

Time bars on contract claims

STUART JORDAN* discusses whether contractual time bars are fair and enforceable in the event of contractor claims in the Gulf region.

CONTRACTUAL time bars are common in both published and bespoke construction contracts in the Gulf. They are also controversial – there are regular debates about whether they are commercially justified and fair, and whether they are enforceable.

In the context of a construction contract, a time bar is a provision which expressly disqualifies any claim, whether for an extension of time or for additional cost, if that claim is not notified within a certain time.

They can be drafted in different ways but for this article, we'll concentrate on the principle of a time bar and ask two questions.

• **First: Are they fair?** The common complaint is that they are just a tripwire placed in the contract to try to deny meritorious claims. The common defence is that they promote good practice, in forcing the contractor to put its claims on the table for early evaluation – and to give the owner a chance to make informed project management decisions.

Both the complaint and the defence are right, of course: Owners (and lenders), in my experience, don't lose sleep over contractor claims being inadvertently lost by missing the time bar. Equally, it is also true that modern practice in contract administration does encourage claims to be determined (and any disputes resolved) as soon as practicable after they arose, and before they become over-layered with later actions and events. If a contract sets a time for submission of claims but doesn't also set a consequence for failure to meet that time limit (that is, late submissions will still be recognised and administered), the inevitable consequence is that claims are held back, bundled together and are tabled as part of the tussle at final account.

What do the standard contracts say? Some common published contracts have time bars and some do not. Owners like to point out that Fidic main contracts (which remain the most influential forms

in the Gulf region) have time bars – or at least they used to.

The First Edition Fidic contracts include a straightforward time bar: claims are required to be notified within 28 days of when the contractor became aware, or should have become aware, of the event or circumstances giving rise to it – and the claim shall be lost if this time limit is not met.

But the Second Edition forms are significantly different. There is still a time bar but if a claim is notified late, the engineer (or owner) must notify the claiming party (the process applies to claims from either party) of this fact within 14 days of the original notification – and if the engineer/owner fails to give that notice in time, the original claim is deemed to have been given in time. BUT the other party may still give a notice stating that the claiming party's notice should not be deemed valid.

I cannot see the logic to all this. Instead of deciding on a binary question (Should the claims timescale be a time bar?) we have a strange hybrid that adds a layer of potential dispute, about the validity of the original notice.

Whatever your view on these provisions, it is clear that Fidic no longer provides for a simple time bar.

• **Second question: Are they enforceable?** The obvious potential weak point is that a time bar can operate to deny meritorious claims. Where such claims arise from owner breach, this leaves the owner benefiting (in taking delay liquidated damages) from its own breach of the contract. So contractors have argued that time bars fall foul of the "prevention principle".

English Courts, however, have upheld

the enforceability of time bars so long as they are properly drafted as a condition precedent to entitlement. That is, to state clearly:

1. The contractor's timed obligations in submitting the claim (so think about when that time commences, the format and content of the notice etc.); and
2. That the consequence of failing to meet those obligations, on time, means the entitlement is lost.

The position in Gulf jurisdictions is potentially different – due to legal principles we have looked at before. These principles might operate on time bars in two important ways: to regulate the good conduct of parties; and to remove unfairness or prejudice in the outcomes of contract operation. As examples, from the UAE Civil Code:

Article 106(1) states that a party shall be held liable for an unlawful exercise of its rights – and under Article 106(2), that exercise will be unlawful if the interest sought is disproportionate to the harm suffered by others.

Article 246(1) requires that a contract is performed in accordance with its contents and in a manner consistent with the requirements of good faith.

Parties can argue, of course, about whether the benefit to the owner in invoking a time bar, is disproportionate to the harm to the contractor (are they not logically equal?) or whether invoking any agreed provision can be judged to be badly motivated.

Both parties should approach this issue with their eyes open and with good advice. ■

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Jordan ... time bars are controversial.