 was entitled "Power of the Court to Extend Time for Commencing Arbitration Proceedings":

[6] *City Inn Ltd v Shepherd Construction Ltd* [2003] B.L.R. 468.
[7] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447 (TCC); [2007] B.L.R. 195.
[8] *Multiplex Constructions* [2007] EWHC 447 (TCC); [2007] B.L.R. 195 at [103].
[9] *Steria Ltd v Sigma Wireless Communications Ltd* [2008] B.L.R. 79; 118 Con. L.R. 177 at [95].

> "Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given... or some other step to commence arbitration proceedings is taken within a fixed time by the agreement, and a dispute arises to which the agreement applies... [then] notwithstanding that the time so fixed has expired, may, on such terms, if any... extend the time for such period as it thinks proper."

Whether s.27 could be used to extend time depended on the terms of the contract. In *Crown Estate Commissioners v John Mowlem*[10] the court recognised that there was a distinction between a clause which barred the commencement of an arbitration and one which made a final certificate issued by an architect or engineer conclusive as to matters relating to standards and quality of work.[11] The distinction arises because s.27 only applies to situations where there is delay in giving a notice to appoint or other step to commence the arbitration. It does not apply, and the courts cannot extend time, where a clause extinguishes a claim; for example, where the clause states that by not serving the claim in a prescribed time the potential defendant is discharged from any liability under that claim. Therefore in *Babanaft International Co SA v Avant Petroleum Inc*[12] a time-bar operated where no claim in writing supported by documents was received within 90 days of a prescribed event.[13] Donaldson L.J. noted that such a clause might be "a source of injustice or even oppression" but "as the law stands, that will be the position".[14]

4. EXTENDING TIME FOR COMMENCING AN ARBITRATION UNDER THE ARBITRATION ACT 1996

The Arbitration Act 1996 increased the court's powers as to when it could extend time for commencing an arbitration. As stated by Mustill and Boyd,[15] the new bases for extending time "are different from the old law, the numerous decisions on which must now be regarded as largely if not wholly irrelevant". The Arbitration Act 1996 s.12(1):

> "Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step-
>
> (a) to begin arbitral proceedings, or to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun, the court may by order extend the time for taking that step."

The main changes are that s.12(1) applies where the claimant's right will be extinguished, not just barred; and not only to commencing an arbitration but also commencing some other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun. The changes are not merely semantic. *Babanaft* would probably now be decided differently and *Crown Estate Commissioners v John Mowlem* might be reversed.

[10] *Crown Estate Commissioners v John Mowlem* (1994) 70 B.L.R. 1 CA.

[11] In Scotland the courts took a narrower view of the conclusive effects of a final certificate: *Firholm Builders Ltd v McAuleym* 1983 S.L.T. (Sh. Ct.) 105 and *Belcher Food Products Ltd v Miller & Black,* 1999 S.L.T. 142*;* and see MacRoberts, *Scottish Building Contracts* (London: Wiley-Blackwell, 1999), p.93.

[12] *Babanaft International Co SA v Avant Petroleum Inc* [1982] 1 W.L.R. 871.

[13] See also *Tradax Export SA v Italcarbo Societa di Navigazione SpA (The Sandalion)* [1983] 1 Lloyd's Rep. 514 at 517 and *British Gas Trading Ltd v Amerada Hess Ltd* [2006] EWHC 233 (Comm).

[14] *Babanaft International Co SA v Avant Petroleum Inc* [1982] 1 W.L.R. 871 at 886C.

[15] Michael Mustill and Stewart Boyd, *Commercial Arbitration, 2001 Companion* (London: Butterworths, 2000), p.275.

In *Monella and Monella v Pizza Express (Restaurants) Ltd*[16] the High Court had to consider a rent review clause. The relevant terms were in cl.8:

> "Whenever the Revised Rent in respect of a Review Period has not been agreed between the Landlord and the Tenant before the relevant Review Date and the Landlord has not made any application to the President for the time being of the Royal Institute of Chartered Surveyors as hereinbefore provided the Tenant may serve on the Landlord notice in writing containing a proposal as to the amount of such Revised Rent not being less than the rent payable immediately before the commencement of the relevant Review Period and the amount so proposed *shall be deemed to have been agreed* by the parties as the Revised Rent for the relevant Review Period and sub-clause (D)(i) hereof shall apply accordingly unless the Landlord shall make such application as aforesaid within one month after service of such notice by the Tenant."

The time-bar provision therefore had nothing to do with commencing the arbitration. The rent was deemed to be agreed unless it was referred to the President of the RICS for a decision. Morritt V.C. held: "I have no doubt, and I so hold, that s.12(3) is applicable to clause 8." It is implicit that he saw the referral to the President of the RICS as part of the dispute resolution procedure. It should be noted that he made no reference to *Crown Estate Commissioners v John Mowlem.*

There are, however, strict requirements that a Claimant needs to overcome before a court will make an order under the Arbitration Act 1996 s.12; s.12(3) states that the English court, where the seat of the arbitration is in England and Wales or Northern Ireland, may extend a contractual time-bar provision if it is satisfied:

> "(3)(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or
> (3)(b) that the conduct of one of the parties makes it unjust to hold the other party to the strict terms of the provision in question."

The courts have been reluctant to grant extensions of time save in exceptional cases as this has been seen to be contrary to the principle of party autonomy and would be an interference with the parties' contract. In *Harbour & General Works v Environment Agency*[17] the claimant entered into a contract with the respondent based on *ICE Conditions of Contract*, 6th edn. The claimant issued a notice to refer a dispute to arbitration but it was eight days late. The Court of Appeal refused to extend time for the commencement of the arbitration. Waller L.J. stated[18]:

> "The sub-section is concerned with party autonomy. Its aim seems to me to be to allow the Court to consider an extension in relation to circumstances where the parties would not reasonably have contemplated them as being ones where the time bar would apply, or to put it the other way round, the section is concerned not to allow the Court to interfere with a contractual bargain unless the circumstances are such that if they had been drawn to the attention of the parties when they agreed the provision, the parties would at the very least have contemplated that the time bar might not apply; - it then being for the Court finally to rule as to whether justice requires an extension of time to be given.. . . it would appear quite impossible to characterise a negligent omission to comply with a contractual time bar, however little delay was involved, as, without more, outside their mutual contemplation."

[16] *Monella v Pizza Express (Restaurants) Ltd* [2003] EWHC 2966 (Ch); [2004] 1 E.G.L.R. 43.
[17] *Harbour & General Works v Environment Agency* [2000] 1 W.L.R. 950; [2000] 1 Lloyd's Rep. 65.
[18] *Harbour & General Works* [2000] 1 W.L.R. 950; [2000] 1 Lloyd's Rep. 65 at 81.

In *Gibson Joint Venture v The Department of Environment of Northern Ireland*[19] the parties entered into an ICE, 5th edn, form of contract. Disputes arose and the engineer issued a decision and thereafter the contractor and engineer entered into negotiations to discuss the claims. The negotiations broke down and the contractor issued a notice of arbitration 23 days late. The contractor referred to these negotiations between him and the engineer and argued that this was "*conduct of one of the parties* [which] makes it unjust to hold the other party to the strict terms of the provision in question" as provided by the Arbitration Act 1996 s.12(3)(b). The court, although having sympathy for the contractor, disagreed. Furthermore the court found that the engineer, though agent to the employer, was not one of the parties to the arbitration agreement and therefore the engineer's conduct was irrelevant when considering s.12.

In *Korbetis v Transgrain Shipping BV*[20] the court had to consider whether an error in sending the notice of arbitration by fax to a wrong number was a circumstance outside the reasonable contemplation of the parties. The court concluded there was no basis for extending time. Toulson J.[21] equated s.12(3)(a) with all sorts of events that may occur which the:

> "parties would not ordinarily expect to occur, but which they know might conceivably occur. I have in mind the sort of extraneous things which in other contexts might be considered *force majeure* or frustrating events."

In *Monella v Pizza Express (Restaurants) Ltd*[22] the court had to consider whether a change in the law which affected the time-bar clause was an event under s.12(3). The court concluded on the facts that the change in the law, which made the dates specified in a rent review clause of the essence, was not an unforeseeable event. However, in *Borgship Tankers Inc v Product Transport Corp*[23] Cresswell J.[24] stated that, if parties had acted on a mistake as to law, "there would be significant arguments available in support of the contention that s.12(3)(a) might be engaged".

The issue in *Thyssen Inc v Calypso Shipping Corp SA*[25] was whether the court should extend time where the claimant had commenced proceedings in the courts of the United States within the contractual time limits but had not issued a notice of arbitration. The court concluded that this was not a basis for extending time under s.12. Steel J. held that it was not enough for the claimant to commence proceedings. The claimant had to commence proceedings correctly. The proposition that by instituting proceedings in any jurisdiction in the world this would have the effect of preventing discharge of liability by passage of time was, Steel J. noted, absurd.

However, *Van Oord ACZ v Port of Mostyn Ltd*[26] illustrates that there are circumstances in which the courts will exercise their discretion and extend time. The Notice to Refer was sent not to the principal place of business of Van Oord ACZ, as required by the contract, but to a subsidiary office. It was sent in time, but Van Oord ACZ then waited and notified the Port of Mostyn of its error after time had expired and then sent it to its head office. Counsel admitted that the conduct of Van Oord ACZ was "commercially savvy". Judge Kirkham[27] described

[19] *Gibson Joint Venture v The Department of Environment of Northern Ireland* [2001] NIQB 48.
[20] *Korbetis v Transgrain Shipping BV* [2005] EWHC 1345 (QB).
[21] *Korbetis* [2005] EWHC 1345 (QB) at [25].
[22] *Monella* [2003] EWHC 2966 (Ch); [2004] 1 E.G.L.R. 43.
[23] *Borgship Tankers Inc v Product Transport Corp* [2005] EWHC 273 (Comm); [2005] 1 Lloyd's Rep. 565.
[24] *Borgship Tankers* [2005] EWHC 273 (Comm); [2005] 1 Lloyd's Rep. 565 at [49].
[25] *Thyssen Inc v Calypso Shipping Corp SA* [2000] 2 All E.R. (Comm) 97; [2000] 2 Lloyd's Rep. 243.
[26] *Van Oord ACZ v Port of Mostyn Ltd* Unreported September 10, 2003.
[27] *Van Oord ACZ* Unreported September 10, 2003.

this admission as "an acknowledgment of conduct which was unlikely to be viewed with favour by the court". The court concluded that the conduct of the applicant was such that it would be unjust to hold The Port of Mostyn to the strict terms of the service provision. However, there is a tension between *Van Oord ACZ* and *Cathiship SA v Allanasons Ltd (The Catherine Helen)*,[28] where Jeffrey Brice Q.C. held[29]:

> "[M]ere silence or failure to alert the claimant to the need to comply with the time-bar cannot render the barring of the claim unjust."

The Arbitration Act 1996 s.12 may in very limited circumstances be relied upon to circumvent a time-bar provision. The approach of the courts is that the parties have agreed the terms and conditions of their contract. If the parties agree that, as a condition precedent to bringing arbitration proceedings, certain steps should be taken by certain dates, then they will be held to their bargain. As Waller L.J. stated in *Harbour & General Works v Environment Agency* this is just the application of the principle of party autonomy. A party to a contract would therefore be unwise to think that s.12 is a "get out of jail card" where it has missed a time-bar clause.

5. FIDIC TIME-BAR PROVISIONS

In the FIDIC 1999 forms of contract the obligation to give a notice of claim is set out in sub-cl.20.1:

> "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."

The giving of the notice under sub-cl.20.1 is considered to be a condition precedent to the right to claim time or money. The question, however, is whether the Arbitration Act 1996 s.12 can defeat this provision? In this regard it should be noted that s.12 is a mandatory provision and cannot be excluded by the parties. Therefore, irrespective of what is stated in the contract, the section will apply to an arbitration whose seat is in England and Wales or Northern Ireland.

The next point is whether the referral to the engineer is part of "some other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun"? In all probability the answer is yes. It is irrelevant that there are other tiers of dispute resolution which are more formal in the contract and the engineer is required to make a "fair determination" pursuant to sub-cl.3.5 of the contract.

The third point is whether the reference to the employer being discharged from all liability defeats the claim (the *Babanaft* issue). As stated in this article, the new wording in s.12(1) referring to the claimant's right being extinguished is likely to mean that the employer would not be discharged if the claimant can justify an extension under the Arbitration Act 1996 s.12(3).

[28] *Cathiship SA v Allanasons Ltd (The Catherine Helen)* [1998] 3 All E.R. 714; [1998] 2 Lloyd's Rep. 511.

[29] *The Catherine Helen* [1998] 3 All E.R. 714 at 729.

6. CONCLUSION

Mustill and Boyd[30] suggested that it was irrational for there to be a distinction between clauses barring claims in arbitration and those in legal proceedings. However, there is a distinction which became more pronounced when the Arbitration Act 1996 was enacted. To date the battle lines regarding s.12 have been drawn around the interpretation of s.12(3) and when the court should extend the time limits. At present the attitude of the courts is that a party who has failed to comply with the time-bar clause will have to persuade a court that something akin to frustration or force majeure has prevented it from complying with the time bar or that the conduct of the other party makes it unjust to uphold the time-bar provision. This will never be easy and case law indicates that only in exceptional circumstances have the courts permitted an extension of time under s.12. However, if there are onerous time-bar clauses in a contract, then there may be a benefit in having the matter resolved by arbitration rather than the courts and, while it will be difficult to circumvent a time-bar clause, it is incorrect to say there are no ways round it.

[30] Mustill and Boyd, *Commercial Arbitration, 2001 Companion*, 2000, p.275.