CONSTRUCTION LAW IN THE GCC – KEY TAKEAWAYS FROM A RECENT DIFC COURT OF APPEAL RULING

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In a recent judgment dated 12 May 2023 in the case of *Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC* [2022] DIFC CA 106/2022, the DIFC Court of Appeal ("CA") considered various topical issues in construction disputes in the Middle East.

INTRODUCTION

The facts underlying the dispute between the contractor ("MESC") and the employer ("Panther") in the *Panther* case are typical of construction projects in the GCC: in 2017 the parties signed a contract for the construction of a residential tower in Dubai based on the FIDIC Redbook 1999 as supplemented and amended by a set of particular conditions. The project was then delayed. The contractor ("MESC") submitted various extension of time ("EOT") claims which were rejected. MESC served a notice of slowdown of the works. The parties attempted to resolve their dispute amicably but to no avail. Panther then proceeded to liquidate the security guarantees and in late 2019 ultimately served a termination letter under Sub-Clause 15.2 (which provided that Panther was entitled to terminate the contract with immediate effect if, amongst other things the maximum amount of delay damages was exhausted, as they alleged it was). Shortly after, Panther appointed another contractor to complete the project.

At first instance, the DIFC Court found Panther responsible for most of the delay. However, the court also found that MESC had not complied with the notice requirements as regards to its EOT claims, which resulted in:

- MESC losing its right to an EOT and/or additional costs; and
- Panther being entitled to liquidated delay damages.

The CA's decision provides useful guidance on the operation of notice requirements under standard FIDIC Redbook Sub-Clause 20.1, the application of the prevention principle and various DIFC Contract Law provisions.

NOTICE REQUIREMENTS UNDER STANDARD SUB-CLAUSE 20.1: CONDITIONS PRECEDENT TO CONTRACTOR'S ENTITLEMENT TO EOT?

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Unsurprisingly, the CA confirmed that as a matter of construction the 28-day notice requirement in Sub-Clause 20.1 is a condition precedent to the contractor's entitlement to obtain an EOT, however strong his claim to an EOT might be otherwise. Therefore, failure to serve that notice in time means that the claim for an EOT (and/or additional payment) will fail.

However, differing from the findings at first instance, the CA ruled that the 42-day detailed claim requirement under Sub-Clause 20.1 is not a condition precedent.

The CA noted that the purpose of the two notices is quite different. The 28-day notice is designed to give the employer notice that a claim for an EOT (or additional payment) will or may be made and to identify the event or circumstance giving rise to the claim. As the CA pointed out, "*it can be short and to the point*" [at 39].

The 42-day detailed claim serves a different function. It must be "*fully detailed*" with "*full supporting particulars*". It is intended to be a claim ready for determination by the engineer.

The CA concluded that the wording at the end of Sub-Clause 20.1 gives "*teeth to the requirement to serve such a claim and to do so within the required time; any failure or delay in complying with the detailed claim regime can be taken into account by the Engineer in arriving at his determination*" [at 47].

NOTICE REQUIREMENTS UNDER STANDARD SUB-CLAUSE 20.1: WHEN DOES TIME START FOR THE PURPOSE OF GIVING NOTICE?

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The CA confirmed that the 28-day notice requirement is triggered when the contractor becomes aware (or ought to have become aware) not of the delay or likely delay but of the event or circumstance giving rise to an EOT claim. It does not run from the date that the delay to completion in fact starts to occur.

This finding is interesting because it differs from the decision *in Obrascon Huarte Lain S.A. v. Attorney General for Gibraltar* [2014] EWHC 1028 (TCC). The CA considered the judgment of Akenhead J in *Obrascon* and noted that Akenhead J appears to say that time can start to run from the moment, usually later in time, that delay to completion of the works in fact occurred or started to occur. The CA saw difficulties in this analysis. The construction advanced by Akenhead J would mean that for example in a three-year project, if an event occurred during the first year which resulted ultimately in the works overrunning by a month or two after the time for completion in Year 3, then the 28-day notice would only have to be given within 28 days of the moment that year when this passed without the works being completed. The CA rightfully concluded that this would render Sub-Clause 20.1 which is designed to ensure that claims are notified and dealt with swiftly "*entirely ineffective for its purpose*" [at 45].

"Acts of prevention by an employer do not set time at large if the contract provides for EOT in respect of those events."

PREVENTION PRINCIPLE AND FAILURE TO COMPLY WITH NOTIFICATION CONDITIONS PRECEDENT: REJECTION OF *GAYMARK V WALTER CONSTRUCTION GROUP* (1999) N.T.S.C 143

The prevention principle is derived from the basic common law principle that a party should not benefit from his own wrongdoing. In a construction context, if a contractor fails to complete the works by the contractual completion date and such failure is caused by the employer, then the contractor will no longer be held to his agreement to complete by the contractual completion date and instead will be required to complete within a reasonable time; the liquidated damages clause, which depends for its efficacy upon there being a fixed completion date, will no longer apply. Acts of prevention by an employer do not set time at large if the contract provides for EOT in respect of those events.

However, EOT provisions make compliance with notice requirements a precondition to the grant of an EOT as is the case with the 28-day notice requirement in Sub-Clause 20.1. What happens when the contractor fails to give the relevant notices within the required time?

Relying on the judgment of Bailey J in the Australian case of *Gaymark Investments Pty v Walter Construction Group Ltd [1999] NTSC 143*, MESC argued that even if no EOT had been granted to the contractor, if on the facts the employer is found to have caused the delay, the prevention principle should still apply and the contractor no longer held to his agreement to complete by the completion date. Therefore, time for completion would be "at large" and the employer not entitled to liquidated damages.

The CA rejected the argument for three main reasons [53-57]:

- the EOT provision is not disabled when not operated correctly by the contractor; the consequence of a failure to operate the clause is that he cannot get an EOT to cover the delay caused by the Employer's fault;
- the effect of the argument would be to allow the contractor to "*pick and choose*" whether or not to invoke the extension of time provision, knowing that, if he did not give the proper notices, then he would be free of any obligation to complete the works by a specified date and of having to pay liquidated damages for delay; and
- the wording of Sub-Clause 20.1 makes it "crystal clear" to the contractor what he has to do to be awarded an EOT and thereby reduce or eliminate the liquidated damages payable by him in the event of delay.

Therefore, the *Gaymark* case does not represent the law as applied in the DIFC.

PRINCIPLES OF GOOD FAITH UNDER DIFC CONTRACT LAW

Relying on Articles 57 and 58 of the DIFC Contract Law which provide for implied obligations of good faith and fair dealing and cooperation, MESC argued that it would be unconscionable for Panther to claim liquidated damages for a period of delay for which it was largely responsible.

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The CA rejected the argument. The CA considered that Sub-Clause 20.1 and the 14-day notice of dissatisfaction in Sub-Clause 3.5 are clear provisions in their effect which do not admit any scope for the postulated implied term or obligation of good faith [at 58].

The CA also emphasised that Articles 57 and 58 of the DIFC Contract Law do not suggest that parties should not be held to their bargain or that the courts should get involved in rewriting the contract or redress what one party sees as an unfair consequence of agreed terms [at 61].

Civil codes in the GCC often include an overarching statutory duty to perform contracts in good faith such as e.g., Article 246(1) of the UAE Civil Code. Contractors in the region routinely raise good faith arguments to try and defeat the strict application of time bar notice provisions. It will be interesting to see if the CA's considerations will have any bearing on good faith arguments under UAE law.

JUDGE'S POWER TO REDUCE LIQUIDATED DAMAGES IF GROSSLY EXCESSIVE UNDER DIFC CONTRACT LAW

MESC also argued that Panther should be debarred from claiming liquidated damages for such part of the delay as was attributable to their own actions based on Article 122 of the DIFC Contract Law which provides that:

- liquidated damages are in principle enforceable: the aggrieved party is entitled to the sum agreed "*irrespective of its actual harm*"; and
- the specified sum may, however, be reduced to a "*reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances*".

"Whilst the CA's findings may appear harsh on contractors, they are in line with common law principles and serve as an acute reminder of the importance to comply with notice provisions."

The CA rejected the argument noting that MESC's argument appeared to assume that the "*non-performance*" was its own failure to give the required notice. However, the CA noted that this would mischaracterise the position. The liquidated damages are payable not for the failure to serve the required notices within the required time but for failing to complete by the agreed completion date.

Interestingly, the CA noted that there had been no attack by MESC on the amount of liquidated damages payable for that failure [at 62]. This leaves the door open for successful applications under Article 122(2) of the DIFC Contract Law if the contractor can demonstrate that the liquidated damages are grossly exaggerated. However, as noted by the CA this requires investigation into and evidence of the cost of the delay to the employer and that is not always easy to achieve.

CONCLUSION

The *Panther* case provides useful guidance on the DIFC Courts' approach to common issues in construction disputes in the region. Whilst the CA's findings may appear harsh on contractors, they are in line with common law principles and serve as an acute reminder of the importance to comply with notice provisions.

The full judgment can be read here.

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