

Trowers & Hamlins' Construction Alert: A contractor's failure to give notice of a claim – The FIDIC Time Bar in the Gulf — November 2016



A contractor failing to give timely contractual notice of claims and an employer enforcing contractual time bars is an all too familiar scenario often confronting parties to a construction contract.

In jurisdictions where such notices are treated as a condition precedent, the contractor's failure to serve notices of claim will be fatal, and an employer will have a complete defence to the contractor's claim, no matter how genuine the claim may otherwise be.

FIDIC in the Gulf

In a construction context it is not uncommon in the Gulf region to encounter either the FIDIC¹ forms of contract or bespoke contracts that have drawn heavily from the FIDIC precedents. Drafted with the construction industry in mind, the FIDIC suite of contracts is generally regarded as taking a balanced approach towards both responsibilities and allocation of risk.

Contractor's claims

In relation to claims by contractors, the FIDIC forms typically prescribe the following time bar² :

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 FIDIC drafting committee intended this notice to be a condition precedent to an extension of time and/or additional payment.³

From a common law perspective, English courts, for example, have given recognition to conditions precedent such that contractors' claims will be time barred where there is a failure to serve a notice of claim within the time prescribed.⁴

From a contractor's standpoint, irrespective of jurisdiction, a contractor's strongest position will always be where it is able to demonstrate its compliance with the contractual requirements to give timely notice of claims.

Time bars and civil law in the Gulf

In a civil law context there are, however, a number of alternative arguments that (in certain circumstances) contractors may be able to raise in response to an employer's argument that the contractor is time barred for having failed to comply with the notice requirements under the contract pertaining to notification of claims.

Statutory prescription periods

Incorporated into Sharia law is the principle that a just claim never expires. This is tempered, at least in those Gulf states with a civil code,⁵ by statutory prescription periods which effectively set time limits for seeking relief (rather than impinging upon the substantive right itself). For example, a translation of Article 487(1) of the UAE Civil Code provides:

It shall not be permissible to waive a time bar defence prior to the establishment of the right to raise such defence, nor shall it be permissible to agree that a claim may not be brought after a period differing from the period laid down by law. (Emphasis added)

Other Gulf states have a reciprocal provision.⁶

Depending upon the jurisdiction, the respective civil code will identify various prescription periods for particular claims. Again, for example, Article 95 of the UAE Civil Code provides an overarching time limit for claims arising out of a commercial contract of 10 years. Presuming that this 10 year time limit applied, it follows that a clause of a contract purporting to reduce the time by which a party must commence proceedings to pursue a claim will be void.

Whether such an argument could be applied to a clause such as the FIDIC clause 20.1 time bar will depend upon, among other things, the facts of a particular case and will ultimately be a matter for determination by the court (or arbitral panel).

Good faith

A further relevant aspect of Sharia law is the principle of good faith. Again, the civil codes enacted in the Gulf states preserve this concept:

*The contract must be performed in accordance with its contents and in a manner consistent with the requirements of good faith.*⁷

Good faith will become relevant to time bars in circumstances where, for example, an employer is responsible for a delay event (causing not only delay to the project but resulting in the contractor incurring additional costs). It would appear contrary to the concept of good faith if the employer was permitted to avoid having to grant to the contractor an extension of time or to compensate the contractor for the additional costs incurred simply because the contractor failed to comply with a notice provision (particular as the employer would likely be aware of the delay event it caused).

In this respect the conduct of the respective parties, and any evidence of acting contrary to the principle of good faith, will become a relevant consideration for a court (or arbitral panel) determining the matter.

Practical considerations

As highlighted, notwithstanding any potential alternative arguments, it remains a priority for contractor's to ensure that they comply with the contractual requirement to notify employers of claims. This means ensuring that all such notices:

- include all the information specified in the contract;
- are served on the relevant party (or parties) in accordance with the methods prescribed in the contract; and
- are served within the time prescribed.

Upon receipt of any claim from a contractor, contractors can expect that an employer's first considerations will be whether or not the claim has been made out of time and/or served in a manner stated in the contract.

In light of the alternative arguments around time bars potentially available to contractors, it remains prudent for employers to undertake a merits review of any notified claims in order to build a contemporaneously constructed case in support of any primary argument that the contractor's claim may be time barred.

The availability to contractors of the alternative arguments mentioned above will, not unsurprisingly, ultimately depend upon the particular facts and circumstances confronting the parties.

¹Fédération Internationale des Ingénieurs-Conseils.

²See for example, clause 20.1 of the FIDIC Red, Yellow, Silver and Gold Books.

³Christopher Seppälä, 'Contractor's Claims Under The FIDIC Contracts For Major Works' (2005) Vol 21 No 4, Construction Law Journal.

⁴See for example, *Bremer Handelgesellschaft mbH v Vanden Avenne Izegem P.V.B.A.* [1978] 2 Lloyd's Rep. 113 and *Multiplex Construction v Honeywell Control Systems* [2007] EWHC 447.

⁵That is, to the exclusion of the Kingdom of Saudi Arabia.

⁶See *Oman Civil Code Article 354, Qatar Civil Code Article 418, Kuwait Civil Code Article 453, and Bahrain Civil Code Article 380.*

⁷A translation of UAE Civil Code Article 246. See also, *Oman Civil Code Article 156, Qatar Civil Code Article 172, Kuwait Civil Code 197, and Bahrain Civil Code Article 129.*

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