

Time bars in the FIDIC Conditions of Contract

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- III. Arguments against the enforcement of time bars
- IV. The new approach to time bars in the 2017 FIDIC books
- V. Practical issues regarding time bars

I. What is a time bar?

What is a time-bar provision?

- What is a time bar?
 - A time bar provides that if a party fails to serve a requisite notice of its claim within a specified period of time, it will be prevented from claiming the relief it seeks in relation to that claim
- Time bars are standard features of construction contracts
 - Examples: Sub-Clause 20.1 of the 1999 FIDIC books, Sub-Clause 20.2.1 of the 2017 FIDIC books

Sub-Clause 20.1 of the 1999 FIDIC books

Sub-Clause 20.1 of the 1999 FIDIC books:

"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."

Purpose of time-bar provisions

- Time bars serve a legitimate purpose
 - In ICC case No. 20910/ASM/JPA (C-20911/ASM), the Tribunal held:

1699. The Arbitral Tribunal stresses that such a contractual notice requirement does not serve purely formalistic ends. In a contractual relationship of the complexity and duration such as this one, where an ongoing cooperation is required from the Parties, it is essential for the proper working of the Contract that the Parties are made aware of circumstances giving rise to potential claims so that these circumstances can be addressed expeditiously and the Parties can proceed with a proper understanding of their respective obligations.

Partial Award in ICC case No. 20910/ASM/JPA (C-20911/ASM) of September 2020

II. Enforcement of time bars

Enforcement of time bars and exceptions

- ❑ The general position is that time bars should be enforced as this is what the parties have agreed
- ❑ However, the approach to the enforcement of time bars differs depending on the jurisdiction in which enforcement is sought
- ❑ Enforcement in some jurisdictions may be denied in some cases

Practical approaches adopted by decision-makers

- Practical approaches adopted by adjudicators/arbitral tribunals in relation to time-bar defences:
 - To dismiss claims as time-barred without reviewing their merits
 - To dismiss claims as both time-barred and unfounded on their merits
 - To disapply the time-bar provisions based on some of the arguments discussed below

Enforcement of time bars in common law countries

- ❑ In the U.K., time-bar provisions with clear language will typically be enforced
 - A notice provision will be construed as a condition precedent if it states precisely the time within which the notice is to be served and makes plain by express wording that unless the notice is served within that time the claiming party will lose its rights (*Bremer Handelsgesellschaft v Vanden Avenne-Izegem* [1978] 2 Lloyd's Rep 109 HL)
- ❑ In the U.S., time bars are also typically enforced subject to some exceptions
 - For example, U.S. courts may refuse to enforce a time bar if:
 - a. The non-claiming party already knew the circumstances that were the basis of the claim;
 - b. The contract administrator considered the merits of the claim without raising the lack of notice; or
 - c. The lack of a timely notice was not prejudicial to the non-claiming party.

Douglas S. Oles, "Lack of Claim Notice as a Defense to Construction Claims", in *The Construction Lawyer* (2012), pp. 6-11

Enforcement of time bars in civil law countries

- ❑ In many civil law countries, time bars will be enforced:
 - ✓ In France, courts have upheld time bars in construction contracts (although not in the context of Sub-Clause 20.1)
 - E.g., *Cour de Cassation* (Supreme Court), 3rd Civil Chamber, July 6, 2011, no. 10-10694
 - ✓ In Switzerland, time-bar provisions will typically be enforced (subject to possible exceptions related to the principle of good faith)
 - ✓ Case law from Central and Eastern Europe suggests that time-bar provisions are generally valid and enforceable
 - Decision of the Polish Supreme Court of 23.03.2017 on Case V CSK 449/16; Final Award in ICC Case 15282 of 2010; Final Award in ICC Case 24652/MHM/HBH of 2021 (unpublished)

Enforcement of time bars in civil law countries

- ❑ A main argument in favour of the enforcement of time bars is the parties' freedom of contract and the principle of *pacta sunt servanda*
- ❑ The same principles are recognized under the Bulgarian Law
 - Чл. 9 от ЗЗД:
"Страните могат свободно да определят съдържанието на договора, доколкото то не противоречи на повелителните норми на закона и на добрите нрави."
 - Чл. 20а от ЗЗД:
"Договорите имат силата на закон за тези, които са ги сключили. Договорите могат да бъдат изменени, прекратени, разваляни или отменени само по взаимно съгласие на страните или на основания, предвидени в закона."

Enforcement of time bars in civil law countries

- Arbitral tribunals have often referred to these principles when enforcing time bars
- E.g., the tribunal in ICC Case 15282 of 2010 held:

"Parties enjoy the freedom of contract (a rule based on article ... of the [State X Civil Code]) and may regulate their rights and obligations in a manner they wish... Once the Parties agreed on the final term and further agreed that the rights depend upon observing the final term, a failure to observe the term results in losing their rights.

Such a form of a final term is permissible and falls into the category of terms 'foreseen to take an action to preserve the right' ... The 70-day term provide for in Sub-Clause 67.1 of FIDIC General Conditions of Contract [of the FIDIC Red Book, 1987 ed.] has exactly that legal nature and failure to observe this term results in losing the right to arbitrate the dispute...".

[Final Award in ICC Case 15282 of 2010, 24 ICC Bulletin, no. 2 (2013), p. 84.]

Enforcement of time bars in civil law countries

- ❑ The tribunal in ICC Case 24652/MHM/HBH dismissed the great majority of the Contractor's claims as time-barred without considering their merits:

389. The notice requirement under Sub-Clause 20.1 is strict. If the Contractor fails to comply timely with this requirement with respect to a claim, the legal consequences of the failure are exhaustively defined in Sub-Clause 20.1 and are clear, namely, the Claimant loses its contractual right to an extension of time or additional payment. This effect takes place automatically by virtue of the Contract. The Engineer and the Employer always have the right to grant the Contractor more time, in the exercise of their contractual autonomy. However, once the Contractor fails to observe the 28-day deadline under Sub-Clause 20.1, they have no obligation to do so.

[Final Award in ICC Case 24652/MHM/HBH of November 2021 (unpublished)]

442. For the above reasons, the Tribunal finds that, of the Claimant's claims that the delay experts agree might have caused of critical delay to the Project, the only one that was not extinguished by the time-bar provisions stipulated in Sub-Clause 20.1 of the Contract is that which concerns the foundations for bridge at KM 6+212. Accordingly, any further consideration by the Tribunal to the Claimant's EoT claims, and the possible entitlement to prolongation cost, will only concern the Claimants claim concerning the foundations for bridge at KM 6+212.

III. Arguments against the enforcement of time bars

Arguments against the enforcement of time bars

Arguments commonly used to defend against a time-bar argument:

- Enforcement of time bars should be denied based on the principle of good faith
- Waiver
- “Constructive notice” arguments
- Time bars contradict statutory limitation (or prescription) periods of mandatory nature

Principle of good faith

- ❑ Most civil codes contain provisions stating that contracts must be performed in accordance with the principle of good faith
- ❑ It is sometimes argued that the enforcement of time bar provisions should be denied if it runs counter to the principle of good faith
 - *E.g.*, if an employer, who is in breach, and is aware of the consequences of its breach, opposes to a contractor's otherwise meritorious claim on the ground that the claim has been notified late

Principle of good faith

- In CRCICA Case No. 281/2002, the tribunal referred to the principle of good faith to deny the enforcement of a time bar:

"[A]s the Contractor failed to comply with the above described procedure, it is in principle time-barred from claiming additional payments in respect to the event giving rise to the claim. However, this principle should be tuned down in the event the Employer and/or the engineer were aware, without any doubt, of the Contractor's intention to claim additional payments..."

"[E]ven though the principle of Clause 20.1 C.C. is clear, it should be applied with flexibility. Thus, if the tribunal must apply the law, that is the Contract (Article 147/1 of the Egyptian Civil Code), it also has to take into consideration good faith in the behaviour of the parties [as] pursuant to Article 148 of the Egyptian Civil Code... Accordingly, the Tribunal will appreciate, for each claim, whether or not the Employer and/or the Engineer were aware, without any possible doubt, of the Contractor's intent to claim additional payments".

[J.V. of American and EU Dredging Companies v. Red Sea Public Authority (RSPA), Final Award, CRCICA Case No. 281/2002, 28 June 2004, at 217]

Principle of good faith

- In CRCICA Case No. 281/2002, the tribunal referred to the principle of good faith to deny the enforcement of a time-bar provision (cont.)
- The tribunal went even further and held that the employer's time-bar defence against one of the contractor's claims was raised in "bad faith"

"It is undisputed, given the briefs of the parties, that the increase of the depth of the tug basin from -4 m to -5 m ordered during a meeting held on August 16, 1999 was not included in the Contract'[s] scope. Thus, additional works were undertaken by the Contractor who is entitled to receive additional payment, as acknowledged by the Engineer in its Decision dated December 22, 2001. The Respondent contends that the Contractor's claim shall be dismissed since it did not, during the course of the Contract, comply with Clause 20.1 C.C. It is the Tribunal's view that such defense is groundless and shows the Employer's bad faith."

[J.V. of American and EU Dredging Companies v. Red Sea Public Authority (RSPA), Final Award, CRCICA Case No. 281/2002, 28 June 2004, at 217]

Principle of good faith

- However, the principle of good faith has sometimes been invoked by tribunals to enforce a time bar:
- For example, the arbitral tribunal in ICC Case 16765 held, by majority, in its final award of 2013:

"Applying [a provision] of the applicable Civil Code referred to by the Claimant, which provides that: 'legally concluded agreements have the power of law between contracting parties', and applying [another provision], pursuant to which: 'agreements shall be fulfilled in good faith', the majority of the Tribunal considers that the Claimant's claim for an Extension of Time in the present arbitration (which is generally based on the allegation that the Engineer's delay in approval of the Process Design – the event or circumstance giving rise to the claim – caused delay to the Works), is time-barred since notice of delay and claim for an extension of time on the part of the Claimant was given later than 28 days from approval of the Process Design, that is to say, 28 days from 13 April 2006." [Final Award in ICC Case 16765 of 2013 in 1 ICC Dispute Resolution Bulletin 2015, p. 104]

Waiver

- The waiver argument can be applied in both civil and common law jurisdictions
 - E.g., if the Employer/the Engineer has been settling contractor's claims without any regard to the time-bar provisions, it may be precluded from insisting upon compliance with these provisions
- These arguments are however not always easily accepted by tribunals
 - For example, the tribunal in CRCICA Case No. 281/2002 rejected the contractor's argument that the employer has waived its right to raise a time-bar defence:

"As to the Claimants' allegation that the Employer has waived its right to rely on [Clause 20.1] since it has not invoked in due time the Contractor's non-compliance with it, the Tribunal finds that it was the Contractor's sole liability to comply with clause 20.1 C.C. thus, in the event it failed to do so, it cannot rely on the Employer's alleged failure as the latter was not bound, under the Contract, to raise a notice of non-compliance."

[J.V. of American and EU Dredging Companies v. Red Sea Public Authority (RSPA), Final Award, CRCICA Case No. 281/2002, 28 June 2004, at 217]

“Constructive” notice

□ “Constructive” notice argument:

- Possible to make under the 1999 FIDIC books where a “bare notice” is sufficient
- However, the 2017 FIDIC books appear to preclude the parties’ reliance on this argument:
 - Pursuant to the definition of a “Notice”, the Notice of Claim is a *“written communication identified as a Notice”* (Sub-Clause 1.1.56 RB/17)
 - *“Nothing in any programme, the Programme or any supporting report shall be taken as, or relieve the Contractor from any obligation to give, a Notice under the Contract”* (Sub-Clause 8.3 RB/17)

Time bars v. limitation periods

- ❑ In some civil law jurisdictions, time bar provisions have been considered as invalid on the ground that they contradict statutory limitation (or prescription) periods of mandatory nature
 - Е.г., съгласно член 113 от ЗЗД:
„Недействително е съглашението, с което се скъсяват или удължават установените давностни срокове, както и отказът от давност, преди тя да е изтекла“
 - Note that most scholars consider that there is a conceptual difference between statutory limitation periods and contractual time-bars

Time bars v. limitation periods

Limitation Periods	Contractual time bars (Sub-Clause 20.1)
Concern <i>the right to take legal action</i> before a court/tribunal	Concern <i>the substantive right itself</i> and not the right to take legal action in respect of that right
Expiry of the period bars the <i>exercise</i> of the substantive right but does not extinguish it	Expiry of the period extinguishes the substantive right
Can be subject to suspension or interruption	Not subject to suspension or interruption
They are usually of mandatory nature and cannot be reduced and/or prolonged by the parties	Typically freely agreed upon the parties or contained in a standard form that the parties are free to modify
Considered as a matter of public policy	They are not a matter of public policy; serve to protect the interests of the contracting parties

Time bars v. limitation periods

- ❑ Most legal systems recognize that time bars are different from limitation periods
- ❑ The UNIDROIT Principles also recognize this distinction:
 - **Article 10.1 of the UNIDROIT Principles:**
 - “(1) The exercise of rights governed by the Principles is barred by the expiration of a period of time, referred to as “limitation periods”, according to the rules of this Chapter [10 - Limitation Periods].
 - (2) This Chapter does not govern the time within which one party is required under the Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or to perform any act other than the institution of legal proceedings”.

Time bars v. limitation periods

□ The Polish experience

- Article 119 of the Polish Civil Code:

"Periods of limitation may not be shortened or prolonged by a legal act"

- In two decisions from 2011 and 2012, the District Court of Warsaw held that Sub-Clause 20.1 of the FIDIC Books was invalid as it contravened Article 119:

"There is no reason to assume that the scope of freedom of contract goes so far as to allow for free creation of contractual deadlines causing the extinction of claims related to property, in particular, where such claims are subject to statutory regulation on limitation"

[Judgment of 13 July 2011 (file XXV C-701/10) and Judgment of 11 June (file XXV C-567/11, confirmed by the Court of Appeals on 20 March 2013 (file No. VI Aca-1315/12), referred to in Lukas Klee, *International Construction Contract Law*, 2nd ed. (2018), pp. 384-385)]

Time bars v. limitation periods

□ The Polish experience

- However, the same Court took the opposite view in other decisions:

"In accordance with the general principle of freedom of contract stated in the Article 353 [1] of the Polish Civil Code it is possible to contractually agree a period of time after which the creditor's claim expires. This is not contrary to the Article 119 of the Polish Civil Code. The effects and functions of time bars and periods of limitation are different".

[Judgment of 30 April 2013 (file XXV C-355/10), referred to in Lukas Klee, *International Construction Contract Law*, 2nd ed. (2018), pp. 384-385)]

- In 2017, the Polish Supreme Court recognized that Sub-Clause 20.1 was generally valid and that it was not a modification of the limitation periods under Polish law

[23 March 2017, case no. V CSK 449/16]

IV. The new approach to time bars in the 2017 FIDIC books

Increased number of time bars under the 2017 FIDIC Books

❑ The 2017 editions contain multiple time bars:

- The claimant must give a Notice of Claim to the Engineer within 28 days after it became aware or should have become aware of the event or circumstance giving rise to the claim (otherwise the claim is time-barred) [SC 20.2.1 RB/17]
- The claimant must submit a fully detailed claim within 84 days after it became aware or should have become aware of the event or circumstance (if no statement of the legal basis of the claim is submitted, within that period, the Notice of Claim is no longer valid) [SC 20.2.4]
- If a Party is dissatisfied with an Engineer's determination of a Claim, it may give a Notice of Dissatisfaction ("NOD") within 28 days (otherwise, the Engineer's determination becomes final and binding) [SC 3.7.5]
- The resulting Dispute must be referred to the DAAB within 42 of giving or receiving a NOD (otherwise the NOD is no longer valid) [SC 21.4.1]
- A Party dissatisfied with an DAAB's decision must give a NOD against it within 28 days (otherwise the DAAB decision becomes final and binding) [SC 21.4.4]

The Engineer may disapply the time bars

□ Time Bars and Disapplication of Time Bars

- The Engineer has an active role in monitoring whether the claimant has complied with the time-bar provisions under SC 20.2.1 and SC 20.2.4:
- If (1) the claimant's Notice of Claim is late and/or (2) the basis of the Claim is not submitted within the 84-day period for submission of a fully detailed claim:
 - the Engineer must give Notice of time bar within 14 days, with reasons. If no such Notice, Notice of Claim is deemed provisionally valid (SC 20.2.2 and 20.2.4)
 - If either party disagrees with Engineer's Notice or lack of Notice of time bar, it must object and provide details (the Claimant must do so in its fully detailed Claim) (SC 20.2.2 and SC 20.2.4)

IV. The new approach to time bars in the 2017 FIDIC books

- **Time Bars and Disapplication of Time Bars**
 - The new FIDIC books provide for a more flexible approach towards time bars
 - The Engineer may disapply the time bars in SC 20.2.1 and 20.2.4 by taking into account certain circumstances which may include:
 - Whether or to what extent the other party would be prejudiced by the late submission;
 - The other party's prior knowledge of the event or circumstance giving rise to the Claim and/or the legal basis of the Claim (SC 20.2.5)
 - The Engineer's determination to disapply a time bar is subject to review in DAAB proceedings and/or arbitration

V. Practical issues regarding time bars

In what form should a notice of claim be given?

- The 1999 FIDIC Books do not prescribe a specific form for a notice of claim
 - Bare notice is sufficient (no requirement to be identified as a notice of claim, to state that it is given under SC 20.1 or to identify the particular relief sought)
 - However, it must be clear from the notice that it concerns a claim in relation to an identifiable event/circumstance
- Examples from the 2014 *Obrascon* case under English law:
 - The following wording in a letter “*[i]n our opinion the excavation of all rock will entitle us to an extension of time*” was considered to amount to a notice of claim
 - To the contrary, a statement in a progress report “*[t]he adverse weather condition (rain) have [sic] affected the works*” was considered to be “nowhere near a notice under Clause 20.1”

In what form should a notice of claim be given?

- Under the 2017 FIDIC editions however:
 - The Notice must identify itself as a Notice (SC 20.2.1)
 - There is no explicit requirement that the Notice refer to Sub-Clause 20.2

Does the time bar apply to claims arising out of Variations?

- Under the 1999 editions:
 - Sub-Clause 8.4 expressly states that claims for an extension of time are subject to Sub-Clause 20.1 (unless an adjustment has been agreed (SC 8.4(a)))
 - But does Sub-Clause 20.1 apply to claims for an additional payment arising out of Variations?
 - Conflicting views: there is no explicit reference to Sub-Clause 20.1 in the Variation provisions and scholars disagree as to whether such claims are covered by the broad wording of Sub-Clause 20.1

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 this Contract 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 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.

Sub-Clause 20.1 of RB/99

Does the time bar apply to claims arising out of Variations?

- There is conflicting case law as to whether Sub-Clause 20.1 applies to claims for additional payment arising out of Variations:
- *E.g.*, in ICC case No. 20910/ASM/JPA (C-20911/ASM), the arbitral tribunal held that a claim for an EoT and/costs arising out of a Variation was time-barred as no Sub-Clause 20.1 was given

1707.	<p><u>Therefore, it is incorrect to say that a Notice of Claim is never required if the claim relates to a Variation. Reading the Contract as a whole, it is clear to the Arbitral Tribunal that the only circumstances in which a claim for costs or time related to a Variation does not require notice under Sub-Clause 20.1 is where the Parties have agreed upon an adjustment to the Time for Completion and/or a Milestone Date as a result of the Variation. Otherwise, the Contract is quite clear that where there is a disagreement over the consequences of a Variation and the Contractor considers itself entitled to an Extension of Time, notice must be given.</u></p>
1708.	<p><u>The Arbitral Tribunal is of the view that no Notice of Claim for an Extension of Time was given within 28 days of an alleged Variation on 16 February 2011 and/or 21 February 2011, and therefore that the Contractor's claim for an Extension of Time and/or costs based on an alleged Variation is time-barred.</u> However, this does not mean that the Contractor's other claims for breach of Sub-Clause 5.2 or of ACP's legal duties are time-barred, since those claims fall within the scope of the Notices filed in May/October 2010 and March 2011, as already noted above.</p>

Does the time bar apply to claims arising out of Variations?

- ❑ The 2017 FIDIC Contracts clarify that claims arising out of Variations are not subject to the claims procedure
 - See Sub-Clause 8.5 and Sub-Clause 13.3.1 of RB/2017
- ❑ Given the uncertainty under the FIDIC 1999 books, it might be prudent for contractors using these books to give a notice of its claims for an EoT and/or additional payment arising out of Variations

Questions?