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INSIGHTS

Insights is a monthly newsletter from CG Engineering Consults with news in engineering, contract management and dispute resolution.

Issue 04 - July 2023

Contract Management

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Notice Requirements for Force Majeure under 1999 FIDIC Forms of Contract

Introduction

Force majeure is defined in sub-clause 19.1 of the 1999 FIDIC forms of Contract as follows:

"An exceptional event or circumstance
(a) which is beyond a Party's control,
(b) which such Party could not reasonably have provided against before entering into the Contract,
(c) which, having arisen, such Party could not reasonably have avoided or overcome, and
(d) which is not substantially attributable to the other Party.

"Therefore, for an event to be classified as force majeure, it must possess the following five qualities:

a) the event must be an exceptional one.
b) the event must be outside the control of the party whom it affects.
c) the affected party could not have reasonably provided against the event before the contract came into being.
d) the affected party could not have reasonably avoided or overcome the event; and
e) the event must not be substantially attributable to the other party.

The COVID-19 pandemic and war, for example, are exceptional events, outside of the control of both parties and therefore fit within the description of Force Majeure as prescribed by the definition of Sub clause 19.1 in the 1999 FIDIC Conditions of Contract.

The Question of the Notice Requirements in Contractor's Claims under Force Majeure

When reviewing the issue of the Notice Requirement as a Condition precedent to entitlement, we have to look at Subclauses 19.2, 19.4 and 20.1.

Subclause 19.2 *[Notice of Force Majeure] provides that "If a Party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the other Party of the event or circumstances constituting the Force Majeure and shall*

specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure. The Party shall, having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them. Notwithstanding any other provision of this Clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract."

Subclause 19.4 *[Consequences of Force Majeure] further provides that "If the Contractor is prevented from performing any of his obligations under the Contract by Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], and suffers delay and/or incurs Cost by reason of such Force Majeure, the Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:*

a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

b) if the event or circumstance is of the kind described in sub-paragraphs (i) to (iv) of Sub-Clause 19.1 [Definition of Force Majeure] and, in the case of sub-paragraphs (ii) to (iv), occurs in the Country, payment of any such Cost.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters."

As can be clearly seen, Sub clause 19.2 and Subclause 19.4 show that consideration must be given to the fact that there is two-step procedure to be followed. The requirement to give notice of the event or circumstances constituting the Force Majeure, the party's obligations, and the performance of which is or will be prevented within 14 days after the party became aware or should have become aware followed by the notice procedure as provided for in Subclause 20.1[*Contractor's claims*] is a condition precedent to entitlement for additional payment of costs incurred in the case of the Force majeure event. The Notice under Subclause 19.2 [Notice of Force Majeure] shows the Engineer the presence of a Force Majeure event and the Notice under Subclause 20.1[*Contractor's Claims*] shows the entitlement for extension of time and/or additional payment due to the Force Majeure event. It is also important to note that the notice s must be in accordance with Sub-Clause 1.3 [*Communications*]

Additionally, it is established law by Judge Sanders in *Attorney General for the Falkland Islands v. Gordon Forbes Construction (Falklands) Ltd*, Falkland Islands Supreme Court 14 March 2003, FIDIC contracts are aimed at the early resolution of any queries at the time

when the claim arises, with the likelihood that plant, manpower and witnesses are still on site. Thus, claims must be pursued in a detailed procedure provided by the FIDIC contracts.

Conclusion

Contractors need to be wary about the notice requirements when drafting claims for additional payment/ extension of time under the 1999 FIDIC forms of contract.

Without following the proper notice requirements, the Contractor loses entitlement to claim for extension of time and/or additional payment. The two-stage notice procedure is key in claims under Force Majeure and further highlights the importance of proper contract management in execution of contracts.

Dispute Resolution

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Seat Vs Place in Arbitration Clauses. Which is the Lex Arbitri?

Introduction

Often time, there is a confusion between the concept of seat and place in arbitration agreements and proceedings. This is a question that has also captivated jurisprudence for a long time. Predominantly, there is an inherent confusion because the words "seat" and "place" which are often used interchangeably by parties.

The foundation of Arbitration is the doctrine of "Party autonomy" where the parties are free to choose the dispute resolution process, the law applicable to the contractual agreement which defines the rights and obligations of the parties, the procedural law or lex arbitri which governs the procedure followed during arbitration. The Parties can also choose the rules to be followed during the arbitral proceedings. An arbitration case with a foreign element could potentially have three relevant systems of law, namely, the law governing the substantive contract, the law governing the agreement to arbitrate and the performance of that agreement, the law of the place where the reference is conducted.

The Seat of Arbitration

The Seat of Arbitration is an important aspect in both domestic and international arbitrations and should always be given keen consideration.

The Seat of Arbitration which is often referred to as the lex arbitri is of crucial importance as it determines the law that governs the arbitration. Thus, the seat will be the home of the arbitration and will generally determine the procedural law followed during arbitration. The seat also determines the court which has supervisory jurisdiction over the arbitral proceedings. It is the courts in the seat of the arbitration that have the power to enforce or set aside the arbitral award. The seat of the arbitration should not be confused for the geographical location of the arbitration hearings. This legal system can be agreed upon by the parties in the arbitration agreement and if not, the arbitral tribunal can determine the

same while giving consideration to the parties' intentions and relevant circumstances. Therefore, the seat of the arbitration has nothing to do with:

- The place where the arbitration is held
- The nationalities of the parties
- The law being enforced by the arbitrator
- The place where the award is written or signed.

It should also be noted that the seat once agreed or determined never alters where the hearings are held or the country in which the award is signed. If the seat of the Arbitration is Uganda, for example, the Arbitration and Conciliation Act 2000 applies. The Award can then be enforced in any Ugandan court. If the seat is elsewhere, the courts in Uganda can still enforce the award but as a foreign award.

The Place/Venue of arbitration.

The place/venue of Arbitration is the geographical location chosen by the parties for conducting arbitration hearings. This should be chosen based on the convenience of the parties.

Conclusion

Parties should take keen interest in the drafting of their dispute resolution clauses such that they are able to make good choices for the seat and venue of their arbitral proceedings. The clear distinction between seat and venue should also be taken by lawyers who often time are not keen on the separation between the two. Proper consideration should be made to choose a seat where the local courts support arbitration and also where the enforcement of foreign awards through the New York Convention is possible.

CG Engineering Consults is a company that deals in engineering design, claims consultancy, and dispute resolution.

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