

Conditions Precedent: Will they bite?

9 July 2020

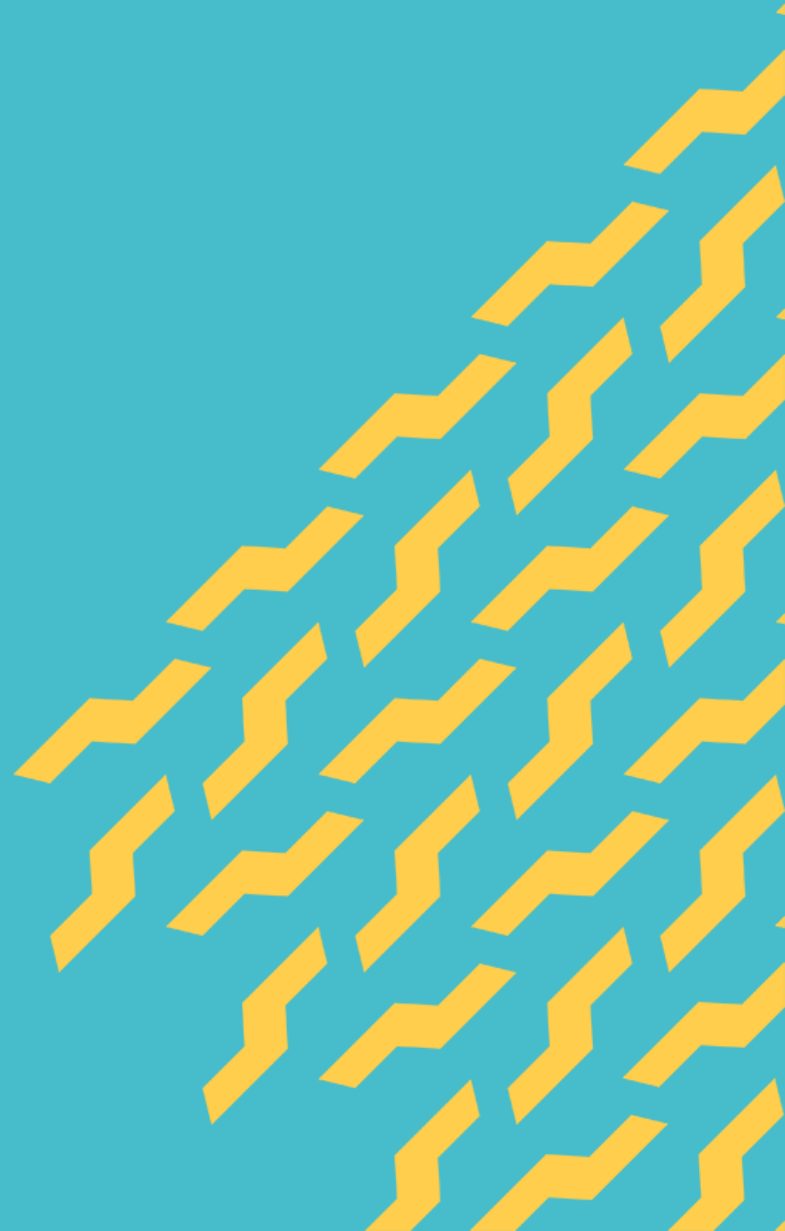
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Introduction

- What is a condition precedent?
- When will they be enforced?
- Conditions precedent in:
 - NEC
 - FIDIC
 - JCT?
- Will they bite?

What is a condition precedent?



What is a condition precedent?

- A contractual stipulation that must be satisfied before a right or obligation comes into existence
 - Includes, but not limited to, notice provisions with time bars attached to them
- Widely used in construction contracts:
 - Notices required for claims for extensions of time and associated loss and expense
 - Notices required for claims for adjustments to the contract price
 - Gateways to next steps in a dispute resolution process
- Useful management tool when used properly

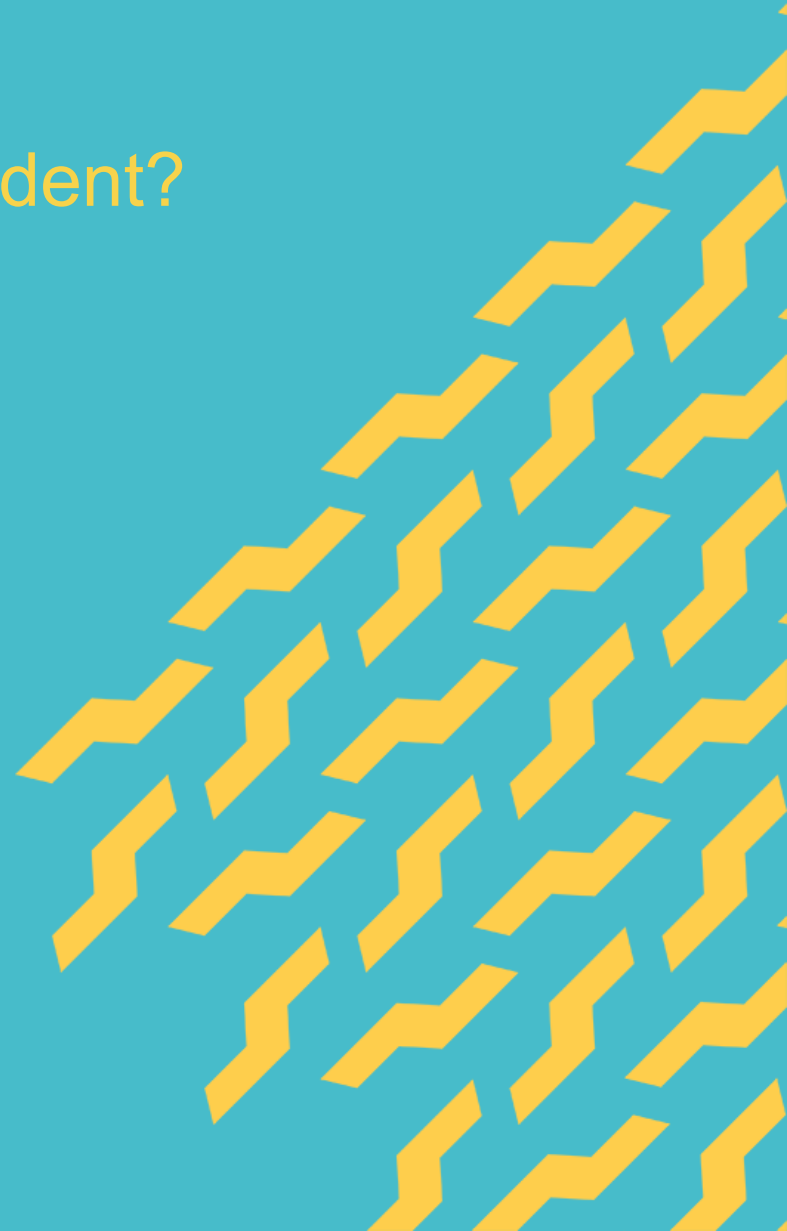
Conditions precedent as a management tool

- Prompt notification allows prompt evaluation of claims
- Parties can work together to manage the risks more effectively
- Stops the build up of claims and the classic “final account” dispute
- Their role is recognised by the Courts:
 - Mr Justice Jackson:

“Contractual terms requiring a Contractor to give prompt notice of delay serve a valuable 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.”

Multiplex v Honeywell [2007] EWHC 447 (TCC)

Is this clause a condition precedent?



But it doesn't say it's a condition precedent!

- Must be clear that the relief or obligation is contingent on the performance of certain obligations
 - i.e. there must be a conditional link
- No specific words are required
 - “Condition precedent” NOT required
 - “Condition” may not be enough (*Schuler (LG) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235)
- Bespoke contracts:
 - Not always clear!
 - Standard forms often amended or indeed subject to debate

Normal rules of contractual interpretation

- Normal principles of contractual interpretation apply
 - Ordinary meaning of words in the context of the contract as a whole
 - How are those words used elsewhere?
- If the words “*Condition Precedent*” are used in one place but not another what does that suggest?
- Other words may denote conditions precedent:
 - “Subject to” (*Heritage Oil and Gas Ltd v Tullow Uganda Ltd* [2014] EWCA Civ 1048)

Tullow Uganda Ltd v Heritage Oil and Gas Ltd, 2014 WL3535432

- Where words were used to create clear conditions precedent elsewhere in the contract were not repeated in the clause in question, that absence of wording is *“marked and of particular significance”*
- Both parties had a potential entitlement to indemnity under the contract, and it would not serve either of their interests to be able to be deprived of this for a minor technical breach of a notice provision – *“The fact that they did not use language such as that used in Article 7.4 suggests that they did not intend such consequences”*
- *“the fact that a breach of the notice requirement... might either be serious or minor is also, in light of the authorities to which I have referred, a reason for not finding it to be a condition precedent in the absence of clear language. Mr Cox submitted that one reason for regarding it as a condition precedent is that a breach might result in a loss that is not quantifiable. This argument, however, cuts the other way. If a breach might cause no loss or no obvious financial loss, that would be a good reason why the parties would not have agreed that any breach of Article 7.5, however minor, should lead to the loss of a valuable indemnity right”*
- The structure and construction of the clause is important – sub-clauses introduced by the same sentence are conjoined limbs of one clause, and therefore must both be capable of being a condition precedent or neither will be. This can be distinguished from the *“separate and free-standing”* sub-clauses in *Aspen Insurance UK Ltd v Pectel Ltd [2008] EWHC 2804 (Comm)*

Does my clause extinguish a right to relief? (1)

- Treated as limitation clauses
 - “clear, grammatical and workable” (*Towergate Financial (Group) Ltd v Hopkinson* [2020] EWHC 984 (Comm))
 - Unfair Contract Terms Act 1977 - “reasonable” (*J Murphy and Sons Ltd v Johnston Precast Ltd*, 2008 WL 51300336 (2008))
- Does extinguishing a right to relief reflect the commercial purpose of the clause? (*Aspen Insurance UK Limited v Pectel Limited* [2008] EWCH 2804 (Comm))
- Does the clause go further than simply making compliance mandatory? i.e. does it say or imply what the consequence of failing to comply is intended to be? (*Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2015] EWHC 3658 (Comm))

Does my clause extinguish a right to relief? (2)

- Keating on Construction Contracts:

“Many contracts provide that the contractor’s entitlement to an extension of time is dependent upon, amongst other things, the service of a notice within a stipulated time of an event causing delay. Courts are normally reluctant to construe the requirements as to the form and content of the notice required under such clauses too strictly and are unlikely to treat them as condition precedent to the making of any claim (as opposed to procedural requirements) absent clear language to this effect.”

When is a notice provision a condition precedent?

- A notice provision should be construed as a condition precedent if it:
 1. States the **precise time** within which the notice is to be served;

and

 2. Makes plain by **express language** that unless the notice is served within that time the **party making the claim will lose its rights under the clause**

Bremer Handelgesellschaft mbH v Vanden Avenne Izegem PVBA
[1978] 2 Lloyd's Rep 109 HL

What is a precise time? (1)

- *Steria Ltd v Sigma Wireless Communications Ltd* [2007] EWHC 2454 (TCC)
 - Suggests that a “*reasonable period*” may be precise enough
 - May not require a number of days to be set out
 - Clause 6.1 provided:

*“.....If by reason of any circumstance which entitles the Contractor to an extension of time for the Completion of the Works under the Main Contract, or by reason of a variation to the Sub-Contract Works, or by reason of any breach by the Contractor the Sub-Contractor shall be delayed in the execution of the Sub-Contract Works, then in any such case **provided the Sub-Contractor shall have given within a reasonable period written notice to the Contractor of the circumstances giving rise to the delay,** the time for completion hereunder shall be extended*”

What is a precise time? (2)

“...the principle which applies here is that if there is genuine ambiguity as to whether or not notification is a condition precedent, then the notification should not be construed as a condition precedent, such a provision operates for the benefit of only one party, i.e. the employer, and operates to deprive the other party (the contractor) of rights which he would otherwise enjoy under the contract.

...

*In my judgment the phrase ‘provided that the sub-contractor shall have given within a reasonable period written notice to the contractor of the circumstances giving rise to the delay’ is a clear in its meaning. What the sub-contractor is required to do is give written notice within a reasonable period from when he is delayed, and **the fact that there may be scope for argument in an individual case as to whether or not a notice was given within a reasonable period is not itself any reason for arguing that it is unclear in its meaning and intent.**”*

Steria Ltd v Sigma Wireless Communications Ltd

Express warning re non-compliance?

- *Steria Ltd v Sigma Wireless Communications Ltd*
 - Requirement may not need to be as expressly stated as suggested by the House of Lords in *Bremer*

“91. In my judgment a further express statement of that kind is not necessary. I consider that a notification requirement may, and in this case does, operate as a condition precedent even though it does not contain an express warning as to the consequence of non-compliance. It is true that in many cases (see for example the contract in the Multiplex case itself) careful drafters will include such an express statement, in order to put the matter beyond doubt. It does not however follow, in my opinion, that a clause — such as the one used here — which makes it clear in ordinary language that the right to an extension of time is conditional on notification being given should not be treated as a condition precedent. This is an individually negotiated sub-contract between two substantial and experienced companies, and I would be loathe to hold that a clearly worded requirement fails due to the absence of legal ‘boilerplate’.”

- Clause 6.1 was a condition precedent

- Conditions precedent will be enforced under English law when they are clear

*“I do have some sympathy for the plaintiff’s position because the failure to notify prevents a claim being made. That may seem harsh when commercial parties anticipated that a claim might come to pass. I should say that Mr Brannigan did leave no stone unturned in arguing this case. However, I have to decide the case within the parameters of commercial and contract law. **The contractual terms are clear and commercial certainty is an overarching consideration.** The evidence as to the commercial context and surrounding circumstances has not remedied the defect in the letter. It seems to me likely that the notification requirement was overlooked amid a mass of claims and in the midst of an ongoing process of discussions.”*

Keegan J

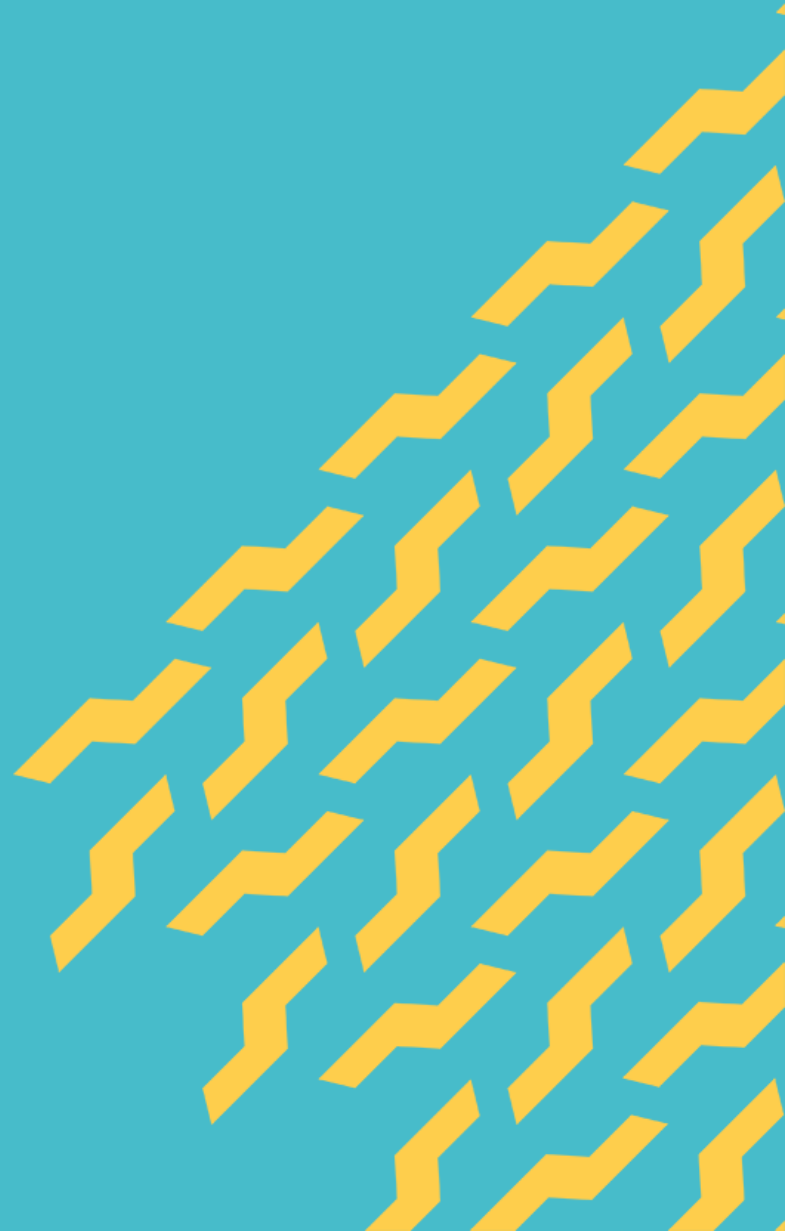
Glen Water Ltd v Northern Ireland Water Ltd

[2017] NIQB 20

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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 Prices, the Completion Date or a Key Date unless the event arises from the Project Manager or the Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption.

NEC3 – Does the time bar apply?

- Does the compensation event arise out of any of the following?
 - An instruction
 - A certificate
 - Changing an earlier decision
 - Correcting an instruction
- What is an instruction?
- Who needs to be “aware” of the event?
- Time starts from the event
- Waiver or estoppel:
 - Gentleman’s agreement?



NEC3 – What about Clause 10.1?

- Clause 10.1

“The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and cooperation.”

- Does that impact on the Clause 61.3 time bar?

*“Taking the obligation of mutual trust and co-operation (or even good faith) at its highest, it meant that, in the present case, the defendant could not do or say anything which lulled the claimant into falsely believing that the time bar in clause 93 was either non-operative or would not be relied on in this case. For this purpose, I am also prepared to accept that this obligation would go further than the negative obligation not to do or say anything that might mislead; **it would extend to a positive obligation on the part of the defendant to correct a false assumption obviously being made by the claimant, either that clause 93 was not going to be operated or that the time bar provision was not going to be relied on.** But beyond that, on any view of clause 10.1, there can have been no further obligation, because otherwise the provision would have required the defendant to put aside its own self-interest.”*

Mr Justice Coulson

Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319 (TCC)

FIDIC Conditions Precedent

- FIDIC imposes conditions precedent :
 - Employer's Claims
 - Clause 2.5 in the Red, Yellow and Silver Books
 - Clause 20.2 in the Gold Book
 - Contractor's Claims
 - Clause 20.1 in the 1999 editions
 - Clause 20.2 in the 2017 editions
 - Force Majeure
 - Clause 19.2 in the 1999 editions
 - Clause 18.2 in the 2017 editions

Clause 20.1

- *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*
 - Accepted that Clause 20.1 (FIDIC 1999) imposes a condition precedent
 - FIDIC 1999 Contract:

“no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer”

Clause 20.1

Under FIDIC 1999 Clause 20.1, a claim should:

- Be made by notice in writing to the Engineer
- Describe the event or circumstance relied on
- Be recognisable as a claim for an extension of time or additional payment (or both) under the contract or in connection with it

Mr Justice Akenhead

Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar

[2014] EWHC 1028 (TCC)

1999 Clause 2.5 – Employer claims

- If the Employer considers himself entitled to either any payment or an extension of the Defects Notification period under the Contract, the Employer or Engineer shall give notice and particulars to the Contractor
- The notice relating to payment should be given as soon as practicable after the Employer has become aware of the event or circumstance which gives rise to the claim
- Any notice relating to the extension of the Defects Notification Period should be given before the expiry of that period
- The Employer must also provide substantiation including the basis of the claim and details of the relief sought

1999 Clause 2.5 – Employer claims

- Once notice has been given, the Engineer shall make a determination in accordance with sub-clause 3.5
- Any amount payable under sub-clause 2.5 may be included as a deduction in the Contract Price and Payment Certificates
- The Employer cannot make any deduction by way of set-off or any other claim unless it is in accordance with the Engineer's determination
- Notice is not required for payments due to the Employer for services under sub-clause 14.19 or equipment under sub-clause 4.20

Is 1999 Clause 2.5 a condition precedent?

“Perhaps most crucially, it appears to the Board that ... although the closing part of clause 2.5 limits the right of an Employer in relation to raising a claim by way of set-off against the amount specified in a Payment Certificate, the final words are ‘or to otherwise claim against the Contractor, in accordance with this sub-clause’. It is very hard to see a satisfactory answer to the contention that the natural effect of the closing part of clause of 2.5 is that, in order to be valid, any claim by an Employer must comply with the first two parts of the clause, and that this extends to, but, in the light of the word ‘otherwise’, is not limited to, set-offs and cross-claims”.

Lord Neuberger

NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago)

20.3 [Waiver of Time limits] 2017 Edition:

“...if the claiming Party considers there are circumstances which justify the late submission of the Notice of Claim or particulars...he may apply to the DAB for a ruling...If the Engineer considers that, in all the circumstances, it is fair and reasonable that the late submission be accepted, the Engineer shall have the authority to waive the time limit...The circumstances which the Engineer may take into account....may include:

- (i) Whether or to what extent the other Party would be prejudiced...;*
- (ii) ...any evidence of the other Party’s prior knowledge; of the event or circumstance giving rise to the Claim;*
- (iii) ...any evidence of the other Party’s prior knowledge of the contractual and/or other basis of the Claim...*
- (iv) The extent (if any) to which the Engineer may have already proceeded under Sub-Clause 20.2.5 [Agreement or determination of the Claim]”*

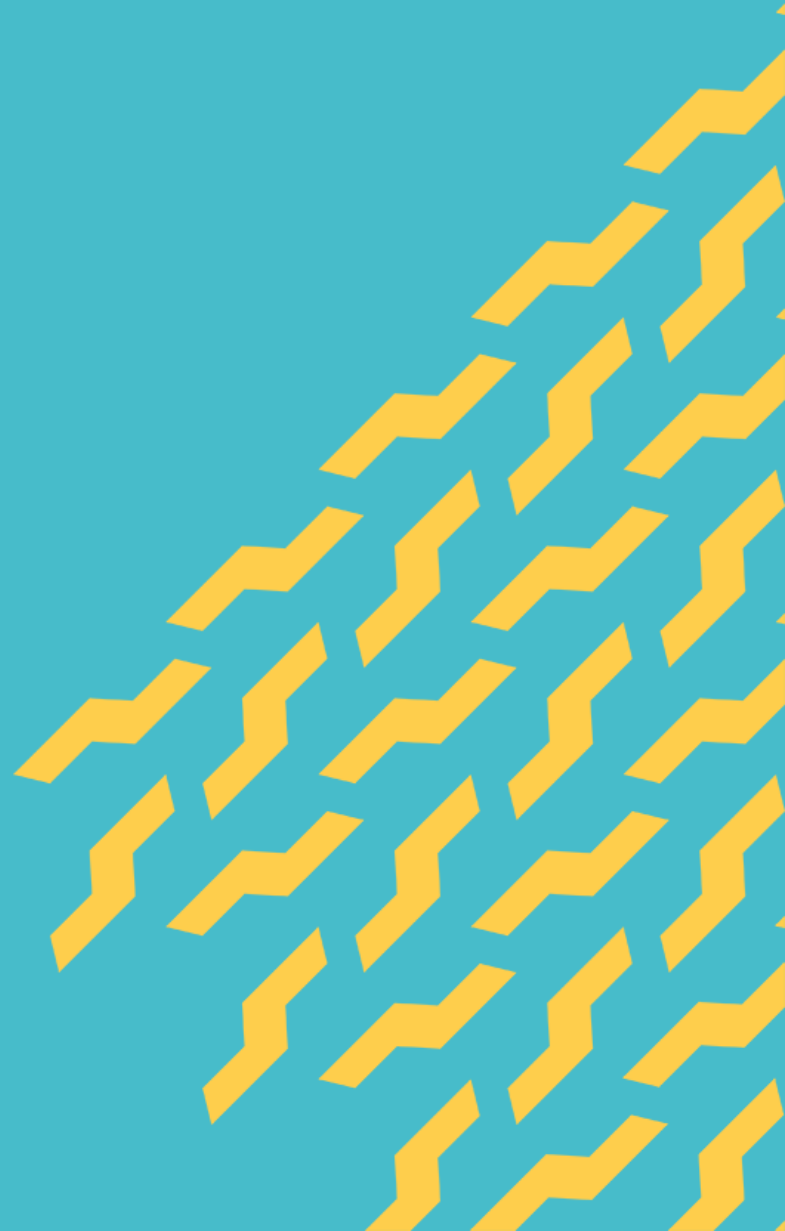
See also 20.1(a) of Gold Book

- Regarded as more contractor friendly than some other forms
- JCT Drafting Committee stated that they did not intend notification of Relevant Events or Relevant Matters to be the subject of a condition precedent
- Clause 4.20.1:
 - Sometimes argued it is a condition precedent
 - *“The Contractor **shall** notify the Employer as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession (or should have become) reasonably apparent to him”*
 - JCT 2011 wording different as the word “may” was used
- Sensible to notify sooner rather than later
- Bespoke amendments imposing clearer time limits often made

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Arguments around conditions precedent?

- Has there been some form of waiver or estoppel?
- *City Inn v Shepherd Construction Ltd* [2010] CSIH 68
 - Contract required Shepherd to give details of the impact of an architect's instruction within 10 days of an instruction or lose their entitlement to an extension of time
 - Representatives of City Inn were silent re the time bar at a meeting where the claims were discussed and "*defenders must be taken bound to know the terms of their own contract*"
 - Time bar clause waived by conduct
 - No need to show that there had been prejudice
 - "[90] It should also be recognised that, following upon the meeting of 8 April 1998, the respondents continued for many months to pursue their extension of time claim, based on the gas venting instruction, despite the fact that, had clause 13.8 been operated, such a claim would have been barred from the outset....."

What about the contents of the notice?

- *Maeda Corporation v Bauer Hong Kong Ltd* [2019] HKCFI 916
 - Tunnels constructed for the Hong Kong to Guangzhou Express
 - Bauer was the diaphragm wall subcontractor
 - Clause 21 required two notices:
 - Notice of intention to claim for extra money or time within 14 days
 - Notice within 28 days of the first setting out “*contractual basis together with full and detailed particulars and evaluation of claim*”
 - Arbitrator decided that the contractual basis of the claim did not need to be the same as set out in the notice
 - Judge held that arbitrator was incorrect:
 - “*failed to pay heed to the express terms which included a statement that the provisions had to be strictly complied with*”
- Contrast to *Obrascon* case and the approach of Mr Justice Akenhead

Consider the governing law

- Good faith: Article 14 of the Romanian Civil Code:
 - (1) *“Any natural or legal person must exercise its civil rights and must perform its civil obligations with good faith in accordance with public policy and good morals.*
 - (2) *Good-faith is presumed unless proved otherwise”*
- Civil code also generally impose obligations to act in accordance with the contract
- Does the time bar comply with mandatory limitation or prescription periods which preclude shorter notice periods?

Conclusions

- Consider whether bespoke clauses are actually conditions precedent
- Clear conditions precedent will be enforced under English Law
- Don't hesitate to notify!
 - Conditions precedent are in contracts for a reason
 - They help manage risk and prevent larger disputes in the long term
 - Gentleman's agreements are often difficult to evidence in retrospect
- Label your notice clearly as a notice AND follow the contract wording

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Any Questions?

Claire King
Rebecca Ardagh



Webinar

Watch | Listen | Discuss

Next week:

Adjudication Update: it's not just about *Bresco*

Thursday, 16 July 2020

12pm (30mins + 10mins Q&A)



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