Changing Tack

Written by Victoria Tyson

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A contract may require a party giving notice of a claim to specify the contractual or legal basis of that claim in the notice (or the supporting particulars). What if that party states a contractual or legal basis for the claim but later (perhaps with the benefit of additional information or because of advice from its lawyers) changes its mind or wants to include further contractual or legal bases?

This was considered by the Hong Kong Court of Appeal in *Maeda Corporation and China State Construction Engineering (Hong Kong) Limited v Bauer Hong Kong Limited [2020] HKCA 830*. It found that a subcontractor could not change the contractual basis for its claim once the time period for providing such notice had expired.

What, if any, impact will this decision have on the FIDIC forms of contract?

Background

The Maeda case related to the construction of tunnels for the Hong Kong to Guangzhou Express Rail Link. The Main Contractor was Maeda and China State in joint venture (the "JV"). The Sub Contractor was Bauer Hong Kong Limited ("Bauer").

The Sub-Contract was not a standard FIDIC form of contract. It contained a condition precedent clause that required Bauer to state the contractual basis, together with full and detailed particulars and evaluation, of its claim within 28 days after giving its initial notice (Sub-Clauses 21.2 and 21.1 respectively of the Sub-Contract).

Sub-Clause 21 is set out in full below (with emphasis added):

"21.1 If the Sub-Contractor intends to claim any additional payment or loss and expense pursuant due to:

21.1.1 any circumstances or occurrence as a consequence of which the Contractor is entitled to additional payment or loss and expense under the Main Contract;

21.1.2 any alleged breach of the Sub-Contract, delay or prevention by the Contractor or by his representatives, employees or other sub-contractors;

21.1.3 any claim for discrepancy between Sub-Contract Drawings and documents pursuant to Clause 8.4;

21.1.4 any claim under Common Law, statute laws or by-law;

21.1.5 any extension of time granted to the Sub-Contractor with exception to those cases which the delay are caused by typhoon signal no. 8 and/or force majeure etc.

21.1.6 any Variation or Sub-Contract Variation, as a condition precedent to the Sub-Contractor's entitlement to any such claim, the Sub-Contractor shall give notice of its intention to the Contractor within fourteen (14) days after the event, occurrence or matter giving rise to the claim became apparent or ought reasonably to have become apparent to the Sub-Contractor. For the avoidance of doubt, the Sub-Contractor shall have no entitlement to any additional payment or any additional loss and expense and no right to make any claim whatsoever for any amount in excess of the Sub-Contract Sum in respect of any event, occurrence or matter whatsoever unless this Sub-Contract sets out an express right to that additional payment, additional loss and expense or claim.

21.2 If the Sub-Contractor wishes to maintain its right to pursue a claim for additional payment or loss and expense under Clause 21.1, the Sub-Contractor shall as a

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condition precedent to any entitlement, within twenty eight (28) Days after giving of notice under Clause 21.1, submit in writing to the Contractor:

21.2.1 the contractual basis together with full and detailed particulars and the evaluation of the claim;

21.2.2 where an event, occurrence or matter has a continuing effect or where the Sub-Contractor is unable to determine whether the effect of an event, occurrence or matter will be continuing, such that it is not practicable for the Sub-Contractor to submit full and detailed particulars and the evaluation in accordance with Clause 21.2.1, a statement to that effect with reasons together with interim written particulars. The Sub-Contractor shall thereafter, as a condition precedent to any entitlement submit to the Contractor at intervals of not more than twenty eight (28) Days (or at intervals necessary for the Contractor to comply with his obligations under the Main Contract, whichever is shorter) further interim written particulars until the full and detailed particulars are ascertainable, whereupon the Sub-Contractor shall as soon as practicable but in any event within twenty eight (28) Days (or as necessary for the Contractor to comply with his obligations under the Main Contract, whichever is shorter) submit to the Contractor full and detailed particulars and the evaluation of the claim;

21.2.3 details of the documents and any contemporary records that will be maintained to support such claim; and

21.2.4 details of the measures which the Sub-Contractor has adopted and proposes to adopt to avoid or reduce the effects of such event, occurrence or matter which gives rise to the claim.

21.3 The Sub-Contractor shall have no right to any additional or extra payment, loss and expense, any claim for an extension of time or any claim for damages under any Clause of the Sub-Contract or at common law unless Clauses 21.1 and 21.2 have been strictly complied with."

Bauer gave notice of its claim on time and provided full and detailed particulars within 28 days, submitting the contractual basis of its claim to be a Variation and/or Sub-Contract Variation for unanticipated ground conditions and naming specific clauses in the Sub-Contract.

The dispute between the JV and Bauer escalated to arbitration.

In the arbitration, Bauer also pursued an alternative contractual basis for its claim. This was a "*like rights*" claim, based on the main contractor's entitlement under the provisions of the main contract, under different clauses of the Sub-Contract. This had not been included within the information provided within the 28 days (despite the wording of Sub-Clause 21.1).

The arbitrator (Sir Vivian Ramsey Q.C.) rejected Bauer's variation claim on the basis that "*the changed ground conditions do not, in themselves, give rise to payment as a Variation or Sub-Contract Variation, in the absence of an instruction*". This left the "*like rights*" claim. The arbitrator had to consider "*whether the contractual basis of the claim made under Clause 21.2 had to be the same as the contractual basis of the claim made in the arbitration*". He decided that it did not, placing significance on the commercial purpose of the condition precedent clause.

The Court of First Instance disagreed with the arbitrator, finding that "*there can be no dispute, and no ambiguity, from the plain and clear language used in Clause 21, that the service of notices of claim in writing referred to … are conditions precedent, must be "strictly" complied with, and failure to comply with these conditions will have the*

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effect that [Bauer] will have "no entitlement" and "no right" to any additional or extra payment, loss and expense". The judge, M Chan J, placed reliance on the English court cases of *Rainy Sky SA v Kookmin Bank [2011]* [1] and *Arnold v Britton [2015]*.[2]

THE COURT OF APPEAL

Bauer appealed and (unsuccessfully) made a number of arguments including the following:

- Bauer had submitted notice. The issue was not whether such notice had been given but whether such notice complied with Sub-Clause 21.2.1.
- Sub-Clause 21.2.1 does not require Bauer to identify the contractual basis upon which its claim for additional payment or loss and expense ultimately succeeded in the arbitration. Had this been the intention of the parties, this would have had to have been expressed clearly.
- Sub-Clause 21.2.1 does not expressly state, nor can it be inferred, that Bauer was precluded from amending or substituting a contractual basis or that the effect of such an amendment or substitution would nullify the entitlement of Bauer to additional payment.
- Sub-Clause 21.2.1 was at the least ambiguous as to whether the notice needed to state the contractual basis upon which the claim ultimately succeeded or whether a party is precluded from pursuing a claim on a different contractual basis from that stated in the notice. As such, it should have been construed narrowly.
- Sub-Clause 21.2.1 referred to "*contractual basis*" in the singular, rather than the plural. It could not be "*strictly complied with*" as stipulated in Sub-Clause 21.3, because the factual basis for Bauer's claim provided not one but two contractual bases – as Variations or Sub-Contract Variations, and as a "*like rights*" claim.
- A party should not be prevented from advancing a claim after the expiry of a time bar merely because it placed a different legal label in the notice submitted when the substance of which was presented in time.
- The arbitrator said that, "*to expect a party to finalise its legal case within the relatively short period and be tied to that case through to the end of an arbitration is unrealistic*". This was a finding of fact and as such is unimpeachable as a matter of law. The Court of First Instance was wrong to ignore this finding of fact.
- Clause 21, when read as a whole, contemplates and provides for a developing understanding of the factual causes or events for which notification is required, and this in turn informs the contractual basis or bases of the claim. Where there is a developing state of affairs and there is provision for interim written particulars under Sub-Clause 21.2, it is manifest that the stated contractual basis under Sub-Clause 21.2 may be amended or substituted to reflect the understanding at that time.
- The arbitrator said that, "*what is important from the point of view of the Contractor is to know the factual basis for the claim so that it can assess it and decide what to do*". This was a correct statement of the law, having regard to the commercial purpose of the notification clause. The important commercial purpose of Sub-Clause 21.2 is whether the receiving party is able to make a proper evaluation of the claim as presented, not whether all the relevant boxes have been ticked.
- The finding in the Court of First Instance that "*there is commercial sense in allocating risks and attaining finality by designating strict time limits for claims to be made and for the contractual basis of claims to be specified*" just restated the purported effect of the clause. The judge erroneously relied on case law and applied the concept of finality dogmatically and with no regard to the commercial purpose of the clause.

[1] UKSC 50.

[2] AC 1619.

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The Court of Appeal held that Bauer had failed to give proper notice under Sub-Clause 21.2 and that the arbitrator's decision was wrong in law. Bauer was not entitled to bring a claim in the arbitration on a different contractual basis than the one notified. This was for a number of reasons, including the following:

- There was no dispute that for a "*like rights*" claim, the notice provisions in Sub-Clause 21.2 must be strictly complied with as conditions precedent to any entitlement to a claim for additional payment under Clause 21.
- Under Sub-Clause 21.2, the notice would need to be given within 28 days after the giving of the original notice. In the notification served by Bauer within that period, Bauer made its claim on the contractual basis of a Variation or Sub-Contract Variation and there was no mention of a "*like rights*" claim, which is a different contractual basis.
- According to the plain wording of Sub-Clause 21.2, the notice or submission that is required to be given within 28 days of the notice of intention to claim must cover three things: (i) the contractual basis; (ii) full and detailed particulars; and (iii) the evaluation of the claim.
- **The full and detailed particulars and the evaluation of the claim**: Sub-Clause 21.2 allows for submissions to be made at subsequent periods, where an event, occurrence or matter has a continuing effect or where the Sub-Contractor is unable to determine if an event, occurrence or matter will be continuing, such that it is not practicable to comply with Sub-Clause 21.2.1. Under Sub-Clause 21.2.2, the developing understanding of the factual causes or events is permitted to have an impact only on the provision of full and detailed particulars and the evaluation of the claim. The allowance to make subsequent submissions does not extend to the obligation to state the contractual basis.
- **The "*contractual basis*"**: The wording of Sub-Clause 21.2 is clear and unambiguous. Within the stipulated time, the Sub-Contractor is required to give notice of the contractual basis, not any possible contractual basis which may turn out not to be the correct basis. The reference to the contractual basis would not preclude identifying more than one basis in the alternative or stating more than one basis in the notice or serving more than one notice each stating a contractual basis.
- **Interpretation**: There is no justification in giving Sub-Clause 21.2.1 a narrow construction or strained interpretation.
- **Contra proferentem**: There was no ambiguity in Sub-Clause 21.2.1 that needed to be resolved by invoking the *contra proferentem* rule.
- **Finding of fact**: The arbitrator did not make a finding of fact that the time stipulated is unrealistically short. What he said about this was a statement of opinion, rather than a finding of fact.
- **Developing facts**: Reliance on a developing understanding of the factual events was not considered to be a valid argument. Bauer gave notice in August 2011 stating the contractual basis as Variation or Sub-Contract Variation under Sub-Clause 21.1.6. It could have given notice of a "*like rights*" claim under Sub-Clause 21.1.1, whether alternatively or cumulatively, within the stipulated time. Under Sub-Clause 21.1, the period of 42 days only commences "*after the event, occurrence or matter giving rise to the claim became apparent or ought reasonably to have become apparent to the Sub-Contractor*".
- **Commercial purpose**: Apart from providing the factual basis for the claim so that the receiving party is able to access the claims validity at a time when the facts giving rise to the claim are still fresh, there are two further commercial purposes for identifying the contractual basis within the stipulated period: first, finality and second, in a chain contract situation, the Contractor may need to know whether the Sub-Contractor's claim would have to be passed up the line. The arbitrator's interpretation may prejudicially affect this commercial purpose.

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- If the only purpose of Clause 21 was to inform the JV of the factual basis for the claim so it could investigate the claim in time, it would have been worded in a similar way to certain clauses in the Main Contract. But that is not how Clause 21 was worded and it is not permissible to interpret Sub-Clause 21.2.1 in such a manner as to re-write the plain language of the provision.

FIDIC

Some clauses in the FIDIC forms of contract also require a party giving notice of a claim to specify the contractual or legal basis of the claim in the notice or the supporting particulars as a condition precedent of that claim. What impact, if any, will this decision have on the FIDIC forms of contract?

The FIDIC Yellow Book 1999

The FIDIC Yellow Book 1999 separates Employer and Contractor claims.

Employer's Claims

Sub-Clause 2.5 requires "*notice*" (to be given as soon as reasonably practicable after the Employer became aware of the event or circumstance giving rise to the claim), and "*particulars*". In the case of *NH International (Caribbean) Limited v National Insurance Property Development Company Limited [2015]*[3] the Privy Council said that the wording of Sub-Clause 2.5 "*makes it clear that, if the Employer wishes to raise such a claim, it must do so promptly and in a particularised form*".

The particulars must "*specify the Clause or other basis of the claim*" as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. Sub-Clause 2.5 does not specify what will happen if the Employer subsequently changes the Clause or other basis of the claim. Compliance with Sub-Clause 2.5 is a condition precedent. 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 [Sub-Clause 2.5]*".

The FIDIC Guidance states (with emphasis added), "*In order to be effective, the particulars should include the basis of the claim, with relevant Clause number(s), and detailed substantiation of the extension and/or payment being claimed*". Therefore, it would appear that a failure to give the correct particulars is not intended to render the notice invalid. Further, as the obligation is to give particulars specifying the clause or other basis of the claim "*as soon as reasonably practicable*", arguably, there is more flexibility in changing the clause or other legal basis of the claim than in the Maeda case which had a strict 28-day deadline.

Note too that Sub-Clause 2.5 distinguishes the "*Clause*" from the "*basis of claim*". Therefore, the basis of claim may be much wider that a mere clause of the contract. Perhaps, it could be expressed as: (i) a claim under the contract; (ii) a claim for breach of contract; (iii) a claim in tort; (iv) a claim under the governing or other applicable law etc. However, there is no reliable authority on this, and it would be dangerous to place so much reliance on the word "*or*". Consequently, it would be wise for an Employer to note each and every clause that could possibly be implicated as well as any basis of claim for breach of contract, in tort, and under the governing or other applicable law etc.

Contractor's Claims

Firstly: Sub-Clause 20.1 requires "*notice*" to be given no later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance. The Guidance states (with emphasis added), "*Generally, there is no need for this notice to indicate how much extension of time and/or payment may be claimed, or to state the Clause or other contractual basis of the claim*". Therefore, it need only be a bare notice. The notice is a condition precedent. If the Contractor fails to give such notice within 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*".

[3] UKPC 37.

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Secondly: A fully detailed claim including "*supporting particulars of the basis of the claim*" is also required within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer. Sub-Clause 20.1 does not specify what will happen if the Contractor subsequently changes the basis of the claim and the FIDIC Guidance does not assist. A failure to give the correct supporting particulars does not render the notice of claim lapsed or invalid but might affect the quantum of the claim: "*Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate*". This is a key difference from the Maeda case, which said that a failure to give a statement of the "*contractual and/or other legal basis of the Claim*" would render the notice of claim lapsed or invalid. On this basis, it is arguable that the decision in the Maeda case ought not to apply to this clause.

The FIDIC Gold Book 2008 is different. In this form, Sub-Clause 1.3 provides that a Notice must include reference to the Clause under which it is issued, and Sub-Clause 20.1 (c) states that if the Contractor fails to provide the "*contractual or other basis of the claim*" within the required time, the Notice of claim is considered to be invalid. This has the same effect as if no Notice had been given in the first place so that the Employer has no liability in respect of the claim. Therefore, the decision in the Maeda case might be applied. If more time is required to establish the correct contractual or other basis of claim the Contractor might ask the Employer's Representative for an extension of time or, failing that, there is specific wording in the FIDIC Gold Book for the DAB to be asked to overrule the given 42-day limit.

As stated above, the basis of claim may be much wider that a mere clause of the contract.

The FIDIC Yellow Book 2017

The FIDIC Yellow Book 2017 combines Employer and Contractor claims (Sub-Clause 20.2).

Firstly: Sub-Clause 20.2.1 requires "*Notice*" to be given no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance. This Notice is a condition precedent. If the claiming party "*fails to give a Notice of claim within this period of 28 days, the claiming party shall not be entitled to any additional payment , the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim*". As above, this need only be a bare notice. Under Sub-Clause 1.3 (b) it must be identified as a Notice but does not need to include reference to the provision(s) of the Contract under which it is issued.

Secondly: Sub-Clause 20.2.4 requires a fully detailed claim including, among other things, *"(b) a statement of the contractual and/or other legal basis of the Claim*" (i) within 84 days after the claiming party became aware, or should have become aware, of the event or circumstance giving rise to the claim, or (ii) within such other period as may be proposed by the claiming party and approved by the Engineer. It is a condition precedent to state the contractual and/or other legal basis of the claim: "*If within this time limit the claiming Party fails to submit the statement under sub-paragraph (b) above, the Notice of Claim shall be deemed to have lapsed, it shall no longer be considered as a valid Notice, and the Engineer shall, within 14 days after this time limit has expired, give a Notice to the claiming Party accordingly*". In other words, a failure to specify the contractual and/or other legal basis of the Claim will render the Notice of Claim lapsed (and the Claim potentially time-barred). As with the FIDIC Gold Book 2008, if further time is needed to establish the contractual or legal basis of the claim a party may seek an extension of time from the Engineer (or ask the DAAB for the additional time, if time permits).

Sub-Clause 20.2.4 does not specify what will happen if the claiming party subsequently changes the contractual and/or legal basis of the claim, and

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the FIDIC Guidance does not assist, but the risk of doing so appears greater in the FIDIC 2017 editions than the FIDIC 1999 editions. Having lawyers available (on Site) to analyse each and every claim and accurately establish the correct contractual and/or other legal basis within 12 weeks of a party becoming aware (or ought to have become aware) of the event or circumstances giving rise to the claim will be undesirably burdensome and costly.

Again, the contractual and/or other legal basis of claim may be much wider that a mere clause of the contract.

Arbitration

Sub-Clause 20.6 of the FIDIC Yellow Book 1999 and Sub-Clause 21.6 of the FIDIC Yellow Book 2017 states: "*Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before* the [DAB / DAAB] *to obtain its decision…*".

This suggests that a party may change its legal arguments, at least, in arbitration proceedings. Does this include the contractual and/or other legal basis of claim in its notice, particulars, or fully detailed claim? Is the freedom to change arguments to be construed within the confines of the clauses notified? Such an argument appears not to have been considered in the Maeda case.

Conclusion

FIDIC is adopting a more demanding approach to notice provisions than ever before (not just in respect of time but also in respect of content) and English law is moving towards a stricter monochrome approach to contract interpretation. Other legal jurisdictions are following. This means that claims are more than likely to fail if the correct procedure is not followed to the letter, regardless of how draconian the outcome may be.

It is very challenging for a paty to correctly identify and fix its contractual or legal basis of of a claim in a hort period of time. When required to do so in the notice, particulars or fully detailed claim, this should be done widely and with extreme care. If further time is needed to establish the correct contractual or legal basis of the claim seek an extension of time from the Engineer or ask the DAB / DAAB for additional time (if time permits). If in any doubt, take legal advice early.

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