1. Works suspension

Question

we are the contractor have received a letter from the PM, with the following content "until co-ordinated shop drawings are received and approved (minimum status B), works to the following areas are to be suspended under clause 40.1(d)".
does the PM have right to suspend the works as such. our issued drawings were truly bad quality and not to the acceptance level to the consultants, yet, the design arch. was missing lots of details that he is still delaying to issue and even when issued, issued as free hand sketches. PM claims that even though we fail to produce a proper shop drawing even relaying on the design ones, regardless to the new changes/ designs/ details requested to be issued by the designing company. I need your help to answer to this letter contractually so as to reserve our rights specially that we doing the works under full supervision by the resident consultants and are getting approvals on the work inspection requests that we are producing!
By all means, project is delayed due to the missing/ delayed information from the designer and new dates were set through minutes of meeting attended by all stakeholders, yet, iam afraid, later on, we might face liquidated damages.
Appreciating your earliest reply .

ANSWER:

Thank you for your question.

So that I can consider it further, please advise which form of contract is applicable to the project and the law applying to the contract.

QUESTION:

The Form of Contract is the FIDIC Conditions of Contract for Construction
1987 edition (amended 1992).

Answer

Thank you for the additional information.

The Engineer has a very wide discretion under sub-clause 40.1. However, it is possible that the Engineer is instructing the suspension either through a lack of knowledge of the full circumstances prevailing or to disguise the true position.

If you are unable to produce complete and accurate drawings because of the failure of others to supply information, I suggest that you should not produce any drawings which might be seen as evidence of your inability to perform the Works. The correct course of action will be to write to the Engineer and advise that you are being delayed by the lack of information and specify what detail is lacking.

In the circumstances that you are anticipating a dispute at a later date, I also suggest that you consider whether you and your staff have the time and the capability to manage the situation without further assistance. In many cases I find that contracting parties struggle on through adversity and appoint 'experts' very late in the day. That presents the expert with the difficulty of managing a situation which might otherwise have been avoided, or at least improved, by an earlier engagement.

Whilst this site is a valuable tool for many seeking initial guidance with their problems, the advice is provided in reliance upon a very limited knowledge of the facts, as interpreted by the person drafting the question. In the longer term that is an unsatisfactory position for the management of any claim situation.

I hope that this guides you. I will be pleased to consider any further information that you can provide, or any other query.

Question

we are the contractor have received a letter from the PM, with the following content "until co-ordinated shop drawings are received and approved (minimum status B), works to the following areas are to be suspended under clause 40.1(d)".
does the PM have right to suspend the works as such. our issued drawings were truly bad quality and not to the acceptance level to the consultants, yet, the design arch. was missing lots of details that he is still delaying to issue and even when issued, issued as free hand sketches. PM claims that even though we fail to produce a proper shop drawing even relaying on the design ones, regardless to the new changes/ designs/ details requested to be issued by the designing company. I need your help to answer to this letter contractually so as to reserve our rights specially that we doing the works under full supervision by the resident consultants and are getting approvals on the work inspection requests that we are producing!
By all means, project is delayed due to the missing/ delayed information from the designer and new dates were set through minutes of meeting attended by all stakeholders, yet, iam afraid, later on, we might face liquidated damages.
Appreciating your earliest reply .

Answer

So that I can consider it further, please advise which form of contract is applicable to the project and the law applying to the contract.

2. Over head and Profit

Question

WE are MEP Contractor in UAE following FIDIC 1987.In our variation claim for one of the project ,we claimed 5% overhead and 10 % mark-up as a normal proctice.But Now Consultant refuse to pay 10% mark-up by mentioning that,its has not been mentioned any conatract or conditions.pls advice me to substantiate my claim through clause.
your advice will be highly appreciated.

Answer

Please clarify which form of contract you are using, FIDIC 87, contracts for construction, Design and Build or EPC?

If its 87, Contracts for Construction, then, is there any agreed %age for Overhead and profit mentioned in contract or later agreed? if not then you need to have agreement on OH & P 1st with Client through Engineer.

Once the claim is submitted under 53.1, please use 53.3- Substantiation of claims. as this clause guides that in case of no agreement with engineer on the rates, engineer should certify any amount on account, which is reasonable in his view. Contractor can dispute his decision under clause 67.1 followed by 67.2 and 67.3.

3. variation work

Question

I have just been assigned as PM to a project in the closing stage. There are over 70 variations submitted by my predecessor and have approved ARF for budgetary purposes. The client after completion of work has began to issue the AVI (approved variation) at a fraction of the variation amount claiming that the BOQ rate is too high.
Client had occupied the project and is operating without a completion certificate. Authorities are penalizing. Completion certificate can't be obtained as NOC missing for items in client's scope that are incomplete. Client issued take over certificate for phase I and EOL period is over. Phase II take over certificate was submitted by consultant to client and is pending signature for over 60 days.
My question:

1- Does the take over certificate by client have any value in the absence of completion ertificate?

2- As a sub-contractor, how can I invoke any procedure if the main contractor is reluctant to invoke any legal action due to personal interest with the client in other projects?

Thank you in advance for any guidance you may give.

ANSWER

Please advise, which form of FIDIC Contracts you are using, 87-92 or 1999, red book or any other?

QUESTION:

Our contract is FIDIC 1999 red book.

Answer

I am sorry for delayed reply as I was not present in my office during EID Holidays.

Apparently this is difficult situation and as you advised, you are a sub-contractor and contract is based on FIDIC 99, well FIDIC Conditions of Contract for Construction 1999 can only be applicable to you once it is so written in your contract with Main Contractor that this contract is on back to Back. even in that case, not all the clauses are applicable. Generally FIDIC contracts for Sub-contractors are 1994 1st edition. So in order for me to answer you precisely, please let me know, Is your contract on Back to back basics? and if yes what does Particular Sub-contract conditions states about
1. Taking over and completion certificate
2. Variations and claims
3. Are you a nominated Sub-contractor?

Q# 1 while considering your have back to back sub-contract with Main Contractor and nothing in contrary is mentioned in Particular Conditions of Sub-contract then, You should issue a Fidic 1999, clause 14.10 "Statement at completion" including any remaining works not yet certified plus Variations. You should include all supporting documents you have to back such Variation claims such as but not limited to, Engineers Instructions, Your quotations, Engineers Approvals (if any) etc. this statement should be submitted within 84 days from Taking over certificate. and for areas where you dont have taking over certificate, If employer have occupied that section or area for his usage, a Taking over certificate is deemed to be issued. clause 10.2.

Completion certificate is required for many purposes such as marking Defect Liability period, application of Retention (5%) and for Your Banks. You are not supposed to be re-leaved from contract unless your have a completion certificate.

Q#2 Since the works has been carried out by you without any approval, so should follow clause 13.3 and write to Contractor under this clause and Unfulfilled Obligations 11.10.
I hope this helps you

4. Type of duration in FIDIC

Question

clause 60.8 at FIDIC 4 "Within 28 days after receipt of the final statement,...."
What type of days works or calendar?

Answer

Thank you for question and Eid Mumbarak.
As I understand from your question,the day mentioned in clause 60.8 refer to what type of day.It is normally "calandar day" unless mentioed otherwise in the contract.In case it is not what is what asked for ,please come back with axact details you wabt me to look into and provide my opinion.
Regards-Liaqat Hayat

5. Suspension of Contract

Question

QUESTION: Hello Sir!
I have a question regarding suspension of work.
Suppose in a Contract which is following FIDIC (Red Book,1987 or 1999, the Contract is terminated (either by the Employer or the Contractor).
In that event is there any Defect Liability Period for the part of works that has been done by the Contractor?
Also will retention be charged on the amount that is finally due to the contractor?
And will the Employer return the Performance Bond immediately after the notice of termination has been served?

ANSWER

I would request you to kindly specify your question for a certain situation, For Example:

Under FIDIC 87-92
If Employer terminates the contract on default of contractor (reason or default type) and a certain %age of works have been carried out.

Is there be any Defect Liability Period?
Does client has right to deduct retention on amount finally due to contractor?
when should Performance Bond be returned by Employer on termination or Notice of Termination?

I hope by specifying a problem or a particular situation, will be very helpful for me to answer exactly to your needs.

QUESTION:

Thanks a lot for your reply.

I would like to provide the following details as a follow up to my question:
1. The Employer had terminated the contract due to a default of the contractor and the contractor had already carried out a certain percentage of the works.
2. There is a defect liability period of 1 year in the contract with retention being 10% (5% to be released after taking over and 5% to be released after the defect liability period).
3. Performance Bond is to be valid till the end of the defect liability period after which the employer is to hand it over to contractor.

Answer

Under FIDIC 87-92, if the contract is terminated by employer due to contractor's default then Contractor should be responsible for defect liability for 1 year (clause 64.1) and 5% retention to be certified at "Payment after Termination" (Clause 63.3).

Performance Bond is returnable as soon as the termination is in effect.

6. Suspension of Contract

Question

I have a question regarding suspension of work.
Suppose in a Contract which is following FIDIC (Red Book,1987 or 1999, the Contract is terminated (either by the Employer or the Contractor).
In that event is there any Defect Liability Period for the part of works that has been done by the Contractor?
Also will retention be charged on the amount that is finally due to the contractor?
And will the Employer return the Performance Bond immediately after the notice of termination has been served?

Answer

Thanks for writing,
I would request you to kindly specify your question for a certain situation, For Example:

Under FIDIC 87-92
If Employer terminates the contract on default of contractor (reason or default type) and a certain %age of works have been carried out.

Is there be any Defect Liability Period?
Does client has right to deduct retention on amount finally due to contractor?
when should Performance Bond be returned by Employer on termination or Notice of Termination?

I hope by specifying a problem or a particular situation, will be very helpful for me to answer exactly to your needs.

7. Sectional Handing Over

Question

Hi Alina! This is Subhabrata. Hope you remember me. I'm sorry I could not honour your invitation to attend DRBF seminar in Romania. Can I ask a question?
Suppose in a Contract there is no sectional handing over. But can the Engineer/Client insert a Sectional Handing over once the project has started? If yes then how will the Liquidated damages for this setion be calculated provided the LD in the contract is 0.1% of Contract Value per day subject to a maximum of 10% of the Contract Value.
Please answer from a FIDIC 1987 or 1999 point of view.
Thanks in advance.

Answer

It's been long time since I did not hear from you!

The Engineer cannot change the Contract. It is the Employer which can initiate an addendum to the Contract to define Sections (amend 1.1.5.6, in case of FIDIC 1999, and Appendix to Tender), if they are not defined yet in the Contract. Having Sections defined, they can be handed/taken over separately, as per Sub-Clause 10.1 of FIDIC 1999.

The delay damages (liquidated damages) can, then, be calculated as percent from the value of the Section(s) remained not handed/taken over, and delayed beyond their contractual completion date because of the Contractor.

8. Revised Baseline Programme

Question

Please tell me after getting EOT, the revised baseline programme will be prepared on the original baseline programme or the latest updated programme?

ANSWER

It is based on neither. The revised baseline programme has to be based on the contractual completion date, so it must include the EoT, which is not necessarily consistent with the latest updated programme.

I hope that the above is useful and you can mark me 10.

QUESTION:

My question is after getting the EoT, which programme has to be modified as per the new contractual milestone dates. If it's the original baseline programme or the latest updated programme. Because, if the original baseline programme has to be modified, then you've to work on the already completed activities. But, if it's the latest updated programme, then only the ongoing activities and the activities which are not started yet are to be modified.

Answer

I presume that you submitted a programme to justify your claim for an EoT, and that this programme, or a

variation of it, was approved when the EoT was accepted. It is this programme that should be used to programme the remainder of the contract, i.e. one that takes account of accepted delays to the critical path and shows the actual durations of events before the delay event occurred. Basically, in order to get the new baseline, I suggest that you record the actual durations of events in the past, and modify the timing of future events as necessary, while using the logic and durations from the original baseline programme unless you need to vary them based on actual information, to ensure completion by the contractual completion date.

All very confusing, but I hope that you have understood the intent.

I hope that the above is useful and you can mark me 10.

9. Revised Baseline Programme

Question

Please tell me after getting EOT, the revised baseline programme will be prepared on the original baseline programme or the latest updated programme?

Answer
Hi Ansuman,

It is based on neither. The revised baseline programme has to be based on the contractual completion date, so it must include the EoT, which is not necessarily consistent with the latest updated programme.

I hope that the above is useful and you can mark me 10.

10. Quality

Question

we are working under fidic 87 amended 92. we have been asked to hand over an area for the client important event taking place on a certain date that if the area was not handed by then, client would have faced a huge loss of profit and would be v. embaressed. some of important details were received few days prior to handing over date, while others were newly revised faie enough time advance that could be applied. However, thanks to god, we could achieve the required handing over date and the client receives hios area and released it for its planned purposes on time. no time for inspection or snag was available for the client/ consultants/ engineer as we just reached the date by which the client wanted to use the area. Now, its few days from the client receipt date and all are claiming quality issues to the area that has never been addressed to us formally, meanwhile, we have issued our own quality snag list with the deffects we can recognize along with a handing over request one day prior to the usage date of the area, on official handing over date, we issued a request for TOC referring to our handing over request letter and the snags we listed ourselves and confirming all defects to be rectified within the defect liability period. is this ok and are we realy entitled to receive our TOC and what if the client refused counting onn the quality issues they are claiming that we did not follow the consultants details.
Thanks for your urgent reply.
Answer

The FIDIC 1987 (1992 revision) allows for the issuing of a TOC for any part of the permanent works which the Employer has elected to occupy or use prior to completion, where such was not allowed for in the Contract. Sub-clause 48.2(c) is relevant. The procedure which should have been followed at the relevant

time is the same as required for the issue of a TOC under sub-clause 48.1.

In response to a request for a TOC, the Engineer is obliged to take action within a limited time period. In theory you are entitled to your TOC but there may be other factors for consideration.

The extent to which the Contractor is liable for defects will depend upon the circumstances in the case and the notices that were given at the relevant time. Accordingly, in the absence of further knowledge of the facts, my answer at this time can only be considered as being for general guidance.

If the Engineer did not notify of any defects in the site area under discussion, it is arguable that there were none to be addressed by the Contractor. In those circumstances, whilst the Contractor does not provide for the Contractor issuing a snagging list, the list you submitted can be taken as a formal record of the position at that point in time.

If the Engineer is now identifying defects beyond those stated in the Contractor's notice, I suggest that you consider the nature of the alleged defects and how they might have arisen after the Employer's occupation of the area.

I hope that this assists. If you have any further information which might be of assistance to me in refining this general position, I will be pleased to consider it.

11. ayments For Pile Works In Design Build Lumpsum Contracts

Question

This Is A Design Build Lump Sum Contract For Construction Of A Recreational Building. The Contractor Submitted Architectural Drawings Only And Boq. At The Boq The Contractor Priced 150.0 Piles With Unit Rate 1200$ For Each Pile. After Contract The Contract Submitted Structural Drawings Contain Only 90.0 Piles And The Contractor's Proposal Approved By The Engineer. But The Engineer Deducted The 60.0 Piles From The Contractor's Payment. The Engineer Approved Only In The Payment For 90.0 Piles In Accordance To Boq Unit Rate. Is It True To Pay For Actual Quantity Only Although The Contract Is A Lump Sum Contract And The Boq Is Only Guidance For Payments.

Answer

Forgive Me Pointing This Out But If You Use Only Capitals It Is Considered As Shouting And Not Very Polite. Also It Is Difficult To Read!

Assuming that there is nothing in the Contract specifying how to deal with this situation, ask the Engineer how he intends to deal with extra quantities, if they are shown on the drawings. Will he pay you the extra cost for concrete, rebar or marble over the quantities or cost in the tender BoQ? I doubt it, as it is not a remeasured contract. Contracts are a two way street with shared risks. The Employer gives up his rights to play about with quantities and prices in return for a fixed price. Thus he should pay you the full price shown in the BoQ for the piles. If he continues to refuse to pay the full amount, put in a claim for the omitted amounted and go to arbitration if necessary.
I hope that the above is useful and you can mark me 10.

12. Failure to perform

Question

If a contractor leaves the job in the State of North Carolina, with the work incomplete, do I invite him back to complete the work? or do I hire another contractor to finish the job? I cannot afford to have the job sit incomplete. Thank you.

Answer

I do not know what is written in your contract with the builder, but under most common law systems, you have to give the contractor written notice of non-compliant and unfinished work and adequate time, perhaps 14 days to finish the work or at least return to site with the intention of finishing the work. Then you get three bids, pick the best and engage a new contractor to finish the project. Have a look at some earlier answers

I hope that the above is useful and you can mark me 10.

13. Omission of NSC Works

QUESTION

We are following FIDIC 1987 conditions of contract. In our BOQ one item of work was mentioned in Provisional Sums as being an NSC package (over which we have our own mark-up). However the Client has omitted this item of work and converted it to a Direct Contract. How can we contest their decision?

ANSWER

Why do you want to contest his decision? Where is the profit for you in doing so? At most you are losing a lot of hassle and a little profit.

QUESTION

The reason we want to contest the decision is because the NSC (now a direct contractor) is going to use our resources and we have to manage them and their programme of works is related to our programme.

I hope you understand our situation. Waiting for your reply. Thanks in advance.

Answer

I understand where you are coming from but look on the bright side. I suggest that you would be ill-advised to contest the decision for the following reasons:-

1. You are no longer responsible for the progress of the NSC;

2. You can charge the NSC what you like for the use of your resources by the NSC (don't be greedy);

3. You can charge the Employer what you like for managing their Works (don't be greedy);

4. If they fail to meet your programme requirements you have a solid basis for a claim for an EoT;

5. You have no contractual grounds for contesting the decision.

I suggest that you ensure that the VO is written so that you protect your interests. NSC's are an anathema,

full responsibility with no authority, and to be avoided by contractors at all costs. Other contractors are a nuisance but at least the risk is clear.

I hope that the above is useful and you can mark me 10.

14. Nominated/Named subcontractor

Question

I am working as a senior quantity surveyor in a consultancy firm. We have certain provisional sum items in the BOQ which is to be executed by named subcontractors at the dicretion of the engineer. Now on behalf of the employer we have obtained quotation from a named subcontractor who is approved by the employer and have instructed the contractor to make him as the sub contractor. But the contractor says the time required by the subcontractor is exceptionally high as included in the quotation and demands an extention of time on this account. Could you pls. guide me on this regard.

Answer

There are two factors, within the outline you have provided, which might give the Contractor entitlement to an extension of the Time for Completion. Firstly the work to be undertaken was the subject of a Provisional Sum item under the original tender. Secondly, the Employer has chosen the sub-contractor and, possibly, engaged in extensive dialogue with that sub-contractor, with or without the presence of the Contractor.

If the scope/extent of the work now required in respect of the provisional sum item was not foreseeable at the time of tender, and the Contractor was not previously guided as to the anticipated duration to be allowed within this programme/schedule of work, how can he have allowed for it? On that basis he might have an entitlement to additional time; the extent of the entitlement being dependent upon an analysis of the overall circumstances, not just the (additional) work now instructed.

Similarly, if the Contractor has not had the opportunity of negotiating with the sub-contractor, or the sub-contractor's programme/schedule for delivery of the sub-contract works is such that the Contractor cannot reasonably accommodate him without an extension, the Contractor may have entitlement to additional time. Once again the extent of the entitlement being dependent upon an analysis of the overall circumstances, not just the (additional) work now instructed.

I hope that this guides you. I will be pleased to consider any further information relating to this query or any other question you might have.

15. Measurement and evaluation

Question

I have the following doubt regarding clause # 12.3 of FIDIC 1999 red book

As per this clause, an appropriate rate or price will be fixed under the following circumstances

(1) The measured quantity of the item is changed by more than 10% from the quantity of this item in the BOQ or other schedules

(2) this change in quantity multiplied by such specified rate for this item exceeds 0.01% of the accepted contract amount and so on

But FIDIC does not say anything about how the adjustment to be made to the specified rate for such items in the BOQ under the above circumstances

Could you please guide me how these adjustments can be made

Answer

This is the tough part of contract administration. The Contractor has to make his case for a varied rate and the Engineer has to review and vary or approve it.

How the Contractor will make his case will vary from contractor to contractor and depends on the detailed cost data that is available. Essentially, he has to show how his costs have varied due to the variation in quantities. It could be that he has reduced overhead and profit recovery due to a smaller quantity, and thus needs to increase his unit rate to recover these costs. It could be that he has to use a smaller machine or work with hand labour and thus has lost the economies of scale. It could be that the quantity has increased and thus only marginal costs are involved, giving a reduced rate for the increase only.

Your question enters the realm of how long is a piece of string as the solution varies from case to case. Resolution of this type of problem is the reason for your high salary.

I hope that the above is useful and you can mark me 10.

16. Lump sum contracts

Question

In case of lump Sum type contracts, how can a consultant deal with the following:

1. Deletion of complete items from the contract.
2. Deletion of only sub items from the contract such as ceiling plaster while other plaster remains.

ANSWER

Thank you for your query.
Prior answering it, please detail a bit what are you referring to.

When that deletion occurs? Why? What is the overall context?
Please get back to me with these details, so I know what answer you need.
Look forward hearing from you.

QUESTION:

Both questions refer to activities during the construction stage and both are for the purpose of reducing cost to the Employer.

Answer

Thank you for coming back with these details.

1. If certain works were completed, they are to be paid for. Or, most often, even for works not carried out, but for which, related expenditure has been incurred by the Contractor.

2. Other items that were not made, may be possible, but only depending on actual Conditions of Contract. Often contracts indicate that Employer can not omit works for executing them himself or hire someone else.

Hope that answer your queries, but should you need further support, please develop your questions, I'll be glad to help.

Good luck!

17. Letter of intent

Question

we have received from the project manager, the LOI for a project. contract under fidic 1987 amended 1992. the PM added a statement within the LOI that states" as agreed in meetings held with contractor and as the mockup room has been reviewed along with contract drawings, specs and B.O.Q's, accordingly, no additional works variations to the contract value shall be considered".
we believe this is a critical condition and we feel this is a way not to pay the contractor any extra fees for the extra works that for sure will arise in case of any design miscoordination.
how can we handle this as we wish to sign this contract meanwhile, we want to reserve our rights for variation value that certainly would appear upon actual work starts.
Appreciating your urgent response so as to comment on this condition and if we should accept or decline.

Answer

Thanks for writing,

Apparently, This statement represents a grey area and can lead to future problems even though if Client's PM doesnot mean any harm.

I would suggest to re-phrase it to something more clear and accurate. for example as below

"as agreed in meetings held with contractor and as the mockup room has been reviewed along with contract drawings, specs and B.O.Q's, accordingly, no additional works variations to the contract value shall be considered unless there is any change in drawings, specs or scope outside the provision of this LOI"

or better to stick with Clause 53- Variations

"as agreed in meetings held with contractor and as the mockup room has been reviewed along with contract drawings, specs and B.O.Q's, accordingly, Variations shall be handled under the provision of FIDIC 87-92, clause 53"

or

"as agreed in meetings held with contractor and as the mockup room has been reviewed along with contract drawings, specs and B.O.Q's, accordingly, no additional works variations to the contract value shall be considered unless additional work and time is required for the proper completion of contracted works"

I recommend to re-phrase and discuss this with Client's PM before signing, since this is more fare to all parties.

18. Tiling works 2 yrs 7 mths ago

Question

I STONE TILED A BATHROOM OVER 2 AND A HALF YEARS AGO.Stone should be resealed every 12 mths, the customer has advised me a couple of tiles have fallen off the wall. They have clearly not resealed since job was finished and are demanding i repair and foot the cost, how do i stand??

Answer

Thank you for your question.

A precise answer to this will be dependent upon knowledge of the original agreement that you had; however with the passage of time, I do not think that you are at serious risk of liability.

Factors that will be important are:

- whether you supplied the materials, or worked on a labour only basis;
- whether you told the customer that the tiles required regular maintenance;
- whether you offered a warranty on your work.

In many cases, even if a warranty was offered the lapsed time since completion is such that the customer would have difficulty in enforcing same, unless the warranty was in writing and for a period of more than the time that has passed. In the absence of a written warranty the customer will have to show defective workmanship on your part.

I hope that this assists and will be pleased to answer any further query that you might have.

19. Fidic Red Book 1999 Edition- Re-measurment Contract

Question

My question refer to clause 12.3(a). In order that these tresholds are applicable, does the change in quantity has to be due to a discripancy between the quantity of the BOQ and the Contract drawings only or the omissions and additions to quantities, of similar character, due to variations have to be taken into consideration.

I am faced with the following situation on the project I am working on;

Boq item for ground slabs 10000m2 measured quantities 8800m2 for area indicated on contract drawings. However a variation has been issued for the construction of reservior which a concrete ground slab of 2000m2 has to be cast.
In relation to the above can I claim for a re-rate?
Thanks in advance for your advise,

Answer

Nice try, but I would say no chance.
The theory is that you have based your pricing and work strategy on the quantities in the BoQ. Thus you would get a new rate if the variation met all four of the conditions in clause 12.3(a). However the variation has not varied from the quantity in the BoQ, so hard luck. Have you really suffered a loss, in the logic of the Contract? Perhaps you under bid the item, but that is life. It does not mean that you can rerate an item. If you won, then you made a mistake somewhere. This might be it.

I hope that the above is useful and you can mark me 10.

20. Force Majeure

Question

I have some questions regarding Force Majeure events.
1. Suppose in a contract which follows FIDIC 1999 Conditions of Contract Force Majeure events are listed. Is that list final i.e. can no other event be described as a Force Majeure event (for example suppose tsunami is not described as a Force Majeure event, but if the Works are affected by tsunami will it be considered to be a Force Majeure event?)

2. Can astronomical price hike for a material or unavailability of a material due to war in a neighbouring country be considered as Force Majeure event? Or unforeseen circumstances? Suppose there is no provision for price escalation.

3. If a contractor is granted an Extension of Time for a Force Majeure event, what are the extra costs that he can claim (for example - Extra Preliminaries)?

Waiting for your reply. Thanks in advance.

Answer

If you are looking at the FIDIC 1999 Red Book conditions of contract, the listing of Force Majeure events is specifically qualified as not being a closed list; it states "Force Majeure may include, but is not limited to, exceptional events ...." This is also reinforced by sub-clause 19.4(b) which indicates "if the event or circumstance is of a kind described in ..."

In circumstances when the contract term is silent on whether the list is a closed list, much will depend upon the wording of the relevant clause; however there is a general principle, in some legal jurisdictions, that the words should be interpreted as defining the type of event and similar events would be included.

Regarding the price increase, it is likely that the effect of war in a neighbouring country (which created adverse trading countries in the adjacent country) would be considered as a force majeure event. Again the wording of the particular contract will be important.

In relation to the FIDIC 1999 Red Book, the requirements such that an event would be considered as Force

Majeure are set out in paragraphs 19.1(a)-(d). If the unforeseen circumstance meets those criteria the event may qualify as a Force majeure event. Dependent upon there being no contrary provisions within the contract, the law of the contract or the local law, this will apply even if there is no price escalation clause. Usually a right to a legal remedy will not be excluded unless the contract contains very clear wording omitting that wording. In this respect, careful attention should be paid to sub-clause 19.4(b) which indicates that costs will only be paid if the event or circumstance occurs "in the Country".

The war itself is not within the country, but the effect is. The unusual and unforeseen price increase falls within the criteria of 19.1(a)-(d); but the price increase is not an event of the kind described within 19.1(i)-(v). On this analysis the costs increase in consequence of the war might not be allowed.

As to whether the war is an unforeseen circumstance, it is in relation to the provisions of 19.1(a)-(d) but not in relation to the context of unforeseeable as used in sub-clause 4.12 of the FIDIC 1999 Red Book.

Concerning the claimable costs, the FIDIC 1999 Red Book contract defines which costs can be claimed. This is found within sub-clause 19.4. Any event which is of the kind of event described under sub-clause 19.1 (ii)-(iv) will give entitlement to Cost - as defined at sub-clause 1.1.4.3 - which includes overheads and similar charges. (Preliminaries would fall within this broad definition). Providing the cost of the preliminaries costs have been "reasonably incurred" they should be reimbursable.

I hope that this guides you. I will be pleased to consider any further query you have.

21. Fidic Red Book 1999 Edition- Re-measurment Contract

Question

My question refer to clause 12.3(a). In order that these tresholds are applicable, does the change in quantity has to be due to a discripancy between the quantity of the BOQ and the Contract drawings only or the omissions and additions to quantities, of similar character, due to variations have to be taken into consideration.

I am faced with the following situation on the project I am working on;

Boq item for ground slabs 10000m2 measured quantities 8800m2 for area indicated on contract drawings. However a variation has been issued for the construction of reservior which a concrete ground slab of 2000m2 has to be cast.

In relation to the above can I claim for a re-rate?

Thanks in advance for your advise,

ANSWER

Nice try, but I would say no chance.
The theory is that you have based your pricing and work strategy on the quantities in the BoQ. Thus you would get a new rate if the variation met all four of the conditions in clause 12.3(a). However the variation has not varied from the quantity in the BoQ, so hard luck. Have you really suffered a loss, in the logic of the Contract? Perhaps you under bid the item, but that is life. It does not mean that you can rerate an item. If you won, then you made a mistake somewhere. This might be it.

I hope that the above is useful and you can mark me 10.

QUESTION

Thanks for your previous answer. I have a further question relating to this clause. If the quantity didn't increased/decreased because there was a variation of similar character, would the tresh holds apply if the cause of the change in quantity was only due to under/over measurment of the BOQ quantities?

Thanks in advance for your kind advice.

Answer

Clause 12.3.a.i states (if) the measured quantity of the item is changed by more than 10% from the quantity of this item in the Bill of Quantities or other Schedule, ... then ....

The wording is quite clear and the guide supports the wording. If the quantity is incorrectly measured and the FOUR conditions are met, then you are entitled to a varied rate. However, you might have to make a claim under clause 20. Any delay in submitting your claim could be justified by saying that you expected the Engineer to order extra work to compensate for any over measurement.

I hope that the above is useful and you can mark me 10.

22. FIDIC claims

Question

If I 'am trying to develop a computer work sheets by EXCEL. To ease the claims process by FIDIC.
As an expert what do you expect to find in such sheets.

Answer

I will expect reference to contracted scope of work and their comparison with Varied work, why its a claim (a brief), its amount and number of days in extension (if applicable), Notice dates according to FIDIC and its outcome. %age of contracted amount (plus minus)

for more details you can add every submission and its outcome

23. FIDIC 1999 Fluctuations

Question

A contract was entered into which included sub-clause 13.8 but no table of data was included in the Appendix, therefore I assume that this sub-clause cannot apply. However the contract lists materials that will be subject to fluctuating prices. How do you believe the fluctuating price provision can be operated? Most prices have gone down and the Engineer believes that OH&P adjustments should also be applied. We feel it should be the net amount only. I know this is the case under JCT where it refers to net increases or decreases.

ANSWER:

FIDIC 1999 in UK - most unusual - hope that it has been modified to conform with UK law.

I am missing something here.

'In this Sub-Clause, "table of adjustment data" means the completed table of adjustment data included in the Appendix to Tender. If there is no such table of adjustment data, this Sub-Clause shall not apply.'

That says it all. There is no price fluctuation and the Contractor priced the Contract on that basis so what is the Engineer on about. Does it say somewhere that, by the way, although there is no price fluctuation table, these items will be subject to price fluctuations? What indices will you use, Basxter, CPI, or ...? The Employer, or his agent, made a mistake in writing the Contract. The lawyers will love this one and make a fortune. Stop arguing about how to apply something outside the Contract and apply the Contract.

I hope that the above is useful and you can mark me 10. If not, please submit a follow up question with more details.

QUESTION

Thanks for the response.

This contract is being operated outside of the UK, it was negotiated between the parties 'in a hurry' and many things that should have been in the Appendix have 'to be agreed' against them. The Parties both agreed that fluctuations should apply so that inflation costs need not be included and a hand written clause was added listing those items subject to fluctuations however no actual mechanism for applying the fluctuations was included and no indices referred to, in fact there are none available in this jurisdiction. There is no doubt that it was the intention of the parties that fluctuations should apply therefore I do not believe it is outside the Contract, however 13.8 cannot apply for the reason stated above. I believe 13.8 is only a mechanism for calculating fluctuations and if it does not apply it would not automatically mean that there would be no fluctuations only that the formula approach could not be applied. The Engineer argues that if 13.8 had been applicable then the formula would have allowed for the adjustment of OH&P. The Contractor believes the fluctuation calculation should be the net difference in the price of the materials as the handwritten clause makes no specific reference to OH&P.

ANSWER

This going to run and run. Marry in haste, repent at leisure. Even more so with construction contracts. No formulas agreed, no indices, no coefficients, no baseline prices. Well well. How to apply the intent of the parties. As I said the lawyers will be eating out on this contract for many years. Already you have disagreement and you have not reached the details yet.
The OHP is not part of the formula, except that it is a component of each bill rate. The formula applies to inputs, such as plant, labour, materials, not not rates or OHP, so how does the Engineer support his statement.

Even if you think that the specific FIDIC formula does not apply, you will be forced to agree some form of formula to calculate inflation multipliers. Why reinvent the wheel?

I hope that the above is useful and you can mark me 10. If not, please submit a follow up question with more details.

QUESTION

I believe the Engineer supports it because the formula refers to the Contract Sum which includes OH&P. He is not trying to adjust rates, he is taking the net difference in the cost of the listed materials (base prices were agreed)and then deducts the OH&P percentage - prices have generally decreased - I assume if they had gone up he would have added it on, but who knows? Our argument is that OH&P should remain as tendered and should not therefore be reduced because fluctuating prices have reduced the cost of the materials.

Answer

This clause is appropriate.

'To the extent that full compensation for any rise or fall in Costs is not covered by the provisions of this or other Clauses, the Accepted Contract Amount shall be deemed to have included amounts to cover the contingency of other rises and falls in costs.'

Inflation formulae work on inputs of basic resources. If diesel is estimated to be 1% of the total price, then the coefficient is applied to the variation in cost of diesel only. It is not applied to the rate for earthmoving, which includes other inputs and OHP. The resulting multiplier is applied to the value of the relevant IPC. If the agreed base prices included OHP, then the Engineer is correct. If the agreed base prices were market prices, excluding OHP, the Engineer is wrong.

I hope that the above is useful and you can now mark me 10.

24. FIDIC 1999 Fluctuations

Question

A contract was entered into which included sub-clause 13.8 but no table of data was included in the Appendix, therefore I assume that this sub-clause cannot apply. However the contract lists materials that will be subject to fluctuating prices. How do you believe the fluctuating price provision can be operated? Most prices have gone down and the Engineer believes that OH&P adjustments should also be applied. We feel it should be the net amount only. I know this is the case under JCT where it refers to net increases or decreases.

Answer

FIDIC 1999 in UK - most unusual - hope that it has been modified to conform with UK law.

I am missing something here.

'In this Sub-Clause, "table of adjustment data" means the completed table of adjustment data included in the Appendix to Tender. If there is no such table of adjustment data, this Sub-Clause shall not apply.'

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I hope that the above is useful and you can mark me 10. If not, please submit a follow up question with

more details.

25. Fidic; Value Engineering

Question

We are currently under contract for the construction of residential apartments. The conditions of contract regulating the works are Fidic 'Red Book' 1999 edition and works are to re measured. The engineer required for scaffolding to be erected along the facades of the block of apartments to serve as unloding bays for the finishing contractors. The engineer requested our quotation for this variation.In our contract schedule of rate we have an item for propriety scaffolding at 50 euros per m2 per week. Therefor for erecting 200m2 of scaffolding it will cost 10,000 euros per week. We have proposed an alternative solution which will cost 3,000 euros per week. In regards to this are we entitiled for 50% of the savings as per clause 13.2 Value engineering.

Thanks in advance for your answer,

Answer

At first glance you are due the 50% under clause 13.2. However I suggest that you get the Engineer's agreement to the cost of 10,000 Euros before submitting your alternative. Otherwise, the Engineer might take your alternative submission as your prime solution and deny you the value engineering.

I hope that the above is useful and you can mark me 10.

26. Extension of time

Question

I am working on a railway line construction contract governed by FIDIC -works of civil engineering construction-fourth edition.The date of completition for the work is going to expire and the progress of works has been only 50% due to reasons attributable to the employer as there has been considerable delay in given access to sites and empoyer issue free material.
My question is: Can i walk out of the contract as i have committments elsewhere as already one EOT given by me has expired.
Secondly what options does the emloyer and me have in case of continuation of work.
Thirdly who is supposed to apply for EOT as per my understanding i cannot judge the availability of

employer inputs. pl advise.

Answer

I have following general approach to decide line of action in such cases. I can only give a general scenario as you need to be guided by specific project needs and contractual obligations.
1.The Contractor is entitled for extension of time if there is any delay, impediment or prevention by the Employer under clause 44 with or without financial compensation depending on the nature of the default by the Employer and also on the valid documentation/contemporary record maintained. It is duty of the Engineer to give his assessment after due consultation with the Employer and the Contractor. Also, under clause 69.1, the Contractor is entitled to terminate his employment under the Contract by giving 14 days notice to the Employer. Here the Employer by not giving access to sites is obstructing the work and is hence liable for action by the Contractor under this clause 69. Regarding your first question, you have to decide keeping this contractual position in view.
2.Your second question is also somewhat relate to explanation given in Para 1 above.
3.Regarding your 3rd question, I may refer to FIDIC-IV clause 44.2 in which any extension in time needs to be applied by the Contractor but there is no bar if the Engineer independently make a determination on this account. It all depend on your particular circumstances, exchange of correspondence and Engineer's opinion on this account.

Question

I am working on a railway line construction contract governed by FIDIC -works of civil engineering construction-fourth edition.The date of completition for the work is going to expire and the progress of works has been only 50% due to reasons attributable to the employer as there has been considerable delay in given access to sites and empoyer issue free material.
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Secondly what options does the emloyer and me have in case of continuation of work.
Thirdly who is supposed to apply for EOT as per my understanding i cannot judge the availability of employer inputs. pl advise.
Thanks

ANSWER

I have following general approach to decide line of action in such cases. I can only give a general scenario as you need to be guided by specific project needs and contractual obligations.

1.The Contractor is entitled for extension of time if there is any delay, impediment or prevention by the Employer under clause 44 with or without financial compensation depending on the nature of the default by the Employer and also on the valid documentation/contemporary record maintained. It is duty of the Engineer to give his assessment after due consultation with the Employer and the Contractor. Also, under clause 69.1, the Contractor is entitled to terminate his employment under the Contract by giving 14 days notice to the Employer. Here the Employer by not giving access to sites is obstructing the work and is hence liable for action by the Contractor under this clause 69. Regarding your first question, you have to decide keeping this contractual position in view.

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account. It all depend on your particular circumstances, exchange of correspondence and Engineer's opinion on this account.

QUESTION

As per our mutual understanding we have now agreed for EOT by four months for completition of a major work.Many subsidariy and ancillary works listed in BOQ will still be pending after four months and access to sites for these works will be available.
My question is:
I intend to back out from these ancillary works after four months .Am i entitled to loss of profit and what other costs can be recovered from the cleint or the client will raise damages aganist me. Please reply, Thanks
ANSWER:

Thanks for giving more details. I am of the view that subsidiary and ancillary works mentioned by you, if are part of your scope of work in the contract, are to receive same consideration for the other work that is to be completed within 4 months. I suggest that you go through your contractual obligation again before taking / not taking any further action.
QUESTION

Thanks for your prompt reply. As regards to subsidary and ancillary works i wish to inform you that we will be taking those in the four months EOT period but due to huge accumulation of backlogs of subsidary and ancillary works on account of the client it will take another year to complete.
My question is:Can i back out of the contract after 4 months even when there is access to site on account of my commitments elsewhere.
secondly am i entitled to loss of profit and other costs on balance works on the date of back out

Answer

Thank you for providing more details on your questions my response will be as follows:

Q1.This leads to consideration as Contractor's default under clause 63 of FIDIC-IV and hence will not suggest you. Is there a clause in your contract for termination of contract for convenience of either party?

Q2.I do not think so unless it is by mutual agreement. In that case too contractor's losses shall be balanced against that of the employer and the resultant figure could be against contractor as well.

I hope this clarifies my approach on the subject.

Question

I am working on a railway project in Africa and FIDIC Works of civil engg. construction fouth edition part 1 and II is applicabale.The work has been delayed on account of the employer due to no acess to sites and non availability of sufficent material inputs to be provided by the employer.The date of completion is going to expire in a week and still there is lot of balance works. already we have given one EOT for nine months which is going to expire.
My question is:

1) Can i back out of the contract and will be entitled to loss of profit and costs from the cleint.

2) if i give a conditional EOT for completition of major works and advise the cleint to do subsidary and ancillary works of BOQ themselves, will i be entitled to loss of profit and other costs even when access to

sites for those items are available.

Answer

1. Not really
2. Not really

You need to come to an equitable solution with the Employer, unless the work has been suspended for more than 84 days under clause 40.3.

I hope that the above is useful to you and you can mark me 10.

Question

I am working on a railway line construction contract governed by FIDIC -works of civil engineering construction-fourth edition.The date of completition for the work is going to expire and the progress of works has been only 50% due to reasons attributable to the employer as there has been considerable delay in given access to sites and empoyer issue free material.
My question is: Can i walk out of the contract as i have committments elsewhere as already one EOT given by me has expired.
Secondly what options does the emloyer and me have in case of continuation of work.
Thirdly who is supposed to apply for EOT as per my understanding i cannot judge the availability of employer inputs. pl advise.
Thanks

ANSWER

I have following general approach to decide line of action in such cases. I can only give a general scenario as you need to be guided by specific project needs and contractual obligations.
1.The Contractor is entitled for extension of time if there is any delay, impediment or prevention by the Employer under clause 44 with or without financial compensation depending on the nature of the default by the Employer and also on the valid documentation/contemporary record maintained. It is duty of the Engineer to give his assessment after due consultation with the Employer and the Contractor. Also, under clause 69.1, the Contractor is entitled to terminate his employment under the Contract by giving 14 days notice to the Employer. Here the Employer by not giving access to sites is obstructing the work and is hence liable for action by the Contractor under this clause 69. Regarding your first question, you have to decide keeping this contractual position in view.
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QUESTION:

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My question is:
I intend to back out from these ancillary works after four months .Am i entitled to loss of profit and what other costs can be recovered from the cleint or the client will raise damages aganist me. Please reply,
Thanks

Answer

Thanks for giving more details. I am of the view that subsidiary and ancillary works mentioned by you, if are part of your scope of work in the contract, are to receive same consideration for the other work that is to be completed within 4 months. I suggest that you go through your contractual obligation again before taking / not taking any further action.

27. Evaluation sub-clause 12.3; Fidic 1999 red book, re-Measurement

Question

If the re-measured quantity of an item is less than the quantity of the item in the BOQ (quantity in BOQ is over measured),does it has to meet all the tresh holds in sub-clause 12.3(a) or meeting one is enough is to claim for a re-rate?

Does the Engineer have the right to reduce the Contract completion date because he becomes aware that there is an error in the quantity of the BOQ item ? and on the other hand if the quantities in the BOQ are under measured can the contractor claim for an extension of time?

Answer

Thank you for this question. It is good to hear from you again.

Under sub-clause 12.3(a), points (i) and (ii) are to be considered separately; points (iii) and (iv) are to be considered together. In the situation you have outlined, a reduction in quantity can be considered under 12.3(a)(i) alone.

With regard to the Time for Completion, the Contract does not provide for a reduction in the time. However, when an extension is claimed and being considered the Engineer can take account of all material factors including changes in quantities.

If the reduction in quantity is the sole factor for consideration, which would be very unusual, the Engineer cannot reduce the Time for Completion (whether or not previously extended). Where multiple factors are involved, the net effect of which would give an entitlement to an extension the Engineer can award against the net effect. If the net effect is a reduction, no change can be made.

Whilst the Engineer cannot make such change, it is open for the Employer and the Contractor to agree a reduction in the Time for Completion.

I hope that this assists you. I will be pleased to answer any further query you have or consider additional information relating to this query.

28. Escalation

Question

Can the down payment that the client has given you in the beginning of a contract, which will be taken off at an agreed percentage every month be taken off your amount to be escalated?

Answer

The answer to that is no. I am not aware of your particular case, nor do I see the benefit.

Thus should you consider useful and if you could develop a bit your case, I'll be glad to further look at the matter.

Good luck.

29. Scontractor breached a contract with subcontractor

Question

Hi, my boyfriend worked as a subcontractor to one company through the contractor. He doesn;t have a contract on a paper with the contractor, but he has a letter from the company itself, that he worked there. After the job was finished the contractor failed to pay money. Does my boyfriend has any right to promised pay for his work that he did?

Answer

Thank you for your question.

I am not an expert in UK law and not having a written contract may make it difficult.

However, I believe that having that letter (depends what it says) and if he can manage to get some witnesses to testify his position, he may have a chance in court.

I suspect he can at least prove he worked there, while the company can not prove a payment has been made.

It obviously remains to demonstrate the amount he claims.

Good luck and next time, advise him to put it on paper, or at least ensure there are witnesses.

30. Contractor's Claim

Question

A contract was awarded to a Contractor after his submission of Performance Guaranty. The Contractor also furnished the Mobilization Security. But after one month of the award before commencement of work the Employer deferred the work rather conveyed that the concerned work was no more required.
The Contractor then notified that due to deferment of work he must be compensated for the expenditures made by him so far, cost incurred for the preparation of bid, for the charges for arranging the securities etc. Now the question is what type of compensation will be made to the Contractor?, the cost incurred for the preparation of bid, for the charges for arranging the securities, overhead & profit etc.

FIDIC 4th is used

ANSWER

This is termination for convenience or optional termination - it is not the Contractor’s fault, but the Employer does not need anymore the works tendered and awarded...
This case, the Contractor will be compensated for the Costs he incurred in the scope of the Contract.
In many Tender Documents provided by the Contracting Authorities it is written that the Contracting Authority can at any time renounce to go ahead with the Tender, and the costs related to the tender preparation and the costs with the guarantees will be not compensated/reimbursed – they are the Tenderer's risk - check if it is not the case here.
In the other hand, if the Contract provision according to which "The Contractor shall obtain (at his cost) a Performance Guarantee/Security" remained unchanged in the particular conditions of contract, and other guarantees/securities (such as Mobilization Security you have mentioned) are, according to the Contract, to be obtained by the Contractor and the Contractor did so, and incurred Costs, these Costs are to be reimbursed in case of termination for convenience, or optional termination (subject to not being otherwise written in the Tender Documents, as mentioned above).

QUESTION

What about overhead and profit? are these included in the scope of contract and will be worked out and compensated.

Answer

In FIDIC contracts, "Cost" means all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit. Therefore, whenever there are Costs to be recovered, it means that they include overhead, as well.

The profit is to be paid to the Contractor in the specific cases when, during the execution of the works, the Employer caused, by his actions, delays and Costs to the Contractor. In case of optional termination/termination by convenience, there is no profit mentioned, but only Costs.

The only case when the Contractor is entitled to be paid the loss of profit is when the Contractor is entitled and does terminate the Contract.

Question

A contract was awarded to a Contractor after his submission of Performance Guaranty. The Contractor also furnished the Mobilization Security. But after one month of the award before commencement of work the Employer deferred the work rather conveyed that the concerned work was no more required.
The Contractor then notified that due to deferment of work he must be compensated for the expenditures made by him so far, cost incurred for the preparation of bid, for the charges for arranging the securities etc.
Now the question is what type of compensation will be made to the Contractor?, the cost incurred for the preparation of bid, for the charges for arranging the securities, overhead & profit etc.
FIDIC 4th is used

Answer

This is termination for convenience or optional termination - it is not the Contractor’s fault, but the

Employer does not need anymore the works tendered and awarded...
This case, the Contractor will be compensated for the Costs he incurred in the scope of the Contract.
In many Tender Documents provided by the Contracting Authorities it is written that the Contracting Authority can at any time renounce to go ahead with the Tender, and the costs related to the tender preparation and the costs with the guarantees will be not compensated/reimbursed – they are the Tenderer's risk - check if it is not the case here.
In the other hand, if the Contract provision according to which "The Contractor shall obtain (at his cost) a Performance Guarantee/Security" remained unchanged in the particular conditions of contract, and other guarantees/securities (such as Mobilization Security you have mentioned) are, according to the Contract, to be obtained by the Contractor and the Contractor did so, and incurred Costs, these Costs are to be reimbursed in case of termination for convenience, or optional termination (subject to not being otherwise written in the Tender Documents, as mentioned above).

31. Change of Method of Contraction - A Variation?

Question

Our contract is FIDIC 1988 and I am working with the contractor. The Engineer instructed us to propose cost reduction due to change of method of sand filling from the original dry fill (dump truck and excavator) to direct hydraulic pump fill. Such change of method has been approved by the Engineer and he issued instruction to carry such work in accordance with such method.

My questions are:
1. Does the change of method of construction from dry fill to hydraulic fill considered as a modification (of Specification) covered under Clause 51(c) "change of character or quality of kind of any such work" that the Engineer can issue a Variation?

2. Does the modification of Specification always operate under Clause 51 wherein any modification of the Specifications gives right to the Engineer to issue a Variation?

3. Or, are there any instances where modification of Specification, as long as it does not "change the character, quality or kind of any such work", give NO right to the Engineer to issue a Variation?

Answer

1. Yes
2. Yes
3. Not that I know of, except perhaps if the contract between the Engineer and the Employer forbids it, usually on the basis of cost or time.

I get the impression that you are giving me selected facts. I suggest that the real problem might be that you do not wish to change the method for financial or programming reasons. So provide the evidence to convince the Engineer or make a claim and continue until you reach arbitration. Use the provisions of the contract to protect your interests.

I hope that the above is useful and you can mark me 10. If not, please submit a follow up question with more details.

32. Builder keeps delaying closing date

Question

I singed a contract to build a new home in Virginia in May 2009. Our original closing date was Sept 8th. We signed an addendum at the builders request to extend to Oct 8th. Now, the builder wants to delay closing until Oct 28th. I have already paid the builder a substantial payment to start construction. Since the contract was signed the home values in this area have rebounded somewhat, making the finished home somewhat more valuable than what we are paying. I assume that he will be in breach of contract if we don't close due to the house not being done. What is my recourse if I do not agree to the new date?

ANSWER

Has the builder given any reason for the extension he has requested?
What form of written agreement, if any, do you have with the builder?

QUESTION

Yes, we have a written contract. This would be an addendum added to the contract.

He blames the county inspectors for being late. I have talked to the county, they were 5 days late on one inspection.

Answer

Eric,

Thank you for the additional information.

The written contract that you have should be the first point of reference to determine the rights and obligations of the Parties. In the absence of any specific remedy it will be necessary to review the agreement to determine whether any remedy has been excluded or whether remedies are to be implied (by reference to the local law and/or trade practice).

As your builder is claiming an extension of time, perhaps you should ask him to write to you providing the details of the grounds upon which he is basing his request. Only then can you research and answer them properly. It will be too easy for the builder to say one thing now and another thing later.

It is for the builder to demonstrate his case for an extension. In the absence of a case, you do not have to make any further amendment to the contract/agreement and you can enforce performance. The potential danger is that the builder could decide to walk away from the job, leaving you the difficulty of engaging another contractor and, if appropriate, suing the original builder for any losses or additional costs that you incur.

I suspect that this is something that will not be concluded conveniently and, therefore, I suggest that you approach a local trade organization for advice, or your local community legal advice centre. As an alternative - potentially at a cost - approach a construction claims professional or an attorney.

I am sorry that I cannot be of more assistance at this time. I wish you well in resolving the matter.

Kind regards,
John Dowse

John Dowse can be contacted by e-mail to courtroom@hotmail.co.uk

33. Assessment of EOT Claims under FIDIC 1999

Question

I work for a Main Contractor in the UAE using FIDIC 1999. I am currently assessing and preparing responses to a number of EOT claims from Sub-Contractors as well as trying to defend the rejection of our EOT claim by the Engineer.

I read with interest your response to 'Delay and Extension of Time' dated 29/4/07. Whilst i am reasonably experienced in dealing with EOT claims and the requirements of FIDIC 1999 Clause 20.1 & 8.4, i am keen to improve my understanding and experience. You refer to the SCL protocol in terms of the presentation of the claim - does this apply/is it relevant to FIDIC 1999? I would also welcome any other handy tips you may have on this subject.

Answer

Nice to know that people read my answers and find them useful.

The SCL protocol is valid for all forms of contract. It is most useful if it is a living document, generated and updated during the implementation of the contract, rather than a forensic tool generated after contract completion. In fact some judges hate it, when generated after contract completion, because some experts are too theoretical, but lawyers love it because it muddies the water.

I presume that you have downloaded it from http://www.eotprotocol.com/ and studied the various scenarios regarding concurrent delay. I suggest that it would be good if all parties understand its requirements from day 1 on all contracts and subcontracts, and that a CPA is installed and run from day 1. The protocol formulises early practices. Twenty years ago, half way through a two year contract, I used Powerproject (http://www.astadev.com/software/powerproject/index.asp) to reduce the projected contract overrun from 18 months to under six months. An objective demonstration of the causes of, and the work needed to recover, any delay reduces the subjective blame casting.

I hope that you find the above useful and can mark me 10.

34. Advance payment

Question

I would like to ask if the client has the right to put on hold the due payment to the main contractor,if the contractor did not renew the bank guarantee against the advance payment.

Answer

Under FIDIC 1999 red book, clause 14.2 "Advance Payment" contractor shall extend the validity of Advance payment guarantee 28 days before the expiry. under banking procedures if the Any guarantee expires, after proper legal notices if the contractor doesn't extend the validity then Client has the option to deduct full amount of Advance Payment or full amount becomes due.

so in normal practice client does hold payment but such situation does not have much guidance from FIDIC.

Question

Dear Sir,

I'm a Norwegian law student writing a thesis comparing the variation system in the Silver Book to that of a Norwegian standard form for EPC-contracts. I have some questions regarding sub clause 13.3.

If the contractor doesn't respond within the time limit, will he loose his right to claim an EOT and an adjustment to the Contract Price?

And if he responds, but it turns out that the costs/delay of the variation are greater than he expected (and included in his response), will he later be able to claim further adjustments?

Can you give me some pointers as to where I can find relevant case law regarding this subject?

Thank you so much for your time,

Best Regards Ingvil

Answer

Hi Ingvil.

Here are some thoughts on time bar clauses with lots of legal references

http://www.thomastelford.com/journals/DocumentLibrary/mpal.160.1.25.pdf

http://www.scl.org.uk/papers/papersummaries.php?PID=142&RID=476

http://www.fenwickelliott.co.uk/files/Contract%2018%20-%20Time%20Bar%20Clauses.p...

There is also a paper by Brewer Consulting and more on Daniel Atkinson's web site. There was recent case connected with the delivery of a shipment of oil, but I cannot find it at present. There is an interesting case on Tony Bingham's site about application of time bar by an adjudicator, which was overruled by a judge.

The general rule is that the application of time bar clauses is applied generously rather than strictly to avoid any conflict with the rules of natural justice.

As part of your review, I am sure that you have read the several articles on the joys and pains of the FIDIC silver book, which can be found on the FIDIC website at www.fidic.org.

I hope that the above is helpful. If not, submit a follow up with more details. Good luck with your research

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The rise and rise of time-bar clauses*

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Time-bar clauses are becoming popular. This paper examines the express time-bar clauses in the FIDIC and NEC3 standard forms of contract and considers whether such clauses are enforceable under English Law. The paper examines the jurisprudential conflict between such clauses and the so-called English Law concept of the 'prevention principle'. The paper concludes that the 'real issue' is not, in fact, the tension between the time-bar clause and the prevention principle but one between the time-bar clause and the 'freedom of contract' doctrine. This jurisprudential analysis is supported by a body of (English; Scottish and International) case law.

1. THE OPPORTUNITY AND BURDEN FOR CONSTRUCTION ARBITRATORS

Construction arbitrators sitting in domestic and international arbitrations now have a vital role in deciding whether time-bar clauses are effective as a complete defence to contractors' claims that are not submitted in accordance with the express notice provisions. This is because the use of express time-bar clauses in standard forms is increasing (and is expected to continue to do so) and because arbitration is increasingly becoming the final form of dispute resolution.

The increase in express time-bar clauses in the standard forms is, in particular, evident in clause 20.1 of the Fédération International des Ingénieurs-Conseils (FIDIC) contracts for major works ('Red Book'; 'Yellow Book'; and 'Silver Book')[1–3] and the new clause 61.3 of the New Engineering Contract third edition (NEC3) Engineering and Construction Contract.[4] The third edition of the NEC was launched just over a year ago on 14 July 2005. It was endorsed by the UK Office of Government Commerce and such endorsement is likely to encourage greater use of the NEC3 in the UK Defence Estate and Civil Estate works as well as in the private sector. It has also been reported that it will be used by the 2012 Olympic Delivery Authority and the UK Nuclear Decommissioning Authority. In addition, there is now a preference in the public sector that arbitration should be the final tier in the dispute resolution process. For example, the Nuclear Decommissioning Authority has issued details of its 'outline of the dispute resolution process', which expressly states that 'in the event the Dispute is not otherwise settled, compromised or resolved in accordance with [Senior Representatives; Adjudication; Mediation] it shall be finally resolved by reference to arbitration.

The increase in the number of time-bar clauses coupled with the increased use of international and domestic arbitration presents an opportunity for construction arbitrators finally to resolve the jurisprudential tensions that exist in this area of contract law and to uphold the 'freedom of contract' doctrine.

2. SUMMARY

This paper examines the express time-bar clauses in the FIDIC and NEC3 standard forms of contract; considers the legal tools used to undermine such clauses and focuses on the jurisprudential conflict between such clauses and the prevention principle; and concludes that the 'real issue' for construction arbitrators is not the tension between the time-bar clause and the prevention principle but one between the time-bar clause and the 'freedom of contract' doctrine. This is because an analysis of the case law tends to support the view, both, that the prevention principle is not a rule of law but a rule of construction and that 'proximate causation' analysis simply precludes the operation of the prevention principle.

3. THE RISE OF TIME-BAR CLAUSES IN STANDARD FORMS

3.1. FIDIC Clause 20.1

Prior to FIDIC clause 20.1 and NEC3 clause 61.3 time-bar clauses were very rare. Clause 6(2) of CECA Blue Form of Subcontract[5] includes the statement 'it shall be a condition precedent to the Sub-Contractor's right to an extension of the Period for Completion that he shall have given written notice to the Contractor of the circumstances or occurrence which is delaying him within 14 days of such delay first occurring' but does not state that failure to comply with the notice requirements means that there will be no extension to the Period for Completion.

Clause 20.1 of the FIDIC standard form contracts states:

> '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 Employer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as

*This paper was awarded the inaugural Norman Royce Prize by The Society of Construction Arbitrators. This paper was judged to be the best paper on a topic relevant to or touching on domestic or international construction disputes, including, but not limited to, their resolution and avoidance, and the lessons to be learnt from them. For further details please see: www.arbitrators-society.org

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 . . .'
'The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.'

Of interest, but perhaps not strict significance in this paper is the fact that unlike the old FIDIC fourth edition of the Red Book or the Orange Book the new clause 20.1 not only regulates claims for additional payment as in the past, but also regulates extensions of time.

Seppala in *Contractors Claims under FIDIC* Contracts[6] explains 'after much reflection' the conclusion of the FIDIC drafting committee was that the contractor must give notice of a claim within 28 days for there to be a valid claim, so that all involved are aware that there is an event or circumstance where extra time or money may be due to the contractor. [It should be noted that, of course, some employers may consider that the 28-day time limit ought to be reduced but that the FIDIC drafting committee considered 28 days to be a reasonable period (see page 287 of Ref. 6).] Notice of the claim is intended to alert the engineer/employer and to allow the parties to monitor the 'claim' by keeping contemporary records.

Seppala has also stated:[7]

> 'I wish to emphasize that the Contractor has merely to give a bare notice of a claim within 28 days . . . : a one- or two-sentence letter from the Contractor may do. There is no need for the Contractor to provide particulars within 28 days.'

It is clear that the FIDIC drafting committee intended clause 20.1 to be a condition precedent. Contractors, however, have stated that clause 20.1 is 'unduly harsh'[8] and unfair.[9] The question whether clause 20.1 ought to be construed as a condition precedent, by construction arbitrators, is considered in Part B of this paper.

3.2. NEC3 Clause 61.3

The new clause 61.3 relates to the contractor's obligations to notify compensation events and states:

> 'The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if
> - The Contractor believes that the event is a compensation event and
> - The Project Manager has not notified the event to the Contractor.
>
> If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not.'

The Guidance Notes issued by the NEC panel for the new clause 61.3 state:

> 'To avoid having to deal with a compensation event long after it has occurred there is a time limit on notification by the Contractor. Failure to comply with this time-limit ''time-bars'' the Contractor from any compensation for the event . . .'

As with clause 20.1 of FIDIC, it is clear that the NEC panel intended the second paragraph of the new clause 61.3 to be a condition precedent. As stated above, Part B will analyse whether clause 61.3 ought to be so construed.

3.3. Why are time-bar clauses so important?

The respective drafting panels of the FIDIC and NEC standard forms of contract are clear that the primary aim of the respective time-bar clauses is to 'alert' the employer/contract administrator to the contractor's claim, allow swift evaluation and to prevent the stockpiling of claims. (For example, the FIDIC forms contemplate the award of an interim extension of time no later than 12 weeks from the contractor becoming aware of an event or circumstances giving rise to a claim for an extension of time. It ought to be noted that both the FIDIC forms and NEC3 allow interim awards to be made, notwithstanding that the effects resulting from the event or circumstance have not ended or are 'too uncertain to be forecast reasonably'.) However, there is a much more fundamental reason why such time-bar clauses are so important and if held ineffective would have significant (detrimental) consequences for employers.

If the time-bar clause is held to be ineffective then in the absence of any extension of time award the time for completion is 'at large' such that the employer will lose the 'automatic' right to liquidated damages. This is stated succinctly by Lord Fraser in *Bilton v. Greater London Council* [1982][10]

> '1. The general rule is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer.
> 2. That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from completing his work by the completion date—see for example *Holme v. Guppy* (1838) 2 M&LJ 387, and *Wells v. Army and Navy Co-Operative Society* (1902) 86 LT 764. [See also *McAlpine Humberoak v. McDermott International* [1992] 58 BLR 1 where Lloyd LJ at pp. 21–22 stated:
>
> 'The principle enunciated in *Wells v. Army & Navy Co-operative Society* was not new. It is as old as *Holme v. Guppy* (1831) 3 M & LJ 387, where Baron Parke first used the phrase, often since repeated, of the contractor being ''left at large''. In recent times the principle has been applied in such cases as *Peak Construction (Liverpool) Ltd v. McKinney Foundations Ltd* (1970) 1 BLR 114, *The Cape Hatteras* [1982] 1 Lloyd's Rep 518 and *SMK Cabinets v. Hili Modern Electrics Pty Ltd* [1984] VR 391. In all these cases the employer was claiming liquidated damages. In all of them it was held that the claim for liquidated damages must fail since the employer could not rely on the original date of completion, nor on a power to extend the date of completion. In the absence of such a

power, there could be no fixed date from which the liquidated damages could run . . . .']

The employer's right to liquidated damages for delay is replaced by a right to unliquidated damages based on a new 'completion date'. [See *Rapid Building v. Ealing Family Housing* [1985] 29 BLR 5 where Stephenson LJ at pp. 16 stated:

'. . . as it seems to me, where a claim for liquidated damages has been lost or has gone . . . the defendants are not precluded from pursuing their counterclaim for unliquidated damages.']

In a 'time at large' situation the contractor's obligation is to complete its work within a reasonable time. The Court of Appeal decision in *Shawton Engineering v. DGP International* [2006][11] is authority for the proposition that what is a reasonable time has to be judged as at the time when the question arose in the light of all relevant circumstances.

In short, it is precisely the 'time at large' issues that employers ordinarily seek to avoid (for example by the use of extension of time clauses) that eventuate if time-bar clauses are held to be ineffective. However, if held to be effective such time-bar clauses can, as discussed below, act as a complete defence to a contractor's claim.

3.4. The challenges for construction arbitrators

Time-bar clauses have always existed in bespoke domestic and international agreements. However, the introduction of the new clause 61.3 in NEC3 and clause 20.1 in the FIDIC forms and the increased use of these standard forms coupled with the expected increase in the use of arbitration present a great challenge for construction arbitrators.

The use of NEC3 is increasing and is likely to increase further. There is no empirical evidence but anecdotal evidence tends to suggest that NEC3 will be used on the majority of publicly funded projects. For example, in the UK, the Olympic Delivery Authority has announced that it will be using the NEC3 suite of contract documents for design and construction works on 2012 Olympic projects.[12] This announcement is in line with a recommendation in the National Audit Office Report, *Improving Public Services through Better Construction*,[13] published in March 2005.

In *Trends in Construction Dispute Resolution*,[14] Gaitskell states that domestic English arbitration is of course subject to the impact of statutory adjudication but highlights that there has not been any significant reduction in the number of arbitrations. As discussed above, the increasing use, by major domestic public sector clients, of arbitration as the final tier of the dispute resolution process is in the Author's view likely to increase the number of domestic construction arbitrations. A similar position is expected for FIDIC- and NEC3-based international arbitrations. [See Ref. 14, note 18 at pp. 5, where Gaitskell QC states that: 'although adjudication is being adopted by a number of other countries (e.g. Singapore, New Zealand, Australia, Hong Kong), and notwithstanding that mediation is available worldwide, the international arbitrator appointing bodies have seen only slight dips in the number of disputes handled'.]

4. COMPETING THEORIES TO UNDERMINE TIME-BAR CLAUSES

The primary challenge for construction arbitrators is, or will be, to decide whether the express time-bar clauses in the FIDIC and NEC3 standard forms are effective and therefore provide a complete defence for an employer. There is no shortage of case law where courts are urged to adopt common sense and practical approaches: for example, in *Skanska Construction UK Limited v. Egger (Barony) Limited* [2004].[15] Counsel submitted:

'. . . the appropriate approach is one based on common sense and practicality. This is not a criminal trial or a 19th Century Chancery Action: the court, taking into account its considerable and specialist experience should adopt a common sense and practical view of the question of whether the SCL has proved their loss. Perfect proof may on occasion be lacking, but that is no reason for the court not to do the best it can.'

His Honour Judge (HHJ) Wilcox stated:

'I accept that the court should adopt a sensible and pragmatic view . . .'

It is submitted that construction arbitrators (who also possess considerable and specialist experience) should also adopt a sensible and pragmatic view when dealing with time-bar clauses but that their approach should also enforce freely negotiated bargains between substantial commercial entities in accordance with the express terms of the agreement.

4.1. Interpretation arguments to defeat the time-bar clause

The first challenge for a construction arbitrator is to decide, regardless of what the respective FIDIC and NEC3 drafting panels intended, whether the standard form time-bar clauses are drafted as a condition precedent.

There is no direct authority (either in English Law or otherwise) on the interpretation of Clause 61.3 of NEC 3 or on Clause 20.1 of the FIDIC forms. However, the House of Lords decision in *Bremer v. Vanden Avenne* [1978][16] is authority for the proposition that for a notice requirement clause to rank as a condition precedent the clause must state the precise time for service and make it plain by express language that unless the notice is served within that time, the party required to give notice will lose its rights under that clause.

It is submitted that clause 61.3 of NEC3 appears likely to be construed as a condition precedent. This is because it makes clear reference to an 'eight week' time limit 'of becoming aware of the event'. [Note: it is submitted that bespoke amendment of clause 61.3 would be sensible in order to provide greater certainty on the precise nature of the notice required (format, from and to whom) and to deal with what 'of becoming aware of the event' is intended to mean.] Furthermore, clause 61.3 expressly states that rights/entitlement will be lost: '[The Contractor] is not entitled to a change in the Prices, the Completion Date or a Key Date'.

Similarly, it appears likely that clause 20.1 of the FIDIC forms would be construed as a condition precedent because it makes express reference to a 28-day period 'after the contractor became aware, or should have become aware, of the event or circumstance' and expressly states that rights will be lost: '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.'

However, there is a possibility that even in cases where a time-bar clause appears to be drafted as a condition precedent that a court/arbitral panel may refuse to construe it as a condition precedent. A notable example of this is the English Court of Appeal case of *Koch Hightex GmbH v. New Millennium Experience Company Ltd* (1999)[17] in which it was held that the following express clause was not a condition precedent:

> 'The provision of a guarantee and performance bond is a condition precedent to any liability or obligation of the New Millennium Company under the contract.'

In Lord Justice Chadwick's view, if the clause were held to be a condition precedent 'such an arrangement could properly be described . . . as commercial nonsense'. His Lordship was not convinced that the employer and the contractor had intended that the effect of their agreement should be that the contractor should be entitled to carry on works without being paid for some indefinite period until it chose to provide the guarantee and performance bond. In practical terms, situations that may give rise to a 'commercial nonsense' interpretation will include cases where the employer has selectively waived the time-bar clause so that some Contractor's claims have been time-barred whereas others have been evaluated and compensated. Black[18] submits that it is doubtful that such 'commercial sense' interpretations would be 'appropriate in the context of a major infra-structural project'.

4.2. Prevention principle arguments to defeat the time-bar clause

The so-called prevention principle provides that where one party [the contractor] to a contract has failed to perform a condition of that contract [e.g. reach completion by the completion date], the other party [the employer] cannot rely on its non-performance if it was caused by his own wrongful act. [See *Roberts v. The Bury Improvement Commissioners* (1870) LR 5 CP 310, Exchequer Chamber, per Blackburn and Mellor JJ, at pp. 326:

> '. . . it is a principle very well established at common law that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself . . .'

See also *Holme v. Guppy* (1838) 3 M&W 387 Exchequer Pleas, per Parke B at pp. 389:

> '. . . and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default . . .']

On first reading it can appear that the greater challenge for construction arbitrators is to decide whether the prevention principle defeats the NEC3 clause 61.3 or FIDIC clause 20.1 time-bar clauses in, for example, the following (NEC3) scenario:

> 'The Employer has failed to provide something commensurate with a date shown on the Accepted Programme (Compensation Event 60.1(3)); however, whilst the Contractor is aware (or ought reasonably to have been aware) of the compensation event, he simply fails to notify the Project Manager within the eight week time limit set out in clause 61.3; the Contractor is delayed and fails to complete the project by the contractual completion date; the Employer seeks to deduct liquidated damages for the late completion; however, the Contractor claims an extension of time and also asserts that ''time is at large'' since the Employer cannot be permitted to benefit from its own breach.'

If one assumes that the time-bar clause is construed as a condition precedent and that there are no arguments that may give rise to a 'commercial nonsense' construction, construction arbitrators will need to decide whether the NEC3 time-bar clause is effective. There is no direct authority (either in English Law or otherwise) on the jurisprudential tension between either clause 61.3 of NEC 3 or FIDIC clause 20.1 and the prevention principle. The authors of *Keating on Building Contracts*[19] state that there are 'conceptual difficulties' in this area. See para 9–36A pp. 292:

> 'There are, however, conceptual difficulties, it is submitted, where the event causing delay has been caused by the employer's default . . . There is no authority on whether the employer can in those circumstances recover liquidated damages. It is arguable that although the contractor may not be entitled to an extension of time, the employer would not be able to recover liquidated damages on the basis that he cannot take advantage of his own breach of contract.'

4.2.1. Conflicting case law. The jurisprudential tension or 'conceptual difficulty' between the prevention principle and time-bar clauses has, however, been considered in Australia and to a lesser degree in Scotland. The approaches in these jurisdictions *may* provide guidance to construction arbitrators.

The notable cases that are commonly cited in support of bespoke time-bar clauses are the Australian cases of *Turner Corporation Ltd v. Co-ordinated Industries Pty* [1997][20] and *Décor Ceiling Pty Ltd v. Cox Constructions Pty Ltd (No 2)* (2006);[21] and the Scottish case of *City Inns Ltd v. Shepherd Construction Ltd* [2003].[22]

However, the Australian cases of *Gaymark Investments Pty Ltd v. Walter Construction Group Ltd* (1999)[23] and *Peninsula Balamain Pty Ltd v. Abigroup Contractors Corp Pty Ltd* [2002][24] have held that the prevention principle defeats such time-bar clauses.

Turner Corporation Ltd v. Co-ordinated Industries Pty.[20] In *Turner* Justice (J) Cole, addressed the direct conflict between the prevention principle and the condition precedent clause, stating:

> 'If the Builder having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension . . . resulted in its inability to complete by that time. A party to a contract cannot rely upon preventing conduct of the other party where it failed to exercise a contractual right which it would have negated the effect of that preventing conduct.'

City Inns Ltd v. Shepherd Construction Ltd.[22] In *City Inns* a similarly a robust judicial view was taken of the contractor's obligation to comply with an express time-bar clause (heavily amended JCT 80 Private with Quantities). [The relevant part of clause 13.8 is 13.8.5 which stated:

> 'If the Contractor fails to comply with one or more of the provisions of Clause 13.8.1, where the Architect has not dispensed with such compliance under 13.8.4, the Contractor shall not be entitled to any extension of time under Clause 25.3.']

In this case, in short, the contractor had been awarded, (by the architect and an adjudicator) a total 9-week extension of time. However, the employer argued that liquidated damages should be payable since the contractor had failed to comply with the express time-bar clause. Lord MacFadyen agreed with the employer, stating:

> 'if he [the Contractor] wishes an extension of time, he must comply with the condition precedent that clause 13.8 provides for these specific circumstances . . . But if the contractor fails to take the specified steps in clause 13.8.1, then, unless the architect waives the requirements of the clause under 13.8.4, the contractor will not be entitled to an extension of time on account of that particular instruction.'

Décor Ceiling Pty Ltd v. Cox Constructions Pty Ltd (No 2).[21] In *Décor Ceiling* the Supreme Court of South Australia had to consider whether the sub-contractor's claims failed because a notice of claim required by clause 46 in the contract was not served by Décor. The relevant express clause 46 stated:

> The Main Contractor shall not be liable upon any claim by the Subcontractor in respect of or arising out of a breach of the Subcontract unless within 28 days after the first day upon which the Subcontractor could reasonably have been aware of the breach, the Subcontractor has given to the Main Contractor's Representative the prescribed notice.
> The Main Contractor shall not be liable upon any other claim by the Subcontractor for any extra cost or expense in respect of or arising out of any direction or approval by the Main Contractor's Representative unless within 42 days of the entitlement to make the claim, the Subcontractor has given to the Main Contractor's Representative the prescribed notice.

Justice Besanko held that compliance with clause 46 'is properly described as a condition precedent'. [Décor's case was that clause 46 was a condition precedent and so did not need to be pleaded. Cox argued that clause 46 was not a condition precedent but 'an essential fact in action' requiring no notice of the point.] The authors of *Construction Industry Law Letter*[25] concluded that *Décor Ceiling* provides a 'reiteration that if appropriately drafted certain notice provisions will operate as conditions precedent'.

Gaymark Investments Pty Ltd v. Walter Construction Group Ltd.[23] In this case the contract included the following express term:

> 'The Contractor shall only be entitled to an extension of time . . . where the Contractor . . .
> (b) (i) has complied strictly with the provisions of sub-clause SC19.1 and in particular, has given the notices required by sub-clause SC19.1 strictly in the manner and within the times stipulated by that sub-clause . . .'

It was an agreed fact that the contractor was in breach of the above express time-bar clause and had failed to give notice in accordance with SC19.1. However, Bailey J. refused to uphold the above as a condition precedent. The judge's view was that the prevention principle presented a 'formidable barrier' to the employer's claim for liquidated damages. Bailey J also appears to have been influenced by the fact that the contractual term allowing the contract administrator an overriding discretion to grant extensions of time had been deleted by the parties. In the judge's view the deletion of this term created an ambiguity since it failed to provide for actual delays caused by the employer. It is advisable that employers seeking to rely upon NEC3 clause 61.3 and/or FIDIC clause 20.1 and/or time-bar clauses generally should ensure the express inclusion of a term that allows the contract administrator to unilaterally extend the time for completion, thereby preventing 'time at large' ambiguities.

Peninsula Balamain Pty Ltd v. Abigroup Contractors Corp Pty Ltd.[24] In this case the New South Wales Court of Appeal considered the following express time-bar clause:

> 'The Principal shall not be liable upon any claim by the Contractor in respect of or arising out of a breach of the Contract unless within 28 days after the first day upon which the Contractor could reasonably have been aware of the breach, the Contractor has given to the Superintendent the prescribed notice.'

Although the contractor failed to comply with the notice requirements set out in the contract the Court of Appeal held that such failure to give notice did not deprive the contractor of his right to an extension of time but merely delayed it. The Court of Appeal held that the prevention principle trumped the time-bar clause and that the Superintendent should have exercised his unilateral power to grant an extension of time to cover the employer delay.

The above cases do not appear fully to resolve the 'conceptual difficulty' or jurisprudential tension between time-bar clauses and the prevention principle. Commentators have suggested that *Gaymark* and *Abigroup* may be 'seen in future to have represented a false step'.[26] See also Duncan Wallace[27] who states that Gaymark represents 'a misunderstanding of the basis of the prevention theory' and 'a mistaken understanding of the inherently consensual and interpretative basis of the prevention principle'. Others[28] suggest that although none of the Australian cases were directly on FIDIC clause 20.1:

> 'In the light of the decisions in *Gaymark* and *Abigroup*, the condition precedent to an extension of time in sub clause 20.1 of the new suite of FIDIC forms . . . , if governed by Australian law, could result in the employer being prohibited from recovering liquidated damages in circumstances where the employer delays the contractor and the contractor fails to comply with sub clause 20.1.'

4.2.2. The better approach. It is submitted that the jurisprudential tension between time-bar clauses and the prevention principle can be resolved by construction arbitrators if they accept either (*a*) or (*b*), as given in the following analysis.

(*a*) That the prevention principle is a rule of construction and not a rule of law so that express terms (such as NEC3 clause 61.3 and FIDIC clause 20.1) can simply exclude its operation.
(*b*) That the prevention principle does not apply because the 'proximate cause' for the contractor's loss is not one by the employer but the contractor's failure to operate the contractual machinery such that there is no act of prevention by the employer.

The analysis to support both propositions is discussed below. Once the above propositions are accepted then it is clear that the 'real

issue' is simply one between freedom of contract and time-bar clauses.

4.3. Prevention principle is a rule of construction

Alghussein Establishment v. Eton College [1988][29] is House of Lords authority for the proposition that an express provision is needed to contradict the presumption that a party to a contract could not be permitted to take advantage of its own wrong as against the other party.

Bilton v. Greater London Council [1982][10] [see note 10] provides further support that the prevention principle is not an absolute rule of law but one of construction. Lord Fraser stated that the prevention principle was a 'general rule' that 'may be amended by the express terms of the contract' [see Ref. 10, note 13 at pp. 13].

Further, in *Micklefield v. SAC Technology* [1990][30] the court held that the principle that a party was not entitled to benefit from its own wrong was a 'rule of construction which could be excluded by clear contrary provision'. Mr John Mowbray QC sitting as a deputy High Court judge stated:

> '... the principle that a man cannot be permitted to take advantage of his own wrong (that is, in this context, from a breach by him of the contract) is subject to an exception. I refer to the speech of Lord Jauncey of Tullichettle, with which all the rest of their Lordships agreed, in the *Alghussein* case [1988] 1 W.L.R. 587. At the end of that speech, he said, at p. 595: "For my part I have no doubt that the weight of authority favours the view that in general the principle is embodied in a rule of construction rather than in an absolute rule of law." If that is correct, and the rule is only one of construction, then it can be excluded by a sufficiently clear contrary provision in the contract ...
> If it is a question of construction, then the principle can be excluded by an appropriate provision. That was what was contemplated by Lord Diplock in his speech in *Cheall v. Association of Professional Executive Clerical and Computer Staff* [1983] 2 A.C. 180 ...'

Note that in *Kensland Realty Ltd v. Whaleview Investment Ltd* [2001] HKCFA 57[31] the Court of Final Appeal of Hong Kong doubted the correctness of this case because certain Australian authorities [*Peter Turnbull & Co Pty Ltd v. Mundus Trading Co (Australasia) Pty Ltd* (1953–54) 90 CLR 235 and *Mahoney v. Lindsay* (1981) 55 ALJR 118] were not addressed.]

The Court of Final Appeal of Hong Kong in *Kensland Realty Ltd v. Whaleview Investment Ltd* [2001] [31] (while doubting *Micklefield*[30]) held that the prevention principle could be both a rule of construction and a rule of law. Mr Justice Ribeiro PJ stated [See Ref 30, paragraphs 97 and 98.]:

> '... In many cases, it will be appropriate to implement it as a substantive principle of law that precludes the wrongdoer from taking advantage of his own wrong ... In other cases, where appropriate, the courts give effect to the principle as one of construction, holding that the contractual terms with which they are concerned must be construed by applying the principle as a canon or presumption of construction ...'

More recent and further English Law support for this proposition can be found in *Decoma v. Hayden Drysys* [2006][32] where HHJ Coulson QC had to decide whether a contractor could not rely upon a limitation clause on the basis that it was 'taking advantage of its own breach of contract'. HHJ Coulson QC stated:

> 'In my judgement, this presumption [prevention principle] is predominantly a rule of construction, and its application, or otherwise, will always depend on the words used and the meaning and effect of the terms of the contract as a whole.'

HHJ Coulson QC also stated:

> 'This presumption [of the prevention principle] is an important principle of construction of commercial contracts for the reasons explained by Lord Jauncey of Tullichettle in *Alghussein Establishment v. Eton College* [1988] 1 WLR 587. It is important to note that, in that case, the principle was applied because the literal meaning of the clause in question rendered it wholly inconsistent with all the other parts of the Lease and produced what Lord Jauncey called "a bizarre result". Accordingly, given the absence of any provisions which contradicted the presumption that it was not the intention of the parties that either should be entitled to rely on his own breach in order to obtain a benefit, the literal meaning of the clause in question was modified and the party in breach could not rely on the term.'

It is submitted that a significant body of domestic and international case law supports the proposition that the prevention principle is merely a rule of construction and not a rule of law so that clear express terms (such as NEC3 clause 61.3 and FIDIC clause 20.1) can simply exclude its operation. In any event, as discussed below, case law also supports the proposition that the prevention principle may not even be applicable in cases where contractors have failed to fulfil express contractual notice requirements.

4.4. Prevention principle does not apply: proximate causation analysis

In *Kensland Realty Ltd v. Whaleview Investment Ltd*[31] The Court of Final Appeal of Hong Kong considered a number of international authorities[33–37] and concluded that the prevention principle's operation has two limitations:

> 'First, it is necessary to show the relevant party's "wrong" involves his breach of the contract in respect of an obligation owed to the other party ...'
> 'The second limitation on the operation of the principle is a causation requirement. It is necessary to show that the contractual rights or benefits which the party in question is seeking to assert or claim arise as a direct consequence of that party's prior breach.'

It is submitted that the second limitation comes into play in the scenario discussed above where a contractor has failed to comply with express notice requirements and where the employer has also caused a delay. However, it is submitted, that the proximate cause for the contractor's claim for an extension of time is not the employer's act of prevention but the contractor's own breach in failing to operate the express contractual machinery so that the employer is not benefiting from his own wrong.

This analysis is supported by Lord MacFayden in *City Inns Ltd v. Shepherd Construction Ltd* who stated[38]:

> 'that failure on the part of the Contractor to comply with one or more of the provisions of clause 13.8.1 is probably to be regarded as a breach of contract on his part . . .
> there is thus, in a sense, a causal connection between the contractor's failure to comply with clause 13.8.1 [the ''time bar'' clause] and his liability to pay a sum of money . . .'

Similarly, in *Turner Corporation Ltd v. Co-ordinated Industries Pty* Cole J highlighted the point that although the respective employer and contractor breaches of contract are factors or causes of the contractor's liability for liquidated damages the 'proximate' or major cause is the failure by the contractor to employ the contractual mechanisms. Cole J stated[39]:

> 'The act of the Proprietor does not prevent performance of the contractual obligations within time: it entitles the Builder to apply for a contractual variation extending the time for performance.'

5. THE REAL ISSUE: FREEDOM OF CONTRACT

It is submitted that the NEC3 clause 61.3 and FIDIC clause 20.1 time-bar clauses displace the prevention principle (which is a rule of construction) and in any event, the proximate cause analysis discussed above excludes the operation of the prevention principle. It follows that the real issue for construction arbitrators is not the tension between the time-bar clause and the prevention principle but one between the time-bar clause and the freedom of contract doctrine.

This ought to be a much easier issue for construction arbitrators, not least, because of the clear English Law House of Lords Guidance in *Homburg Houtimport BV v. Agrosin Private Ltd* [2003].[40] Lord Steyn stated:

> 'the plain objective of the decisions in *The Eurymedon* and *The New York Star* was to enable businessmen to make sensible and just commercial arrangements, and thereby further international trade. Legal policy favours the furtherance of international trade. Commercial men must be given the utmost liberty of contracting. They must be left free to decide on the allocation of commercial risks . . .'

It is submitted that there does not appear to be any reason why construction arbitrators should not follow this guidance. Construction arbitrators should enforce freely negotiated bargains between substantial commercial entities and so should enforce time-bar clauses, (such as FIDIC clause 20.1 and NEC3 clause 61.3), so that the contractor's failure to comply can be a complete defence for the employer. Such an approach not only supports the contract administration ideas that the respective drafting panels intended but could also resolve such time-bar issues as preliminary issues—swiftly and at less cost to the parties.

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Fenwick Elliott

TIME AND MONEY: TIME BAR CLAUSES

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THE FIDIC CONTRACTS CONFERENCE 2007

Introduction

This paper focuses on time bar clauses, with a particular reference to clause 20.1 of FIDIC. The NEC, ICE and JCT are mentioned briefly for comparative reasons, but the focus remains upon the mechanics of FIDIC clause 20.1 under English law. In essence, the key question is whether a time bar clause (or to be more precise the condition precedent within clause 20.1) is effective in disallowing the contractor a claim that might otherwise be legally recognisable.

An overview of clause 20.1 is provided initially, before then comparing it to some other frequently encountered provision. The requirements for the giving of a notice, and the circumstances and nature of the time bar provisions are then considered.

In summary, it is possible under English law for a condition precedent to be effective, so as to preclude a claimant from bringing an otherwise valid claim. However, in practice, the particular circumstances of each situation will need to be considered, not solely because the courts construe these provisions extremely strictly, but also because the actual circumstances of the case might reveal that the time bar provision has not been effective. These circumstances are explored and considered below.

Clause 20.1

Clause 20.1 of FIDIC is divided into nine unnumbered paragraphs (the fifth paragraph containing three numbered sub-paragraphs). First is the requirement for a notice:

> 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. [emphasis added]

Then, in the second paragraph comes the bar to the claim:

> 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. [emphasis added]

The clause 20.1 notice might not be the only notices required of the contractor:

> The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

Contemporary records are required:

> The Contractor shall keep such *contemporary records* as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer *may*, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to *keep further contemporary records*. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer. (emphasis added]

A detailed claim:

> *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, the Contractor shall send to the Engineer *a fully detailed claim* which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect: [emphasis added]
>
> (a) this fully detailed claim shall be considered as interim;
>
> (b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and

(c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

The engineer is to respond:

> *Within 42 days* after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, *the Engineer shall respond* with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time. [emphasis added]

Payments include substantiated claims:

> Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. 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.

The engineer must determine any extension of time and additional payments:

> The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determination] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

Payments are to "take account of" failure, prevention or prejudice:

> The requirements of this Sub-Clause are *in addition* to those of any other Sub-Clause which may apply to a claim. If the Contractor *fails to comply* with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment *shall take account* of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, *unless the claim is excluded under* the second paragraph of this Sub-Clause. [emphasis added]

Clause 20.1: An overview

Clause 20.1 provides a procedure for dealing with the notification of and substantiation of extension of time and additional payment claims, and sets out the mechanics of the decision-making process of the engineer in respect of those claims. Notice is initially required from the contractor "describing the event or circumstances giving rise to the claim". The important time bar provision is that the notice must be given "as soon as

practicable" and then more particularly "not later than 28 days after the Contractor became aware, or should have become aware" of the particular event or circumstance. It is then the second paragraph that sets out the time bar provision. If the contractor fails to give notice within the 28-day period the Time for Completion "shall" not be extended, and no additional payment shall be made. This paper primarily then focuses on the interaction of the requirements of the notice in paragraph 1, and then the time bar provisions in paragraph 2.

However, that is not the end of the matter. Clause 20.1 requires the contractor to submit other notices if and as appropriate under the contract, in accordance with the other provisions within the contract. Further, the contractor is to keep "contemporary records" in order to substantiate the claim. The engineer may also require further record keeping or the keeping of further contemporary records.

There are then some sensible deadlines placed upon the contractor to provide substantiation of the claim, and also again sensible timescales required within which the engineer is to consider and approve or disapprove the claim. The reasonably tight timescale within which substantiation is made and the engineer either accepts or rejects the claim must be welcomed in the modern context of considering delay and additional costs during the course of a project. Problems need not fester until the end of a project. A dispute can crystallise during the course of the project and then be dealt with by the Dispute Adjudication Board, assuming that the contractor or employer refers the matter to the Board. However, the fact remains that FIDIC anticipates and provides for either party to progress matters to a conclusion during the course of a project rather than wait until the conclusion of the project.

Finally, the final ninth paragraph of clause 20.1 provides that any extension of time or additional payment "shall" take account of any failure, prevention or prejudice caused by the contractor to the investigation of the claim. That proviso only applies where the time bar provision in the second paragraph has not excluded the claim entirely.

Notice provisions as a condition precedent

The time bar provisions in the second paragraph of clause 20.1 are intended to be a condition precedent to the contractor's claim for an extension of time and additional money. Some commentators regard the FIDIC provision as one that will exclude the employer's liability to the contractor if the contractor first provides the notice within time.[1] Such provisions can be effective under English law.[2]

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1 See in particular Christopher Seppala (2005) "Contractors claim under the FIDIC Contracts for major works" conference paper given at the International Construction Contracts and Dispute Resolution Conference, Cairo, April.

2 See *Bremer Handelsgesellschaft mbH* v *Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL, and under English law *City Inn Limited* v *Shepherd Construction Limited* (2002) SLT 781.

However, the English courts have taken the view that timescales in construction contracts are not mandatory, but directory.[3] This is unless the contract clearly states that the party will lose its right, and sets out a specific timescale within which the notice must be served. In other words, it must be possible to identify precisely the trigger point for the notice period and then secondly for the clause to have clearly set out the right that has been lost once the time period has expired.

Contemporary records

The contractor must keep contemporary records in order to substantiate its claim. The requirement for contemporary records in the FIDIC Contracts has been considered by Acting Judge Sanders in the case of *Attorney General for the Falklands Islands* v *Gordon Forbes Construction (Falklands) Limited*.[4] Judge Sanders considered that contemporary records were:

> "original or primary documents, or copies thereof, produced or prepared at or about the time giving rise to a claim, whether by or for the contractor or the employer."

The important point then about contemporary records is that they arise at the time of the claim. The emphasis is very much upon the instantaneous keeping of records which document the events and circumstances at the time of, or certainly very close to the time of, the claim.

Judge Sanders held that it was not possible to avoid the contractual requirement of contemporary records by simply producing witness statements at some point after the event. Those witness statements may of course record the recollections of those who were involved at the time, but they are no substitute for the proper keeping of contemporary records at the time of the claim.

Detailed claim submission

The contractor is then required to submit a "fully detailed claim", together with all supporting documentation, in respect of the time or additional payment claim. Sub-paragraph (b) to the fifth paragraph of clause 20.1 expressly requires the contractor to submit these fully detailed claims at monthly intervals. As the contractor is required to give notice not later than 28 days after the "event or circumstance", then it is arguable that, if the event or circumstance continues, the contractor will need to continue to submit notices each month. This is a somewhat unusual requirement in a construction standard form, but one that may have far-reaching ramifications, especially if the contractor submits some notices but not others. In addition, the contractor may need to provide such further

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3 *Tenloc* v *Errill Properties* (1987) 39 BLR 30, CA, C Croom Johnson LJ.
4 (2003) 6 BLR 280.

particulars "as the Engineer may *reasonably* require".

Once the delaying and financial effect arising from the event or circumstance has come to an end, then the contractor must within 28 days provide a final claim. Once again, the engineer may require further reasonable particulars.

The interim and final claims are to be considered by the engineer. The engineer has 42 days after receipt of the claim, or the further particulars requested, to respond. This period may be extended, but only with the approval of the contractor. The obligation on the engineer is to respond because of the use of the word "shall". The engineer may approve the claim, or if disapproving the claim must then provide detailed comments. If the engineer considers that further information is required, the engineer still has an obligation to respond in respect of the principles of the claim within the 42-day (or other agreed) period.

This approach is supported by clause 1.3, which requires the engineer not to unreasonably delay the determination of claims.

The "take account of" provision

The final ninth paragraph of clause 20.1 expressly provides that a failure to comply with clause 20.1 "shall" be taken into account in respect of any claim made by the contractor. If a failure of the contractor means that a "proper investigation" of the claim has been prevented or prejudiced, then any extension of time or additional payment shall take account of the extent of that failure. This is unless the claim has already been barred as a result of the operation of the second paragraph of clause 20.1.

The time bar provision encourages the contractor to put the engineer on notice of delays or requests for additional payments. This further provision, at paragraph 9 of clause 20.1, encourages the contractor to promptly provide a detailed claim, together with supporting documentation, rather than simply serve notices and then work out the detail of its claim at some later date. The emphasis therefore of clause 20.1 is very much to raise claims during the course of the contract, and also, importantly, to work out the detail of those claims, evaluate them, and certify them (or reject them) during the currency of the contract.

The requirement of the contractor to provide a detailed claim within a 42-day period is not expressed as a condition precedent, unlike the initial notice identifying the event or circumstance or as a footnote.[5] Arguably, if the contractor submits, in good time, notices of events or circumstances giving rise to additional time or money but then fails to provide claims, or properly detailed claims and substantiation in accordance with paragraph 5 of

[5] *London Borough of Merton* v *Stanley Hugh Leach Limited* (1985) 32 BLR 51.

clause 20.1, then paragraph 9 of clause 20.1 allows those effects to be taken into account. For example, if a delay occurs that would have been avoidable, the contractor may still not receive an extension of time. If the employer has lost the opportunity to take some avoiding action that could properly have been instigated, then that may also be taken into account either in the award of an extension of time or in the calculation of additional money.

Crystallising a "dispute"

It may be that the crystallisation of a dispute does not occur until the engineer's determination under clause 3.5. However, this factor must be considered in the light of the obligation under clause 1.3, and the approach of Mr Justice Jackson in the case of *Amec Civil Engineering Ltd* v *The Secretary of State for Transport.*[6] Amec brought proceedings to challenge the jurisdiction of an arbitrator. The parties had entered into a contract incorporating the ICE Conditions, 5th Edition, and the engineer had made a decision in relation to a dispute pursuant to clause 66 of those Conditions.

One of the issues to be decided was whether there was a dispute for the purposes of clause 66 of the ICE Conditions. Reviewing the arbitration and adjudication judicial authorities, the Judge set out seven propositions:

> From this review of the authorities I derive the following seven propositions:
>
> 1. The word "dispute" which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.
>
> 2. Despite the simple meaning of the word "dispute", there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.
>
> 3. The mere fact that one party (whom I shall call "the claimant") notifies the other party (whom I shall call "the respondent") of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
>
> 4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the

[6] [2004] EWHC 2339 (TCC).

inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

Following a meeting on 20 September, where certain defects were discussed, a letter was sent on 2 October setting out the nature of the defects. The fact that no immediate response was required did not prevent this letter being a claim. In fact by this date, Amec had decided to notify its insurers.

A further letter was sent on 6 December, this time not only imposing a deadline for a response of 11 December, but in addition seeking an admission of liability. By this time, the general positions for all parties had been well canvassed such that in the view of the Judge it was inconceivable that such admission would be made.

Therefore, perhaps surprisingly at first blush, the letter of 6 December requiring a response by 11 December, did in fact set a reasonable deadline. The deadline was imposed for a good reason, namely that the limitation period was about to end. The fact that the deadline would not cause Amec any difficulty was clear. It was self-evident that Amec would not be prepared to admit liability for massively expensive defects on a viaduct.

Amec went on to argue that an engineer making a decision under clause 66 is required to abide by the principles of natural justice. The Judge disagreed. He felt there was a great difference between an engineer's decision under clause 66 and an adjudicator's decision under the HGCRA. The duty on the engineer was slightly different, namely to act

independently and honestly and here he had. Interestingly on this point, the Judge gave leave to appeal.

Judgment was given on the appeal in March.[7] The appeal focused specifically on the meaning of "dispute" pursuant to clause 66 of the ICE Conditions of Contract in the context of arbitration. Nonetheless, the Court of Appeal considered adjudication cases dealing with the issue of whether a dispute had formed.

Amec argued that the Secretary of State's notice of arbitration was invalid. Approximately six months before the six-year limitation period was about to expire, defects became apparent to the viaduct that had been constructed by AMEC. Twelve days before the limitation period was about to expire the Highways Agency referred a dispute (as to whether the defect was caused by the roller bearings) to the engineer in accordance with clause 66. Seven days later the engineer gave a decision stating that Amec had installed bearings that were not in accordance with the contract. The following day the Secretary of State gave notice of arbitration. These timescales were short, and AMEC had not accepted nor denied liability. AMEC argued that no dispute existed, and therefore no valid engineer's decision had been given and as a result there was nothing to be referred to arbitration.

The Court of Appeal held that in considering whether there was a "dispute or difference", all of the circumstances including the impending end of the limitation period needed to be considered. Meetings had taken place many months before and it was apparent that Amec did not accept responsibility for the structural deficiencies. The engineer under clause 66 must act independently and honestly, but did not need to comply with the rules of natural justice. As a result his decision was not procedurally unfair and the arbitration notice was valid.

The move towards time-bar provisions

Standard construction contract forms have not traditionally included time-bar provisions. Many standard forms required a notice to be given within a specified period. The pre-1999 FIDIC forms did not include a time bar. The old JCT formulation required a notice to be given within a "reasonable time". This requirement was considered in the case of *London Borough of Merton* v *Hugh Leach*, where it was said:[8]

> [The Contractor] must make his application within a reasonable time: It must not be made so late that, for instance, the architect can no longer form a competent opinion or satisfy himself that the contractor has suffered the loss or expense claimed. But in considering

[7] *Amec Civil Engineering Limited* v *Secretary of State for Transport*, 17 March 2005, Court of Appeal, May LJ., Rix LJ, Hooper LJ. [2005] EWCA Civ 291.

[8] (1985) 32 BLR 51

> whether the contractor has acted reasonably and with reasonable expedition it must be borne in mind that the architect is not a stranger to the work and may in some cases have a very detailed knowledge of the progress of the work and the contractor's planning.

It is therefore unusual for a meritorious claim to be defeated merely because of a lack or a lateness of a notice. Further support for this proposition is often gained from the case of *Temloc* v *Errill Properties*[9] in which it was recognised that prescribed timescales were merely indicative and did not have to be absolutely complied with. However, in the case of *Turner Page Music* v *Torres Design*[10] the judge seems to have taken it for granted that the contractor's failure to provide a written application was fatal to his claim. This approach has not been followed.

The more recent JCT 2005 formulation required a notice to be given "forthwith".[11]

NEC3 has adopted a similar strict regime to FIDIC for contractors in respect of Compensation Events, in Core clause 61.3:

> The *Contractor* notifies the *Project Manager* of an event which has happened or which he expects to happen as a compensation event if
>
> - the *Contractor* believes that the event is a compensation event and
> - the Project Manager has not notified the event to the Contractor.
>
> If the *Contractor* does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Price, the Completion Date or a Key Date unless the *Project Manager* should have notified the event to the *Contractor* but did not.

Clause 61.3 is apparently a bar to any claim, should the contractor fail to notify the project manager within eight weeks of becoming aware of the event in question. The old NEC2 formulation of a two-week period for notification has been replaced with an eight-week period, but with potentially highly onerous consequences for a contractor. This clause must also be read in conjunction with clause 60.1(18), which states that a Compensation Event includes:

> A breach of contract by the *Employer* which is not one of the other Compensation Events in this contract.

Clause 61.3, therefore, effectively appears to operate as a bar to the contractor in respect of any time and financial consequences of any breach of contract if the contractor fails to notify.

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9 (1987) 39 BLR 30 CA
10 (1997) CILL 1263 (at para 108)
11 See for example clause 2.24.1 of JCT Design and Build Contract 2005.

Impact of the timebar

The courts have for many years been hostile to such clauses. In more modern times, there has been an acceptance by the courts that such provisions might well be negotiated in commercial contracts between businessmen.[12] The House of Lords case of *Bremer Handelsgesellschaft mbH* v *Vanden Avenne Izegem PVBA*[13] provides authority for the proposition that for a notice to amount to a condition precedent it must set out the time for service and make it clear that failure to serve will result in a loss of rights under the contract. This seems relatively straightforward. However, it may not be possible for an employer to rely upon *Bremer* in circumstances where the employer has itself caused some delay. So *Bremer* is a case where a party seeking to rely upon the condition precedent was not itself in breach in any respect. An employer may, therefore, be in some difficulty when attempting to rely upon *Bremer* in circumstances where the employer has caused the loss, or a proportion of the loss.

The courts also interpret strictly any clause that appears to be a condition precedent. Not only will the court construe the term against the person seeking to rely upon it, but it will require extremely clear words in order for the court to find that any right or remedy has been excluded. However, an alternative way of approaching such provisions was highlighted in the Scottish case of *City Inn Ltd* v *Shepherd Construction Ltd.*[14]

Here the Court of Session considered the requirement on the contractor to comply with a time-bar clause (in this case an amended JCT80 Private with Quantities).[15] The contractor had been awarded (by the architect and an adjudicator) a total nine-week extension of time. The employer argued that no extension should have been granted and that liquidated damages should be payable, since the contractor had failed to comply with the time-bar provisions. Clause 13.8.1 provided:

> Where, in the opinion of the Contractor, any instruction, or other item, which, in the opinion of the Contractor, constitutes an instruction issued by the Architect will require an adjustment to the Contract Sum and/or delay the Completion Date the Contractor shall not execute such instruction (subject to clause 13.8.4) unless he shall have first submitted to the Architect, in writing, within 10 working days (or within such other period as may be agreed between the Contractor and the Architect) of receipt of the instruction details of [its initial estimate, requirements in respect of additional resources and the length of any extension of time].

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12 See for example *Photo Production Ltd* v *Securicor Ltd* [1980] AC 827, HL.

13 *Bremer Handelsgesellschaft mbH* v *Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL.

14 *City Inn Ltd* v *Shepherd Construction Ltd* 2002 SLT 781, [2001] SCLR 961, Outer Hse, Ct of Sess; then appealed to the Inner Hse (successful on the point that failure to use the procedures of clause 13.8 was not itself a breach of contract, so the clause could not be treated as imposing a penalty), [2003] BLR 468.

15 The relevant part of Clause 13.8 was 13.8.5: "If the Contractor fails to comply with one or more of the provisions of Clause 13.8.1, where the Architect has not dispensed with such compliance under 13.8.4, the Contractor shall not be entitled to any extension of time under Clause 25.3."

Clause 13.8.5 further provided:

> If the Contractor fails to comply with any one or more of the provisions of clause 13.8.1, where the Architect has not dispensed with such compliance under clause 13.8.4, the Contractor shall not be entitled to any extension of time under clause 25.3.

In the Inner House, the Lord Justice Clerk applied the timebar as it stood:

> if he [the contractor] wishes an extension of time, he must comply with the condition precedent that clause 13.8 provides for these specific circumstances. But if the contractor fails to take the specified steps in clause 13.8.1, then, unless the architect waives the requirements of the clause under 13.8.4, the contractor will not be entitled to an extension of time on account of that particular instruction.[16]

The Inner House interpreted the time-bar clause as giving an option, so not imposing any obligation on the contractor; which also disposed of the contractor's argument (successful in the Outer House) that the time bar was a penalty, thus unenforceable.

One important distinction between the drafting of the provision in *City Inn* and FIDIC is that the contractor in *City Inn* did not have to carry out an instruction unless he had submitted certain details to the architect. FIDIC, by contrast, provides a bar to the bringing of a claim simply for failure to notify the engineer in time about an event or circumstance that might impact on the Time for Completion or lead to additional payments. A specific instruction might not have been given; and the contractor might not be prompted to respond in the absence of this.

Awareness

Under clause 20.1, the contractor needs to have "become aware ... or should have become aware" in order to notify the engineer. There will no doubt be arguments about when a contractor became aware or should have become aware of a particular event, and also the extent of the knowledge in respect of any particular event. Ground conditions offer a good example.[17] Initially, when a contractor encounters ground conditions that are problematic, he may continue to work in the hope that he will overcome the difficulties without any delay or additional costs. As the work progresses, the contractor's experience of dealing with the actual ground conditions may change, such that the contractor reaches a point where he should notify the project manager. The question arises: should the contractor have notified the project manager at the date of the initial discovery, rather than at the date when the contractor believed that the ground conditions were unsuitable?

The answer must be, in line with the words of FIDIC, that the contractor should give notice when he encounters ground conditions that an experienced contractor would have

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16 [2003] BLR 468, paragraph [23].
17 See cause 4.12 Unforeseen Physical Conditions

considered at the Base Date to have had only a minimal chance of occurring and so it would have been unreasonable to have allowed for them in the contract price, having regard to all of the information that the contractor is to have taken into account under the contract.

Who needs to be "aware"?

A further question arises in respect of clause 20.1: who precisely needs to be "aware"? Is it the person on site working for the contractor, the contractor's agents or employees, or is it the senior management within the limited company organisation of the contractor? Case law suggests that it is the senior management of the company, not merely servants and agents.[18]

The starting point is the general argument that all corporations and authorities have a legal identity and act through the individuals who run, are employed by or are agents of that organisation. A corporation or authority is a legal person, and is therefore regarded by law as a legal entity quite distinct from the person or persons who may, from time to time, be the members of that corporation.

The position is simplified for a person dealing with a company registered under the Companies Act 1985. A party to a transaction with a company is not generally bound to enquire as to whether it is permitted by the company's memorandum or as to a limitation on the powers of the board of directors to bind the company. However, if the contract is to be completed as a deed, then the contract must be signed by either two directors or a director and the company secretary.

Generally, directors and the company secretary have, therefore, authority to bind the company. If a person represents that he has authority, which he does not possess, but in any event induces another to enter into a contract that is void for want of authority, then that person will be able to sue for breach of want of authority. However, these propositions relate to the formation of contracts, rather than the conduct of the contract and in particular the identification of who within the company needs to have the knowledge required in order to make a decision whether a notice should be served. While then an agent of a company can bind a company, that agent must still act within the scope of their authority when taking actions under a contract.

So who then within the company must be "aware" for the purposes of clause 20.1? Identifying the "directing mind" within a company is the key to ascertaining who within a company has the necessary quality to be "aware", as explained by Denning LJ (as he then was) in *HL Bolton (Engineering) Co Ltd* v *TG Graham & Sons Ltd*:

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[18] E.g. *HL Bolton (Engineering) Co Ltd* v *TG Graham & Sons Ltd* (see note 19 and linked main text).

> Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.[19]

The intention of the company is therefore to be derived from the directors and the managers, rather than those that might be carrying out the work. The company's intention will, therefore, depend upon: the nature of the matter that is being considered; the position of the director or manager; and other relevant facts of the particular case. This principle has been affirmed in subsequent cases, in particular by Lord Reid in *Tesco Supermarkets Ltd* v *Nattrass* in the House of Lords:

> Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation, he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn.[20]

Lord Reid confirms the approach of Denning LJ, but notes that it may be possible for the directors or senior managers to delegate, in this instance, fundamental decision-making processes required during the course of the running of a construction contract. In the absence of such delegation, it is arguable that those who must be "aware" are the directors and managers who constitute the "directing mind" of the company.

The prevention principle

The prevention principle may also apply in respect of any employer's claim for liquidated damages. If the contractor does not make a claim, then the engineer cannot extend the Time for Completion under FIDIC, and so an employer will be entitled to liquidated damages. However, those liquidated damages could be in respect of a period where the employer had caused delay. The employer can only recover losses for delay in completion for which the employer is not itself liable.

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19 *HL Bolton (Engineering) Co Ltd* v *TG Graham & Sons Ltd* [1957] 1 QB 159, CA, page 172.

20 *Tesco Supermarkets Ltd* v *Nattrass* [1972] AC 153, HL, page 171; applied in *KR and others* v *Royal & Sun Alliance plc* [2006] EWCA Civ 1454, [2007] Bus LR 139.

It may be that some will argue that time has thus been set "at large". If an employer is unable to give an extension of time (on the basis that the contractor did not give a clause 20.1 notice) that would otherwise be due, then the contractor may argue that it is relieved of the obligation to complete the works by the specified date. Arguably, where a delaying event has been caused by the employer and there is ordinarily an obligation on the employer to give an extension of time so as to alleviate the contractor from liquidated damages, but the employer is unable to do so, then time will become at large.[21] It must be remembered that the purpose of the extension of time provisions is quite simply to allow the employer the benefit of the liquidated damages provisions where the contractor is in delay, but only where the employer has not caused any of that delay.

The English legal principle of prevention means that an employer cannot benefit from its breach. If, therefore, there is concurrency of delay and the employer refuses to award an extension of time (thus alleviating the contractual liquidated damages), then the contractor may be freed from those liquidated damages in any event.

It might also be said that the true cause of this loss was not the employer, but the contractor's failure to issue a notice complying with clause 20.1. Until recently, judgments such as they were had been divided. The Australian case of *Gaymark Investments Pty Ltd* v *Walter Construction Group Ltd*[22] follows the English case of *Peak* v *McKinney*,[23] but goes further, holding that liquidated damages were irrecoverable when the contractor had failed to serve a notice in time; the completion date could not be identified, since time had become "at large". The alternative approach of *City Inn* suggests a different conclusion: the straightforward application of the timebar.

The key issue in a case like this is: whose acts or omissions under the contract, or breaches of contract, are the events that lead to the loss? Regardless of any acts, omission or breaches of the employer, can the loss be treated as caused by the contractor not having received an extension of time, having failed to issue a clause 61.3 notice in time?

This issue was recently considered in *Multiplex Constructions (UK) Ltd* v *Honeywell Control Systems Ltd (No. 2).*[24] Multiplex was the main contractor building the new national stadium at Wembley and Honeywell was one of the sub-contractors. The claimant in the action was Multiplex, and Honeywell the defendant. The key question in this case was whether time was set "at large" under Honeywell's sub-contract. In other words, had Honeywell's contractual obligation to complete within 60 weeks (subject to any extensions of time) fallen away and been replaced with an obligation to complete within a reasonable time and/or reasonably in accordance with the progress of the main contract works?

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21 See *Peak Construction (Liverpool) Ltd* v *McKinney Foundations Ltd* (1970) 1 BLR 114, CA.

22 *Gaymark Investments Pty Ltd* v *Walter Construction Group Ltd* (2000) 16 BCL 449, Supreme Ct NT.

23 See note 21.

24 *Multiplex Constructions (UK) Ltd* v *Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC), [2007] BLR 195.

Clause 11 required the sub-contractor to carry out and complete works in accordance with the sub-contract. In particular, the sub-contractor acknowledged, at clause 11.1.2, that "the Contractor could suffer loss and/or expense and/or damage if such time related matters [were] not complied with".

The key notice (or time-bar) provisions were clauses 11.1.3 and 11.2.1:

> 11.1.3 It shall be a condition precedent to the Sub-Contractor's entitlement to any extension of time under clause 11, that he shall have served all necessary notices on the Contractor by the dates specified and provided all necessary supporting information including but not limited to causation and effect programmes, labour, plant and materials resource schedules and critical path analysis programmes and the like. In the event the Sub-Contractor fails to notify the Contractor by the dates specified and/or fails to provide any necessary supporting information then he shall waive his right, both under the Contract and at common law, in equity and/or pursuant to statute to any entitlement to an extension of time under this clause 11.
>
> 11.2.1 If and whenever it becomes apparent or should have become apparent to an experienced and competent Sub-Contractor that the commencement, progress or completion of the Sub-Contract Works or any part thereof is being or is likely to be delayed, the Sub-Contractor shall forthwith give written notice to the Contractor of the material circumstances including, in so far as the Sub-Contractor is able, the cause or causes of the delay and identify in such notice any event which in his opinion is a Relevant Event.

Multiplex sought a declaration from the English Technology and Construction Court that, on the true construction of the sub-contract, clause 11 provided a mechanism for extending the period for completion of the sub-contract works in respect of any delay caused by an instruction under the contract. In particular, that such an instruction would not put time at large. In other words, the contract provided a mechanism for extensions of time in order to fix a new completion date, such that any damages could not be said to be a penalty.

Several authorities, some well known, were cited and discussed, in particular *Holme* v *Guppy*,[25] *Dodd* v *Churton,*[26] *Peak* v *McKinney,*[27] and *Trollope & Colls Limited v North West Metropolitan Regional Hospital Board.*[28] Jackson J derived three propositions from these:

> (i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.
>
> (ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.

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25 *Holme* v *Guppy* (1831) 3 M & LJ 387.
26 *Dodd* v *Churton* [1897] 1 QB 562, CA.
27 See note 21.
28 *Trollope & Colls Ltd* v *North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, HL.

(iii) In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor.[29]

Honeywell argued that there was no power to award an extension of time in respect of a direction given under the variations provisions of the contract. This, they argued, meant that a direction would lead to time being rendered at large. The judge did not accept that proposition. He concluded that directions issued under the variation clause 4.2 may have no effect at all upon the duration of the works. On the other hand, those that did have an effect would be variations under clause 4.2 and then would be recognised under the extension of time provisions.

Honeywell also argued that Multiplex failed to review the overall programme or consider and properly award extensions of time. Once again, these did not render the extension of time provisions inoperative.

Relying on the Australian decision of *Gaymark*,[30] Honeywell argued that a failure to comply with the clause was sufficient to put time at large. In that case, the contract provided that the contractor would only obtain an extension of time if notices had been submitted under clause 19.2 of the contract. That in turn relied upon *Peak Construction* v *McKinney*,[31] in which the House of Lords said that if an employer wished to recover liquidated damages because a contractor had failed to complete on time, then the employer could not do so where any of the delay was due to the employer's own fault or breach of contract. The extension of time provisions in a contract should therefore provide for an extension of time in respect of any fault or breach on the part of the employer. *Gaymark*[32] held that the inability to give an extension of time because of a contractor's failure to provide a notice meant that time was set at large; by contrast, in *City Inn*[33] the court concluded that the breach was not the employer's inability to grant an extension of time, the loss having instead been caused by the contractor's failure to serve an appropriate notice or indeed apply their minds to whether a notice was required.[34]

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29 Note 24, paragraph [56].
30 See note 22 and linked main text.
31 See note 21.
32 See note 22.
33 See note 14.
34 On appeal, the Inner House held that Shepherd was not in breach of contract in failing to issue notices under clause 13. However, if Shepherd had issued notices, then it might have been relieved of liability under the liquidated damages clause 23 (see last sentence of paragraph [25] of the judgment note 14). As a result Shepherd was not "in breach of" clause 13, but had incurred liability under clause 23.

Jackson J also considered the use of "the prevention principle" in *Gaymark*,[35] concluding that it was not clearly English law and that the approach of *City Inn*[36] was to be preferred. He thought that there was considerable force in Professor Wallace's criticisms of *Gaymark*, noting that contractual terms requiring a contractor to give prompt notice of delay serve a useful purpose:

> such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. 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.[37]

He concluded:

> If the facts are that it was possible to comply with clause 11.1.3 that Honeywell simply failed to do so (whether or not deliberately), then those facts do not set time at large.[38]

Honeywell had a further argument in respect of the effect of an earlier settlement agreement between Multiplex and the employer Wembley National Stadium Ltd, but Jackson J concluded that this did not entitle Honeywell to any relief. In the absence of arguments drawn from equity, it seems therefore that there is a high chance that the timebar in FIDIC clause 20.1 will be enforced as a condition precedent.

Equity

The contractor wishing to make a claim for additional time or additional payment, like under a more traditional standard form, may be able to rely upon the equitable principles of waiver and/or estoppel.[39] It may be that the contractor does not serve a formal notice because, by words or conduct, the employer (or indeed engineer) represents that they will not rely upon the strict eight-week notice period.

The contractor would also need to show that he relied upon that representation and that it would now be inequitable to allow the employer to act inconsistently with it. Further, what might be the position if the contract contained a partnering-styled amendment such

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35 See Ellis Baker, James Bremen & Anthony Lavers, *The Development of the Prevention Principle in English and Australian Jurisdictions*. [2005] ICLR 197, page 211; also I N Duncan Wallace, *Liquidated Damages Down Under: Prevention by Whom?* (2002) 7:2 Construction and Engineering Law 23, where Duncan Wallace holds that *Gaymark* represents "a misunderstanding of the basis of the prevention theory" and "a mistaken understanding of the inherently consensual and interpretative basis of the prevention principle". In particular he says of *Gaymark*: "Neither Bailey J nor the arbitrator discussed or noted the practical need which justifies a strict notice requirement in all EOT matters (due to the Contractor's more intimate knowledge of its own construction intentions and so the critical path significance of an EOT event and also to give the owner an opportunity as, for example, by withdrawing an instruction or varying the work to avoid or reduce delay to completion of which he has been notified). Nor was there any recognition that, precisely for these reasons, strict notice would be even more justifiable where random acts or instructions of the owner or his Superintend could later be said to be acts of prevention".

36 See note 14.

37 See note 24, paragraph [103].

38 See note 24, paragraph [105].

39 See *Hughes* v *Metropolitan Railway* (1877) 2 App Cas 439, HL.

as the requirement for the parties to act "in a spirit of mutual trust and co-operation"? It would be somewhat ironic if a contractor did not submit contractual notices, in the spirit of "mutual trust and co-operation", but the employer at some much later date relied on the strict terms of clause 20.1.

Conclusion

The time-bar provisions in clause 20.1 of FIDIC 1999 are valid under English law. However, the success of their operation will vary depending on the circumstance of the case. Clauses of this nature are becoming more prevalent in other standard forms, and also in amendments to standard forms and bespoke contracts.

5 October 2007

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Appendix 20.1 Contractor's Claims

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 Contractor shall also submit any other notices which are required by the Contract, and supporting particulars of the claim, all as relevant to such event or circumstance.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

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, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

(a) this fully detailed claim shall be considered as interim;

(b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and

(c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. 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.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determination] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

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5 October 2007