Time Bars under the FIDIC Conditions of Contract

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I. Contractor’s Claims: Sub-Cl. 20.1

The Contractor must:

- notify a claim not later than 28 days after the Contractor became aware or should have become aware of the event or circumstance;

- submit a “fully detailed claim and full supporting particulars” within 42 days after it became aware (or should have become aware); and

- keep “contemporary records” to substantiate the claim and allow the Engineer to inspect these records and obtain copies.
I. Contractor’s Claims: Sub-Cl. 20.1

- The Engineer must:
  - respond within 42 days of receiving a claim or further particulars either approving the claim or disapproving it with “detailed comments”;
  - In any determination under Sub-Cl. 3.5
    - consult with both parties in an endeavor to reach agreement; and
    - if agreement cannot be achieved, make a fair determination in accordance with the contract “taking due regard of all relevant circumstances.”
“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.”

(Sub-Cl. 20.1)
II. Time-Bar Limitation Overview


- Notice of Claims: Sub-CI. 53.1

“Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.”
II. Time-Bar Limitation Overview


- Failure to Comply: Sub-Cl. 53.4

If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub-Clauses 53.2 and 53.3).

- It is clear that the FIDIC drafting committee intended Clause 20.1 to be a condition precedent of the Contractor’s claims.
III. Time-Bar Limitation: Types of Claims Barred

- “…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” (Sub-Cl. 20.1)
- The language of the sub-clause is broad enough to cover many Contractor claims.
III. Time-Bar Limitation: Types of Claims Barred

- However, arguably Sub-Cl. 20.1 does **not** apply to:
  - Any claim that the Contract be rescinded,
  - Claims seeking to establish any other rights of the Contractor, or
  - Claims seeking to establish that the Employer and/or the Engineer are in breach of the Contract.
IV. Time-Bar Limitation: Recourse under the Law

- Civil law approach (Switzerland):
  - Little jurisprudence indicating how the strict time limits of Sub-Cl. 20.1 would be dealt with under Swiss law
  - Duty of the tribunal to seek the parties’ real and common intention
  - *Venire contra factum proprium* and Art. 2 of the Swiss Civil Code (Good Faith Rule)
IV. Time-Bar Limitation: Recourse under the Law

- Civil law approach (more generally):
  - If deemed to be unduly burdensome or excessively onerous, strict time limits may be voided or extended as a matter of *ordre public* (e.g. French CC Art. 2254 al. 1).
  - Provisions such as Sub-clause 20.1 may exclude contractual claims but not claims arising under the law.
  - The duty to give notice to the Engineer may be deemed an obligation of the Contractor, rather than a condition precedent.
IV. Time-Bar Limitation: Recourse under the Law

- **Common law approach:**
  - Sub-Cl. 20.1 is interpreted as a condition precedent to the right to exercise a claim.
  - The Contractor’s claims for extension of time and additional payment must therefore comply with the clause’s time notice requirement.
IV. Time-Bar Limitation: Recourse under the Law

- Common law approach (cont.):

  - There is conflicting case law on the applicability of the prevention principle: a Contractor that has failed to comply with the requirements of Sub-Cl. 20.1 may have his claims foreclosed, even when the Employer’s breach caused the Contractor’s claim.

  - The particular circumstances of each situation must still be considered, because the actual circumstances of the case might reveal that the time-bar provision has not been effective (e.g. constructive notice, waiver and/or estoppel).
V. Practical Considerations and Conclusion

A. Vigilance and communication are key.

B. The importance of effective contract management cannot be understated for determining in a timely manner whether EoT or additional payment claims have arisen.

C. Contractors should understand the implications of the law applicable to the Contract on claims barred as a result of strict time-bar clauses such as Sub-Cl. 20.1.

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