



CONSIDERATIONS IN RESPECT OF CONTRACTUAL TIME-BARS

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INTRODUCTION

In my profession as a claims consultant for HKA, I get the opportunity to support clients with the commercial management of major construction contracts worldwide as well as working closely with many of our expert witnesses in providing independent opinions on matters in dispute. Recently, we published the CRUX report ([click here](#) to download a copy) which provides valuable insights into claims and dispute causation for a portfolio of major worldwide capital projects, with a combined value in excess of US\$400 billion, where HKA provided claims consulting and dispute resolution services. Our research shows an average of 13 interrelated causation factors per project which highlights the complexity of successfully demonstrating cost and schedule overruns in construction contracts.

Even though the facts may be crystal clear and the presentation of a claim compelling, non-compliance with the procedures set out in the contract, in particular time-bar provisions, poses a significant risk to the claiming party's ability to recover loss and expenses. Moreover, a failure to recover time for delays to completion can expose a contractor to liquidated damages or possibly general damages claims for breach of contract. Consequently, the enforcement of a time-bar can have a major impact on the financial outcome of a project.

In this article I will deal with the risks of time-bars from a contractor's perspective. I will explore the meaning of time-bar as a condition precedent to a construction claim, the different perspectives and considerations relating to increasingly challenging time-bars, the enforcement of time-bars and the resultant exposure to counterclaims, examples of some strategies used to overcome the time-bar argument and steps that can be taken by a contractor to mitigate this risk upfront.

THE MEANING OF A TIME-BAR IN THE CONTEXT OF A CONSTRUCTION CONTRACT

Construction contracts typically set out the agreed price and timeframe for the completion of an agreed scope of works by a contractor. Considering that circumstances and requirements often change, most contracts will contain provisions which allow a contractor to claim adjustments to the work time schedule and contract price. The most common examples of contractor claims relate to events such as variations to the scope of works and delays caused by the project owner/ employer. A time-bar clause will generally prescribe the timeframe and content requirements of a notice or claim and will also expressly state that a contractor will lose its entitlement to claim if the notice or claim is given too late or fails to provide the prescribed details.

Non-compliance with the time-bar provision may render the whole claim invalid and inevitably poses a significant financial risk which is unfortunately too often underestimated by contractors.

PERSPECTIVES AND CONSIDERATIONS RELATING TO INCREASINGLY CHALLENGING TIME-BARS

Ultimately, the purpose of a time-bar is to ensure that the employer is given timely notification of events that may adversely impact the contract price and/or time for completion. This information provides the employer with a reasonable opportunity to address the underlying issue(s) and mitigate the negative effects of the event(s) going forward.

Standard forms of contract have been developed with the aim of achieving a reasonable allocation of risk between the parties. For example, the FIDIC Yellow Book standard form of contract is used globally for EPC contracts and was revised in 2017 to provide a reasonable timeframe for notification of claims which is now applicable to both contractor and employer claims. In accordance with Clause 20.2.1 of the 2017 edition of FIDIC Yellow Book, *'The claiming Party shall give a Notice to the Engineer.....no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance'*.

Timely flow of information is of utmost importance to the employer in order to effectively manage its overall schedule and budget and facilitate the decision making process by its key stakeholders. Accordingly, employers will often push for short time-bars combined with a high level of content requirement which can be agreed through amended standard forms or through employer bespoke forms of contract. If the consequences of doing so are not fully understood, there is a risk that this may unnecessarily place a significant administrative burden on a contractor. Equally, the increased frequency and complexity of notices and claims may cause an employer to be overloaded with information and the quality or reliability of this information may also be reduced due to the lack of time allowed for a contractor to prepare the same, thereby ultimately defeating the objective and instead causing decision making to be more difficult for an employer.

Non-compliance with the procedures set out in the contract, in particular time-bar provisions, poses a significant risk to the claiming party's ability to recover loss and expenses

Considering the increasing amount of case law on the subject of time-bars and the increased use of digitalisation in the construction industry, the express wording of time-bars provisions continue to evolve. It is not uncommon these days to see bespoke contracts or amended standard forms which have been tailored to shorten timeframes and require an "immediate" notification as soon as the contractor becomes aware of the circumstances giving rise to the delay, followed by a detailed claim within 5 calendar days of the notification. Most contractors would opine this to be unreasonably onerous and it is understandable that this may raise the question as to whether the time-bars are simply being used by an employer as a tool to avoid

liability for damages caused by its own actions. In addition, these time-bars often only apply to a contractor's claims, whilst there are no timeframes specified for employer's responses or claims.

ENFORCEMENT OF TIME-BARS AND THE RESULTANT EXPOSURE TO COUNTERCLAIMS

Courts will generally not change what has been expressly agreed between two parties in a contract and, therefore, the safest option would be to always assume that a time-bar provision will be enforced. In case of ambiguity, which is often the case in poorly drafted contracts, in common law jurisdictions the provision may be construed '*contra proferentem*', meaning that any uncertainty in the provision will be construed against the party which proposed or drafted the contract.

It should be noted that the consequences of a late notice or claim can differ significantly depending on the specific circumstances of the claimed events, the contract terms and also the law governing the contract. The approach in civil law jurisdiction is not strictly bound by case law (as is the case under common law) and may provide a greater level of flexibility including consideration as to whether enforcing a time-bar would be fair and reasonable. For example, according to the UAE Civil Code time bars are neither expressly prohibited nor enforced. Instead, the prescribed timeframes need to be read in the context of the UAE Civil Code which prohibits the exercise of rights if the '*interests desired are disproportionate to the harm that will be suffered by the other*' (Article 106) and requires the parties to act '*in a manner consistent with the requirements of good faith*' (Article 246).

Common law systems such as the United Kingdom have usually seen enforcement of clearly drafted time bars (e.g. NEC3 clause 61.3 and FIDIC sub-clause 20.1) in the past and it is my understanding that across the common law jurisdictions, the strictest application is generally seen in Australia. A good example is the 2015 decision by the Western Australian Supreme Court in *CMA Assets Pty Ltd v John Holland Pty Ltd* [No 6] [2015] WASC 217 where the judge upheld a strict time-bar against CMA even though John Holland may have

been fully aware of and responsible for the delay. The Court stated that '*there is no doubt the strict application of cl 10.12 and cl 10.13 is harsh. But I am not satisfied that it is without purpose and absurd, so that an alternative construction must be given, notwithstanding apparently clear words.*'

As a consequence of CMA's late delay notice, which should have been served within 7 days, and despite John Holland's full knowledge of the events, CMA was denied an extension of time for delays caused by John Holland. It then automatically followed that, in the absence of an extension of time to the completion date, CMA failed to complete the works by the contractual completion date and was therefore liable to pay John Holland liquidated damages. Of course, CMA argued that John Holland caused the delay and it would be unfair for John Holland to benefit from its own act of preventing CMA from completing on time (commonly referred to as the "prevention principle"). However, the Court held that '*CMA is precluded from the benefit of an extension of time and is liable for liquidated damages, even where the relevant delay has been caused by John Holland*'.

In the above example, the prevention principle was not applied since CMA had the opportunity (and thus was not prevented) to claim relief related to John Holland's breach, CMA's claim merely failed because of CMA's own failure to submit a timely notice. A scenario where the prevention principle would usually be applied is where a contract does not contain a mechanism to extend the time for completion due to a delay caused by the employer's conduct, thereby rendering "time at large" and relieving the contractor from its obligation to achieve a fixed completion date and removing its exposure to liquidated damages.

SOME STRATEGIES USED TO OVERCOME THE TIME-BAR ARGUMENT

I strongly believe in dispute avoidance and would always recommend to try to avoid or at least consider issues early on rather than raising them last minute, which in turn may lead to lengthy disputes that rarely benefit either party to the contract. Ideally, time-bars that suit the reasonable requirements and

capacity of both parties would be negotiated and agreed prior to signing a contract. Alternatively, if the parties agree during the project that the notice and claim submission procedure is too onerous, the parties may agree to extend the time-bars or reduce the content requirements through an amendment of the contract.

With respect to the application of a time-bar, one of the key elements that needs to be determined is the starting point or trigger of the time-bar in the context of the specific contract provision. Some contracts are clearer than others; for example, the starting point of when a contractor becomes reasonably aware of the circumstances giving rise to a delay could arguably be at the very start of the delay or upon the conclusion of the delay when all the circumstances are known. Certain issues may appear insignificant at the time or easy to mitigate, however, the cumulative effect of several small issues can easily lead to significant delays. Often the significance of these issues only becomes apparent further down the line at which point a claim may be deemed time-barred before the contractor knew one had arisen. Another point to consider is to what extent delay events are to be notified and assessed discretely or whether they are more procedural in nature and form part of a wider issue. For example, an employer may argue that a month of ongoing daily site access restrictions needs to be notified and claimed separately for each day the access was restricted, whereas a contractor may be more inclined to notify the issue as one event and submit its claim once the site access returns back to normal.

Arguments that will require legal expertise may include principles of estoppel and waiver which in certain circumstances may be applied to overcome contractual wording. If the notice procedure has not been formally amended but it can be clearly established that there was a common assumption between the parties to deviate from the notice procedure then this may be accepted by the Court.

There may also be other avenues to advance a claim under the law governing the contract. For example, the Australian Consumer Law (ACL) prohibits parties from making misleading representations as to their future intentions and from engaging

in conduct which is “misleading or deceptive or likely to mislead or deceive” (ACL, Section 18). Claims under the Australian Consumer Law may be commenced “within 6 years after the day on which the cause of action that relates to the conduct accrued” (ACL, Section 237). In the case *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd [2018] VSC*, subcontractor Brighton claimed to have incurred delays due to misrepresentations in the tender documents and main contractor Multiplex rejected the subcontractor’s claim based on contractual time-bars. In this instance, the Victorian Supreme Court decided that the statutory right to bring a claim for six years could not be defeated by a contractual time bar.

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As mentioned earlier in this article, if a contractor fails to overcome the time-bar argument in respect of claims for extension of time then it may be exposed to employer claims for late completion in the form of liquidated damages or general damages at law. A general damages claim by the employer for contractor’s breach of contract (failure to achieve the contractual completion date) would be less straight forward since the employer will have to demonstrate on the balance of probabilities that “but for” the contractor’s default the loss would not have been suffered. Therefore, although non-recovery of time (due to time-bars) will make the contractor liable for delay damages, the contractor may have a strong case in defending such claim if the employer’s delays would have caused the incurrance of the claimed damages in any event.

CONCLUSION

Non-compliance with contractual time-bars presents a significant risk in the claiming party’s ability to recover relief due under the contract and can easily result in significant losses. Although digitalisation has enhanced and continues to enhance contractor’s ability to timely identify issues and obtain the requisite records, many contractors still struggle to comply with the contractual time-bar, especially when such time-bars are particularly strict and onerous. The safest option would be to assume that a time-bar provision will be enforced and to take appropriate steps to mitigate the risks associated with time-bars early on, including:

- careful consideration and negotiation of reasonable and realistically achievable provisions;
- careful and clear drafting of such clause (e.g. what does “became aware” mean?);
- preparation of efficient contract administration/management procedures tailored to suit the contract provisions; and
- employment of experienced construction professionals who have both practical knowledge of the scope of work and experience/understanding of how to administer the contract.



About the author

Bjorn Smit, BSc (Hons), MRICS, is an Associate Director of HKA, one of the world's leading providers of consulting, expert and advisory services for the construction and engineering industry.

Bjorn is based in Perth, Australia, and has been extensively involved in supporting and advising clients on commercial and contractual matters throughout the various stages of construction projects ranging from a relatively small to large multi-billion contracts. He has worked on local and international construction projects, both onshore and offshore and in a wide range of sectors including oil and gas, energy, mining, infrastructure and commercial building.