[ж] CLAIM NOTICES UNDER THE FIDIC CONTRACTS: A COMPARISON OF THE CIVIL LAW AND COMMON LAW PERSPECTIVES

(FIDIC İNŞAAT SÖZLEŞMELERİNDE TALEP BİLDİRİMLERİ KITA AVRUPASI HUKUKU VE ANGLO-SAKSON HUKUKU MUKAYESESİ)

Sinem Özyiğit [*] [**]

ÖZ

Günümüzde en yaygın kullanılan inşaat sözleşmesi formları FIDIC tarafından hazırlananlardır. Bu formlarda yer alan en önemli hükümlerden biri talep prosedürüne ilişkin hükümler olup, bir talebin zamanında ve usulüne uygun olarak karşı tarafa bildirilmesi bu prosedürün ilk adımıdır. Böyle bir bildirimde bulunulmaması hâlinde ise sözleşme tarafları ek süre ve/veya ek ücret hakkından mahrum kalacaklardır. Hukuk literatüründe Kıta Avrupası perspektifinden bu gibi önemli bir hükmü inceleyen çalışmaların şaşırtıcı şekilde ender olduğunu gözlemliyoruz. Hâl böyle olunca çalışmamızdaki esas hedefimiz bu eksikliği elimizden geldiğince gidermektir. İlk bölümde FIDIC sözleşmeleri hakkında genel bir açıklama yapacağız. Ardından, inşaat sektöründe uyuşmazlıkların çoğunlukla bildirim hükümlerine aykırılıktan doğduğunu düşünerek, bir talep bildiriminin geçerliliği için FIDIC sözleşmelerinde öngörülen şekil ve süre düzenlemeleri üzerinde duracağız. Nihayet, bildirim hükümlerinin katı bir şekilde uygulanmasının önüne geçmek için kullanılabilecek argümanları saptayacağız. Bu değerlendirmeyi yaparken, Kıta Avrupası ve Anglo-Sakson hukuk sistemlerinden güncel yargı kararlarına başvuracağız.

Anahtar Kelimeler: *İnşaat Sözleşmeleri, FIDIC, Talep, Talep Bildirimleri*

[ж] Eserin Dergimize geliş tarihi: 17.01.2022. İlk hakem raporu tarihi: 22.02.2022. İkinci hakem raporu tarihi: 28.02.2022. Onaylanma Tarihi: 25.07.2022.

[*] Avukat, İstanbul Barosu ve Yeditepe Üniversitesi Hukuk Fakültesi Doktora Öğrencisi.

[**] Yazarın ORCID belirleyicisi: 0000-0003-4907-0467.

Esere Atıf Şekli: Sinem Özyiğit, "*Claim Notices Under The Fidic Contracts: A Comparison Of The Civil Law And Common Law Perspectives*", YÜHFD, C.XIX, 2022/Özel Sayı, s.391-448.

ABSTRACT

The FIDIC family of contract templates is leading in the construction industry at this point in time. An essential provision in those templates regards the claim procedure for additional time or money, the first step of which is notification of claims in a timely and duly manner. Non-compliance with notice requirements will otherwise deprive contracting parties of their right to additional time or money. Surprisingly, sources in legal literature regarding such an essential provision are still few and far between when it comes to civil law countries. As such, our main aim in this article is to fill this gap as much as possible. The first chapter will scrape the surface of the FIDIC standard contracts. Then, we will delve into the notice requirements, considering that disputes in the construction sector are circling around failure to comply with the notice requirements. Finally, we will determine the legal arguments available to prevent the strict application of the notice requirements. While doing this analysis, we will draw on the judgments from the civil law and common law systems.

Keywords: *Construction Contracts, FIDIC, Claim, Claim Notices*

***

INTRODUCTION

1. A construction project does always launch with strong ambitions for the successful completion of the process. However, the relationship between contracting parties during the long life of the project is not smooth sailing. Contracting parties may unexpectedly find themselves standing in sharp contrast to each other over a wide range of issues. A well-drafted construction contract at this point plays a vital role in preventing those issues from eclipsing the overall success of the project. Given every project is unique and complex in nature, contracting parties should actually be committed to cooperative negotiations to identify the technical and legal dynamics of the specific project, and to reach a comprehensive contract by drafting each provision with care. The ramification of adopting such an approach is that construction contract drafting becomes a highly cumbersome process. This, in turn, generates unease among the practitioners, given that they prefer returning to on-site operations as soon as possible, rather than dedicating a vast amount of time and money in the pre-contractual phase.

2. As a panacea for the overwhelming nature of drafting a construction contract from scratch, a number of standard forms has been published by international organizations, including, but not limited to, the Joint Contracts Tribunal ("**JCT**"), Royal Institute of British Architects

("**RIBA**"), UK Institution of Civil Engineers ("**ICE**"), Engineering Advancement Association of Japan ("**ENAA**") and Fédération Internationale des Ingénieurs-Conseils ("**FIDIC**"), which is best translated into English as International Federation of Consulting Engineers.[1] Each construction project has in fact its own technical characteristics, and the border between the civil law and common law tradition is rather discernible. However, the fact that construction projects rely essentially on the same main principles facilitates the drafting of standard contracts. The prevalent use of such contracts throughout the industry already attests to countless advantages they provide,[2] but the following paragraph does lend itself only to a brief overview.

3. Generally speaking, using standard forms minimizes costs, subdues the length of contract drafting, and maximizes efficiency.[3] Efficiency fuels the imagination of contracting parties and their representatives in the sense that focus may be placed on the development of creative mechanisms to bring the contract in line with the mandatory provisions of the governing law and technical specificities of the project at hand. It would otherwise not be possible if the contracts were written out of thin air. Standard contracts may further contribute to the establishment of mutual trust among contracting parties, given that they are drafted with an eye towards taking the interests of both parties into account in a more balanced manner, and that they cover almost all essential factors in the construction projects.[4] Thanks to their intensive use for decades, finally, contracting parties may not only become so familiar with the contract terms that they easily comply with their obligations,[5] but also benefit from settled case law to support their position in a wide variety of disputes.[6]

---

[1] Julian Bailey, *Construction Law* (2nd edn, Informa Law from Routledge 2016) 146-148.

[2] For an extensive analyses with regard to the benefits of using the standard contracts, see for instance: Kiran Giblin and Inga Hall, '"If it isn't broken…": A practical guide to the effective use of standard forms of contract' (*K&L Gates Construction Law Blog*, 21 February 2019) <https://www.klconstructionlawblog.com/2019/02/if-it-isnt-broken-a-practical-guide-to-the-effective-use-of-standard-forms-of-contract/> accessed on 15 December 2021; Richard O. Davis, 'Advantages of Standard Contract Forms' (1986) 2(2) Journal of Management in Engineering 79; Zeynep Sözen, *FIDIC Genel Koşullarından Örneklerle İnşaat Sözleşmelerinin Yönetimi* (Legal 2015) 10.

[3] Giblin and Hall (n 2).

[4] ibid; Davis (n 2) 89.

[5] Davis (n 2) 89.

[6] Giblin and Hall (n 2).

4. Practitioners may find it hardly surprising that a multitude of claims is frequently raised during the course of construction projects. On the one hand, contractors may claim an extension of time for completion and/or an increase in the price of work via an additional payment. On the other hand, employers may claim an extension of time of the defects notification period and/or a decrease in the price of work via an additional payment.[7] Depending on the contract administration strategy, these claims may easily turn into long-running disputes, which could hinder the smooth functioning of construction projects. In order to reduce the risk of claims transforming into potential disputes,[8] a well-drafted contract, either based on the standard forms or drafted from scratch, should cover an effective claim procedure. Considering that the FIDIC contracts have presented themselves as the most chiefly used templates today,[9] our research will be dedicated to the claim structure set up in those contracts.

5. Notification of a claim in a timely and duly manner is indicated in the FIDIC contracts as the first step of the claim procedure. Compliance with notice requirements is even reinforced by entitlements being contingent on proper notification, the laudable aim of which is to pave the way for '*communication,*'[10] collaboration and '*commercial confidence*'[11] when managing the risks, rather than leading to a dead end '*through the artificial creation of procedural hurdles.*'[12] Contracting parties should, thus, feel confident that they equally enjoy the fruits of notice provisions,[13] which is the first step toward compliance. Indeed, proper and timely notice of claims serves a pivotal function in putting '*the matter on a formal and*

[7] See also, Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons 2018) 365; Gabriel Mulero Clas, 'Clause 20: Employer's and Contractor's Claims' (*Corbett & Co. Knowledge Hub*, 27 January 2018) <https://www.corbett.co.uk/clause-20-employers-and-contractors-claims/> accessed 15 December 2021.

[8] Klee (n 7) 364.

[9] Issaka Ndekugri, Peter Chapman, Nigel Smith and Will Hughes, 'Best Practice in the Training, Appointment, and Remuneration of Members of Dispute Boards for Large Infrastructure Projects' (2014) 30(2) Journal of Management in Engineering 185, 186.

[10] Ellis Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, *FIDIC Contracts: Law and Practice* (Informa 2013) 302.

[11] Brian Clayton, 'Can a Contractor Recover when Time-barred?' (2005) International Construction Law Review 341, 343; Cristopher R Seppälä, 'Contractor's Claims Under the FIDIC Contracts for Major Works' (2005) 21(4) International Construction Law Review 278, 295.

[12] Baker, Mellors, Chalmers and Lavers (n 10) 267.

[13] Klee (n 7) 366.

readily identifiable basis'[14] and minimizing the risk of losing sight of claims in a massive amount of communication inputs. Such formal notice enables contracting parties to chip away at the so-called final account disputes and to assess claims efficiently and incrementally in tandem with construction processes[15] when '*plant, manpower and witnesses are still on site.*'[16] Otherwise, it would be nigh impossible to investigate the root cause for claims with little to no information as to the event or circumstance triggering the notice provision. As a final point, contracting parties become able to rein in project costs,[17] and defensive mechanisms are provided to their arsenal in cases where the counterparty arbitrarily refuses their legitimate demands.[18]

6. Despite these benefits, disputes in the construction sector revolve around the issue of non-compliance with contract terms relating to the notice requirements.[19] This is unlikely because the FIDIC contracts are adopted without contracting parties being aware of the legal implications of notice provisions. However, this is probably because contracting parties tend to engage in informal negotiation to maintain an amicable relationship with the counterparty, since it is deeply embedded in our culture that providing formal notice of claim may be construed as '*an aggressive act.*'[20] No matter the reason behind non-compliance with the notice requirements, a notice of claim is elevated to the status of condition precedent for employer's and contractor's claims, meaning that a failure to

[14] *Jennings Construction Ltd v QH&M Birt Pty Ltd* [1986] 8 NSWLR 18, 24.

[15] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)* [2007] EWHC 447 (TCC), 103: '*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.*'

[16] *Attorney General for the Falkland Islands v Gordon Forbes Construction (Falklands) Limited* [2003] BLR 280.

[17] Multiplex v. Honeywell (n 15) 103: '*... such notice sometimes gives the Employer the opportunity to withdraw instructions when the financial consequences become apparent.*'

[18] Klee (n 7) 366.

[19] Michael Wilson, 'The importance of timely and proper notice of a claim under a contract' (*Nuts & Bolts Construction Law Blog*, 22 February 2018) <https://www.greensfelder.com/nuts-bolts-construction-law-blog/importance-of-timely-and-proper-notice-of-claim-under-contract#page=1> accessed 18 December 2021.

[20] The FIDIC Contracts Guide (FIDIC 2000) 88-89. See also, Wilson (n 19).

adhering to the notice requirements may result in forfeiture of claims.[21] Furthermore, it is deeply ingrained in the common law system that courts respect the doctrine of freedom of contract, and thus notice of claim is upheld as sacrosanct.[22] One may observe that even courts in the civil law system are reluctant to interfere with freedom of contract, despite their high degree of discretion, which is actually way more surprising. Under such conditions, any notice of claim must be validly served in tune with the contract between the parties, the law governing the contract, and the surrounding circumstances in question. A key question arises here regarding whether or not a notice has to strictly comply with the contractual requirements. Could contracting parties rely on voice or video chat recordings and assume that they duly informed the counterparty of their entitlement? What would be the legal consequences of sending the notice to the wrong mail address or through an e-mail? Would meeting minutes or time schedules recording a delay or cost amount to valid notices?

7. This article opens with general information regarding the FIDIC and its standard contracts (**A**). We observed that more has been written on the FIDIC contracts in relation to the common law system, and that there has been an abundant body of case law. In this sense, this article primarily aims to reflect on the key discussions within the common law and to meet the need for developing legal analysis on the claim procedure under the FIDIC contracts from a civil law perspective. From this point of view, the second part addresses the formalities and timescales set out in the FIDIC contracts for the valid service of claim notices, and then determines the legal nature of these notice provisions (**B**). Finally, we will evaluate in the third part the suitable legal tools for declaring such provisions unenforceable in common law, carry out the same analysis for civil law, and contrast the approaches in these two systems with each other (**C**).

[21] Jeremy Glover, 'Time bars in an international context' (*Fenwick Elliott Annual Review* 2015/2016, 6 November 2015) <https://www.fenwickelliott.com/research-insight/annual-review/2015/time-bars-international-context> accessed 24 December 2021.

[22] Antoine Smiley and Raeesa Rawal, 'Locked behind Time Bars' (2018) International Construction Law Review 60, 62.

A. THE FIDIC IN GENERAL AND ITS STANDARD CONTRACTS

8. The FIDIC was founded in 1913 by Belgium, France and Switzerland with the purpose of promoting the interests of consulting engineering firms.[23] In essence, the FIDIC has been known for its standard forms of the construction contract for use between employers and contractors, and all those forms are named as such by reference to the color of their cover under which they have been published.[24] The FIDIC contracts have extensively been employed on different types of projects, ranging from the construction of buildings such as hospitals, factories, hotels, shopping malls and schools, to the construction of more complex civil engineering works such as power plants, mines, tunnels, bridges, highways, railroads, stadiums and airports.[25] As such, the FIDIC contracts are the most commonly used templates in the world today, especially on large-scale construction projects.[26]

9. The first FIDIC contract template dates back to 1957. From time to time, the FIDIC introduces new standard forms or revisits and updates the existing ones in light of the sector responses. In this sense, two major updates occurred in September 1999 and December 2017. Among the 1999 FIDIC Forms, the predominant use has always been on the side of the Red, Yellow and Silver Book, and thereby the practitioners in the construction realm are *au fait* with those forms more. This allowed them to discover some issues when applying the FIDIC forms to their construction projects, and the FIDIC, in turn, to revise the Red, Yellow and Silver Book in the first place in order to bring them into line with the expectations. Eventually, almost after eighteen years since the release of the 1999 FIDIC Forms, the FIDIC unveiled on 5 December 2017 the new editions of these three major forms in its standard forms of construction contract. The table below give a brief overview of the main FIDIC forms to date:

---

[23] For more information with regard to FIDIC, see for instance: <http://fidic.org/about-fidic> accessed 28 February 2019; Baker, Mellors, Chalmers and Lavers (n 10) 1.

[24] FIDIC Rainbow Suite ed.2017 - Second edition of the Red, Yellow & Silver Books (FIDIC 1 March 2018) 1, <http://fidic.org/sites/default/files/press%20release_rainbow%20suite_2018_03_1.pdf> accessed 10 December 2021.

[25] See also, Ziya Akıncı, Milletlerarası Özel Hukukta İnşaat Sözleşmeleri (Adalet 1996) 9.

[26] Klee (n 7) 268; Micheal E. Schneider, 'A Typology of Risk Allocation – The Example of FIDIC Suite of Contracts' in Yeşim M. Atamer, Ece Baş Süzel and Elliott Geisinger (eds), Uluslararası İnşaat Sözleşmelerinde Beklenmeyen Hal Kavramı (On İki Levha 2020) 221.

MAIN FIDIC FORMS				
Pre-1999 FIDIC Forms	**1999 FIDIC Forms**	**1999-2017 FIDIC Forms**	**2017 FIDIC Forms**	**Post-2017 FIDIC Forms**
• (*first published in 1957*) Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition of 1987 with a supplement added in 1996 ("**Red Book 1987**"), • (*first published in 1967*) Conditions of Contract for Electrical and Mechanical Works including Erection on Site, Third Edition 1987 ("**Yellow Book 1987**"), and • Conditions of Contract for Design-Build and Turnkey of 1995 ("**Orange Book 1995**").	• Conditions of Contract for Construction Building and Engineering Works Designed by the Employer ("**Red Book 1999**"), • Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor ("**Yellow Book 1999**"), • Conditions of Contract for EPC/Turnkey Projects ("**Silver Book 1999**"), and • Short Form of Contract ("**Green Book 1999**").	• Conditions of Contracts for Design, Build and Operate Projects, First Edition 2008 ("**Gold Book 2008**"), • (*first published in 2005*) Conditions of Contract for Construction Multilateral Development Banks Harmonised Edition for Building and Engineering Works Designed by the Employer, Third Edition 2010 ("**Pink Book 2010**").	• Conditions of Contract for Construction, Second Edition 2017 ("**Red Book 2017**"), • Conditions of Contract for Plant and Design-Build, Second Edition 2017 ("**Yellow Book 2017**"), and • Conditions of Contract for EPC/Turnkey Projects, Second Edition 2017 ("**Silver Book 2017**").	• Conditions of Contract for Underground Works of 7 May 2019 ("**Emerald Book**"), and • Short Form of Contract, Second Edition of January 2021 ("**Green Book 2021**").

10. The FIDIC family of contracts have been caught on very quickly in the area of domestic and international construction law. However, they are

not incorporated into any national legal system.[27] The legal nature of the FIDIC contracts are just contract drafts. Hence, those rules will become binding upon the parties only if the parties refer to them, or insert them in the construction contracts or in the annexes to those contracts.[28] In principle, the users may either adopt the FIDIC rules as is or amend them by removing or updating certain parts.[29] With this in mind, the table below gives a brief overview of the areas of use of the Red Book, Yellow Book and Silver Book:[30]

AREAS OF USE OF THE LEADING FORMS			
	Red Book	**Yellow Book**	**Silver Book**
Construction Works	It is applicable to any construction works where the employer carries out the design.	It is applicable to the provision of electrical and/or mechanical plant, and for the design and execution of building oe engineering works.	It is for turnkey projects.
Design	It is used for the works mostly designed by the employer.	It is used for the works mostly designed by the contractor.	It is used for the works designed by the employer.
Project Administration	The engineer who is employed by the employer is responsible for the administration of the project.	The engineer who is employed by the employer is responsible for the administration of the project.	The employer or its representative is responsible for the administration of the project.
Payment Method	Parties agree the	Parties agree on a	Parties agree on a

[27] Nuray Ekşi, Milletlerarası Ticaret Hukuku (2nd edn, Beta 2015) 543; Akıncı (n 26) 12.
[28] Nuray Ekşi, 'FIDIC Sözleşmelerinde Yer Alan Uyuşmazlık Çözümüne İlişkin 20. Maddeden Kaynaklanan Sorunlar' in Yeşim M. Atamer, Ece Baş Süzel and Elliott Geisinger (eds), Uluslararası İnşaat Sözleşmeleri ve Uyuşmazlık Çözüm Yolları (On İki Levha 2018) 61.
[29] İbrahim Kaplan, İnşaat Sözleşmeleri Hukuku ve Endüstri Yatırım Sözleşmeleri (Yetkin 2013) 387.
[30] See also, S. Aslı Budak, 'Türk Eser Sözleşmesi Hukuku Işığında FIDIC Sözleşmeleri' in Yeşim M. Atamer, Ece Baş Süzel and Elliott Geisinger (eds), Uluslararası İnşaat Sözleşmeleri ve Uyuşmazlık Çözüm Yolları (On İki Levha 2018) 91.

	rates to be applied to the quantity of works. The employer takes the risk that the quantities it estimates will be accurate, and the contractor must ensure that its unit prices for the quantities are sufficient.	set price, so the contractor takes the risk of quantities.	set price.
Risk Allocation	Risk allocation is fair and balanced.	Risk allocation is fair and balanced.	This contractor puts enormous risk on the contractor, such as completion to time, cost and quality are transferred to the contractor, for which the employer would pay a premium.

11. Considering that out-of-hand and material modifications are annihilating the essential characteristics of the FIDIC's general conditions and jeopardizing its reputation, FIDIC released the first edition of the Golden Principles in 25 June 2019 ("**Golden Principles 2019**"),[31] and identified five contractual principles which it considers to be '*inviolable and sacrosanct.*'[32] The users should adhere to the Golden Principles 2019 when amending both the 1999 FIDIC Forms and 2017 FIDIC Forms.[33] However, those principles are not legally binding, meaning that non-compliance with them does not affect the validity of the contract by itself.[34] In fact, the Golden Principles 2019 is way too abstract but still essential in the sense of conveying the message to the drafters that the FIDIC values

[31] For the full text of the FIDIC Golden Principles of 2019, see: <https://fidic.org/sites/default/files/_golden_principles_1_12.pdf> accessed 1 December 2021. For more information on the Golden Principles, see for instance: Victoria Tyson: 'FIDIC's Golden Principles – holding back the tide?' (*Corbett & Co. Knowledge Hub*, 10 March 2020) <https://www.corbett.co.uk/fidics-golden-principles-holding-back-the-tide/> accessed 1 December 2021.

[32] FIDIC Golden Principles (n 31) 6.

[33] Tyson (n 31) 2.

[34] ibid 1.

evenly balanced contracts concluded between employers and contractors.[35] With this in mind, the following are the five principles articulated by the FIDIC:[36]

THE GOLDEN PRINCIPLES 2019	
Golden Principle 1:	The duties, rights, obligations, roles and responsibilities of all the contract participants must be generally as implied in the General Conditions, and appropriate to the requirements of the project.
Golden Principle 2:	The Particular Conditions must be drafted clearly and unambiguously.
Golden Principle 3:	The Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions.
Golden Principle 4:	All time periods specified in the contract for contract participants to perform their obligations must be of reasonable duration.
Golden Principle 5:	Unless there is a conflict with the governing law of the contract, all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.

12. Contracting parties may designate a choice of law clause *ex ante* in order to fill in the potential loopholes in the contract; otherwise, the governing law will be identified by courts under the conflicts of law rules. The governing law serves an essential function in determining the applicability of the Convention on Contracts for the International Sale of Goods ("**CISG**"), depending on which country's laws govern the contract and whether that country adopts the CISG. In this regard, an important question arises as to whether the CISG applies to the FIDIC forms of construction contracts. Generally speaking, construction contracts are perceived as service contracts in common law, while such contracts are treated as contracts for work in civil law.[37] Either way, the FIDIC forms are not subjected to the CISG, since the CISG's scope is limited to

[35] ibid 4.
[36] FIDIC Golden Principles (n 31) 8.
[37] Ingeborg Schwenzer, Julian Ranetunge and Fernando Tafur, 'Service Contracts and the CISG' (2018) 10 The Indian Journal of International Economic Law 170, 178-179.

contracts (**i**) purely for the sale of moveable[38] goods and (**ii**) for the sale of moveable goods to be manufactured except for where the buyer provides a substantial part of the materials that is required for the manufacture, according to Arts. 1(1), 3(1), 3(2) of the CISG. However, the CISG is still a relevant instrument in the construction projects, given that it may be applicable to the supply contracts concluded with the subcontractors for construction materials or equipment.[39] If contracting parties wish to avoid the applicability of the CISG to the supply contracts when selecting the domestic law of CISG contracting states, they should insert a clause explicitly excluding the CISG.

13.The governing law may play several key roles other than determining the applicability of the CISG. Indeed, when any provision of the FIDIC contracts violates the mandatory rules of the governing law, then the relevant provision will be unenforceable.[40] Put in equivalent language, the FIDIC terms will be superseded by the mandatory provisions of the governing law. The governing law may also be determinative in contract interpretation. When contracting parties cannot agree on what a particular contract term means and courts engage in contract interpretation, civil law rules will require courts to interpret the FIDIC contracts in light of the common intentions of contracting parties at the time of the conclusion of the contract.[41] However, courts will focus on how a reasonable person would interpret the contract at the time the conflict arises under the common law rules.[42] Accordingly, due consideration should be given to which law will govern the FIDIC forms.

14.Returning to the 2017 amendments, FIDIC elucidated that such extensive amendments were introduced with strong ambitions for improving '*clarity, transparency and certainty*,' integrating emerging international best practices into its contracts, minimizing issues that users

[38] Ingeborg Schwenzer and Pascal Hachem, 'Article 1' in Ingeborg Schwenzer (ed), Commentary on the UN Convention on the International Sale of Goods (CISG) (4th ed., Oxford 2016), para. 16-17.

[39] See, Seung-Hyeon Kim, Mino Han and Umaer Khalil, 'The Application of the United Nations Convention on Contracts for the International Sale of Goods to Manufacturing and Supply Contracts for International Construction Projects' (2019) International Construction Law Review 352ff.

[40] Ekşi (n 29) 62-63.

[41] Budak (n 30) 93; Sam Moss, 'Swiss Law vs. English Law on Contract Interpretation: Is Swiss Law Better Suited to the Realities of International Construction Contracts' (2015) International Construction Law Review 470, 486.

[42] ibid.

have raised since the release of the 1999 FIDIC Forms, as well as preventing the enforceability of contract terms from being undermined by the surrounding circumstances or law of the specific jurisdiction.[43] Even the increase in the volume may indicate by itself that FIDIC went beyond merely adopting some cosmetic changes. For example, the Red Book 2017 consists of 106 pages as opposed to the Red Book 1999, which covers 62 pages. The Yellow Book 1999 and Silver Book 1999 have been similarly upgraded.

15.It is worth noting here that the 1999 FIDIC Forms are not replaced by the 2017 FIDIC Forms,[44] meaning that the 1999 FIDIC Forms may still be applied, as long as contracting parties desire to do so. In fact, the past four years after the release of the 2017 FIDIC Forms have indicated that the 1999 FIDIC Forms are still preferred more in practice than the 2017 FIDIC Forms.[45] We consider that this is not because the new versions are less successful than their predecessors, but because people tend to prefer the one they have been exposed to in the past, which is known as the mere exposure effect in psychology. We must also admit that the users may have found the 2017 FIDIC Forms daunting given that they are voluminous. This standpoint in practice even led some practitioners to develop strategies on how to benefit from the 2017 FIDIC Forms when adopting the 1999 FIDIC Forms.[46] Under the influence of such a trend, we will evaluate the notice requirements in the 1999 FIDIC Forms and 2017 FIDIC Forms together in the following section.

B. CLAIM NOTICES IN THE FIDIC CONTRACTS

16.Construction projects must be completed by a prescribed date and for an agreed money.[47] Time and money are so essential for the contracting parties that even a minor change may compound stress and dramatically

[43] FIDIC Rainbow Suite (n 25) 1.

[44] ibid.

[45] For practitioners who observe the same tendency in practice, see for instance: Natalie Wardle, 'FIDIC contracts – a preview of what is to come' (*The Practical Law Construction Blog*, 13 January 2021) <http://constructionblog.practicallaw.com/fidic-contracts-a-preview-of-what-is-to-come/> accessed 18 December 2021.

[46] Edward Corbett, 'Adding the Best Bits of FIDIC 2017 to the 1999 Forms' (*Corbett & Co. Knowledge Hub*, 29 October 2018) <https://www.corbett.co.uk/cherry-picking-fidic-2017/> accessed 11 December 2021.

[47] James Bremen and Leith Ben Ammar, 'Contractors' Claims, Remedies and Reliefs' (*Global Arbitration Review*, 12 December 2017) <https://globalarbitrationreview.com/chapter/1145221/contractors-claims-remedies-and-reliefs> accessed 18 December 2021.

impact their ability to proceed with the project. During the long life of the project, on the contrary, their stress level is affected by various contingencies outside of their control, such as pandemic, war, exceptionally adverse climatic conditions, unforeseeable physical conditions, changes in laws, shortages of personnel or goods, inflation, and so on.[48] In order to provide some comfort to contracting parties, the FIDIC contracts contain some possible grounds, the occurrence of which triggers the right to claim for an extension of time or additional money, provided that they comply with the procedure set out in the relevant provision.[49]

17.Claims are subject to different regimes for employers and contractors under the 1999 FIDIC Forms. Indeed, employer's claims are governed by Sub-Clause 2.5 [*Employer's Claims*] Sub-Clause 3.5 [*Determinations*], while contractor's claims are governed by Sub-Clause 20.1 [*Contractor's Claims*] under the 1999 FIDIC Forms. The divide between employer's and contractor's claims has been met with severe criticism, given that Sub-Clause 2.5 provides more flexibility for employers than Sub-Clause 20.1 does for contractors.[50] A stark difference stems from the fact that the 2017 FIDIC Forms place employer's claims on equal footing to contractor's claims by unifying the procedure under Sub-Clause 20 [*Employer's and Contractor's Claims*]. The rationale behind the dichotomy in the 1999 FIDIC Forms was based on the long-standing position in the construction sector that contractors should follow a stricter claim procedure to balance the leverage they gained over employers by managing the labor force when enforcing the claims.[51] This stance has been reversed recently, and reflected in the 2017 FIDIC Forms. We are of the opinion that applying a single claim procedure to both parties is a strong feat,[52] given that it is in line with the principle of the equality of arms.

18.Considering that claims for time and money are of paramount importance, the 2017 FIDIC Forms design two claim procedures and apply the strict one to such claims.[53] Indeed, the strict claim procedure is applicable to **(i)** the contractor's claim for an extension of time for

[48] Seppälä (n 11) 280-281.
[49] ibid 281; Bremen and Ammar (n 47).
[50] Jeremy Glover, 'FIDIC: an overview – The Latest Developments, Comparisons, Claims and Force Majeure' 67 (*FIDIC*, 17 Eylül 2017) <https://bit.ly/3uUBaa4> accessed 15 December 2021.
[51] Klee (n 7) 366.
[52] ibid.
[53] Mulero Clas (n 7) 1.

completion, (**ii**) the contractor's claim for an additional payment, (**iii**) the employer's claim for an extension of time of the defects notification period, and (**iv**) the employer's claim for an additional payment. Any other claim is subject to Sub-Clause 20.1(c) of the 2017 FIDIC Forms. Here, our focus will be on claims for time and money. Claim procedures set out in the 1999 FIDIC Forms and 2017 FIDIC Forms consist of the following steps: (**i**) notice of claim, (**ii**) a fully detailed claim, and (**iii**) the engineer's agreement or determination.[54]

19. Notice requirement is an essential step of the claim procedures both under the 1999 FIDIC Forms and 2017 FIDIC Forms, and employers and contractors must give a claim notice promptly and in a specified form in compliance with Sub-Clauses 2.5 and 20.1 of the 1999 FIDIC Forms, and Sub-Clause 20 of the 2017 FIDIC Forms. If such provisions are enforceable under the governing law, then a failure to comply with the notice provision will result in a party losing its entitlement to time and money.

20. In this section, we will provide a brief overview of the content, form, timing and legal nature of claim notices; and determine the aspects where the strict divide between employer's and contractor's claims lies under the 1999 FIDIC Forms as well as the amendments introduced by the 2017 FIDIC Forms.

1. THE CONTENT OF NOTICES

21. Sub-Clause 2.5 does not explicitly require particulars to be delivered at the same time with claim notices, nor does it determine an express time period for service of particulars. Although the fact that Sub-Clause 2.5(2) of the 1999 FIDIC Forms excludes particulars when determining the timing of notices muddies the waters, civil law countries may benefit from this ambiguity to interpret the wording of Sub-Clause 2.5 so as to enable employers to serve particulars in a reasonable time. In fact, the FIDIC considers that particulars may be provided at any time, but excessive delay may indicate that employers will not proceed with the notified claim.[55] However, a contrasting approach was adopted in the *NH International* case where the court clearly stated that employer's claim notices must be served together with particulars.[56] As such, more detailed notifications may be required for employers to protect their claims in common law countries,

[54] ibid.
[55] The FIDIC Contracts Guide (n 20) 80.
[56] *NH International (Caribbean) Limited v National Insurance Property Development Company Limited* (Trinidad and Tobago) [2015] UKPC 37, 38.

since employer's notices must be accompanied by particulars. While notices may briefly introduce the event or circumstance triggering the claim, particulars must specify (**i**) the basis of claims in the sense of relevant clauses if the claim is relied on the contract, and (**ii**) a substantiation of the additional time or money to which employers consider themselves to be entitled.[57] Accordingly, employers should take this judgment into consideration, and ensure that they provide the particulars '*as soon as practicable*' together with notifications of the claims; otherwise, the failure to comply with these requirements may result in the loss of employer's right to bring a claim.

22.This can be contrasted with the position under Sub-Clause 20.1 where more general notifications are often sufficient for contractors. Indeed, contractor's notices must solely set out '*the event or circumstance giving rise to the claim*' under Sub-Clause 20.1 of the 1999 FIDIC Forms. It is sufficient at this initial stage to give the notice in a '*bare*' or '*short*' letter[58] in order to preserve the claim, meaning that contractors may refrain not only from indicating the contractual basis of the claim[59] and the amount of time or payment requested,[60] but also from providing any document supporting their entitlement.[61] This was confirmed in *Obrascon* where the court found that the contractor complied with Sub-Clause 20.1 by referring to the letter regarding rock encountered, which merely stated that '*[i]n our opinion the excavation of all rock will entitle us to an extension of time...*' without further substantiation.[62]

When particulars must be provided is more straightforward for contractors than employers when focusing on the time frames in Sub-Clause 20.1. Contractors must give short notices within 28 days after they became aware or should have become aware of the event or circumstance giving rise to the claim.[63] They follow up their notices with '*a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed*' within 42 days

[57] Sub-Clause 2.5(3) of the 1999 FIDIC Forms.
[58] Baker, Mellors, Chalmers and Lavers (n 10) 338; Seppälä (n 11) 291.
[59] The FIDIC Contracts Guide (n 20) 90-93.
[60] ibid.
[61] Seppälä (n 11) 291.
[62] Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC) 315(a). See also, Adrian Bell and Natalie Hall, 'Employer Claims under FIDIC: Where Are We Now?' (*Turkish Commercial Law Review*, Winter 2016) <http://the-tclr.org/employer-claims-fidic-now/> accessed 15 December 2021.
[63] Sub-Clause 20.1(1) of the 1999 FIDIC Forms.

after they became aware or should have become aware of the event or circumstance giving rise to the claim.[64] The fact that both periods begin to run simultaneously leads us to conclude that contractors are not required to submit particulars together with short notices within 28 days, but benefit from an additional time to hammer the claim into its final form.

It follows that a failure of employers to serve particulars together with notices may imperil the right to bring a claim, whereas a failure of contractors is not fatal to their claims.[65]

23. Generally speaking, the regime adopted under the 2017 FIDIC Forms follows in the footsteps of Sub-Clause 20.1 of the 1999 FIDIC Forms. Indeed, employers and contractors must solely indicate the event or circumstance giving rise to the claim under Sub-Clause 20.2. This short notice must be given within 28 days after contracting parties became aware or should have become aware of the event or circumstance giving rise to the claim. After reserving the entitlement with short notice, contracting parties must submit their fully detailed claims which include full supporting particulars within 84 days after contracting parties became aware or should have become aware of the event or circumstance giving rise to the claim.[66] As such, contracting parties do not have to serve claim notices together with particulars. One of the remarkable amendments introduced by the 2017 FIDIC Forms is that the period for submitting a fully detailed claim has been extended from 42 days to 84 days.

2. THE FORM OF NOTICES

24. Both Sub-Clause 2.5 and Sub-Clause 20.1 of the 1999 FIDIC Forms do not provide any particular formality for employer's and contractor's claim notices.[67] Since there is a loophole in the 1999 FIDIC Forms, we may resort to Sub-Clause 1.3 [*Communications*] as to the form of notices.[68] It follows that contracting parties enter the contract from equal positions in the sense that they must comply with the same formalities. According to Sub-Clause 1.3(1)(a) of the 1999 FIDIC Forms, notices must be given '*in writing,*' the meaning of which is demonstrated under Sub-Clause 1.2(1)(d) of the 1999 FIDIC Forms as '*hand-written, type-written, printed or electronically made, and resulting in a permanent record*.' Voice or video

[64] Sub-Clause 20.1(5) of the 1999 FIDIC Forms.
[65] Seppälä (n 11) 296.
[66] Sub-Clause 20.2(4)(i) of the 2017 FIDIC Forms.
[67] Regarding Sub-Clause 20.1 of the 1999 FIDIC Forms, see: Obrascon v Gibraltar (n 62) 313.
[68] The FIDIC Contracts Guide (n 20) 79, 299.

chat recordings of meetings where contracting parties effectively discuss the details of their claims do not constitute valid claim notices, and thereby it is still necessary to give written notice in order to reserve their claims.

25. Sub-Clause 1.3 of the 1999 FIDIC Forms is flexible enough to enable contracting parties to rely on any written record as a substitute for claim notices, such as informal letters, meeting minutes,[69] monthly progress reports[70] and programmes.[71] Having been greatly influenced by the Gold Book 2008, the users have occasionally shut the door on relying on informal notices by amending Sub-Clause 1.3 of the 1999 FIDIC Forms in a way to require correspondence to label itself as a '*notice*' and to refer to the clause under which it is provided.[72] Furthermore, in the common law case of *Obrascon* where the contractor attempted to rely on a monthly progress report and a letter to prove its entitlement to an extension of time in relation to the exceptionally adverse weather, *Justice Akenhead* ruled that such records did not amount to notice *per se* under Sub-Clause 20.1 of the Yellow Book 1999. Indeed, the contractor never clearly stated that it was in delay and entitled to an extension of time because of the rain. The report merely expressed that the rain has '*affected the works*'[73] without referring to an actual delay, while the letter was regarding future delay over a new circumstance, namely the contamination as a result of the rain, although it was silent about the contractor's actual delay arising out of the rain. Under these circumstances, the *Obrascon* judgment provides guidance regarding the form and content of notices, and states that notices must (**i**) be in writing, (**ii**) describe the event or circumstance giving rise to the claim, and (**iii**) '*be recognisable as a claim.*'[74]

26. The issue in *Glen Water* was regarding whether the meeting minutes and the correspondences through which the underlying issues were discussed constitute a valid notice.[75] Thereupon, it must be pointed out that,

[69] Jeremy Glover, 'Sub-Clause 20.1 – the FIDIC Time Bar under Common and Civil Law' (*Fenwick Elliott*, 2015) <https://www.fenwickelliott.com/research-insight/articles-papers/contract-issues/sub-clause-fidic-time-bar> accessed 24 December 2021.

[70] Obrascon v Gibraltar (n 62) 315(b).

[71] Ben Mellors, 'FIDIC 2017's enhanced contract management provisions' (*Practical Law Construction Blog*, May 22, 2019) <http://constructionblog.practicallaw.com/fidic-2017s-enhanced-contract-management-provisions/> accessed 26 December 2021.

[72] Glover (n 69).

[73] Obrascon v Gibraltar (n 62) 315(b).

[74] ibid 313. See also, Glover (n 69).

[75] *Glen Water Ltd v Northern Ireland Water Ltd* [2017] NIQB 20.

although this case did not concern the FIDIC contracts, it is still relevant, since the notification at issue was agreed to be a condition precedent.[76] Contracting parties entered into a PFI project agreement to carry out a sludge treatment services. The contract required the employer to maintain its existing sludge treatment assets during the construction phase. In case of a breach by the employer of its obligations, the contract granted the contractor the right to claim compensation, which was preconditioned on the contractor serving 21 days' notice of a compensation event. During the construction phase, the contractor issued several compensation event notifications, ranging from the notification on the new build cooling water system to the notification addressing concerns about the maintenance of the employer's existing assets. The contractor claimed that the employer had breached its obligations, which was said to be a compensation event. In response, the employer contended that the contractor's claim was barred due to lack of timely notice of the claim. The contractor, however, argued that timely notification had been provided by a letter, and the details of the claim had been provided in a meeting.

The court held that the claim was time-barred, since the letter and the minutes of meeting relied upon by the contractor did not constitute proper notification of claim. After noting that '*[a] notification should be clear and unambiguous,*'[77] it found that the letter at issue did not notify the claim in clear terms, since the meaning was not apparent from the wording of the letter nor from the context where the letter formed part of a chain of correspondence relating to another claim, namely, the contractor's cooling water system claims.[78] Indeed, the letter did not clearly state that it was a claim; instead, it merely referred to the claim event as a prospective future claim only. The court concluded that, although contracting parties had discussions as to a potential claim event, the formal notification of a claim in accordance with the contract is still required, since '*the fact that [a party] may anticipate that a compensation event may occur does not equate to notification of an actual compensation event.*'[79]

27. This written notice is required to be properly (**i**) delivered by hand upon receipt, (**ii**) sent through mail or courier, or (**iii**) transmitted via the agreed systems of electronic transmission included in the appendix to

[76] ibid 55.
[77] ibid 56.
[78] ibid 57.
[79] ibid 64.

tender.[80] The address to which the notice must be served is the recipient's address indicated in the appendix to tender unless an address change is notified.[81] Considering that the organizational structure may be relatively complex, contracting parties must pay heed to serve notices at the correct address; otherwise, notices may be deemed ineffective.[82] The contracting party issuing the claim notice to the counterparty must furnish a copy to the engineer.[83] Both employer's and contractor's notices must be listed in the monthly progress reports.[84]

28. In the common law case of *Obrascon*, the core issue was whether a termination notice served on a wrong address is valid, and a far more accommodating approach was adopted by the courts.[85] The contractor undertook the design and construction of a road and tunnel near and under a runway at Gibraltar airport under the Yellow Book 1999 edition with minor amendments. The contract was terminated by the employer, since the works were delayed for a variety of reasons. The notice of termination was delivered by hand to the contractor's site office in Gibraltar where it was signed by one of the contractor's employees. The notice was then dispatched promptly by the site office to the main office in Madrid. The contract in question, however, required all notices to be delivered by hand or sent by mail or courier to the contractor's Madrid office.

Justice Akenhead stated that he could see '*no reason why [Sub-Clause 20.1] should be construed strictly against the [c]ontractor 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 [e]mployer.*'[86] As a result, the court refused to invalidate the notice depending on two reasons, which are that (**i**) correspondence had been frequently sent to the contractor's site office in Gibraltar without any objections from the contractor, and (**ii**) the project manager with a very substantial authority was based in site office in Gibraltar.[87]

[80] Sub-Clause 1.3(1)(a) of the 1999 FIDIC Forms.
[81] Sub-Clause 1.3(1)(b) of the 1999 FIDIC Forms.
[82] Obrascon v Gibraltar (n 62) 368.
[83] Sub-Clause 1.3(2) of the 1999 FIDIC Forms.
[84] Sub-Clause 4.21(f) of the 1999 FIDIC Forms.
[85] For more judgments adopting a flexible approach, see for instance: *Yates Building Co Ltd v Pulleyn & Sons* (York) Ltd [1975] 273 EG 183; *Goodwin & Sons v Fawcett* [1945] EG 186; *HOE International Ltd v Andersen* [2017] CSIH 9.
[86] Obrascon v Gibraltar (n 62) 312.
[87] ibid 367.

29. Especially in the Covid-19 era, it would be meaningful to provide a short deliberation of whether claim notices may be sent via email or fax. Claim notices may be sent through email and fax both under the 1999 FIDIC Forms and 2017 FIDIC Forms, only if they are indicated in the appendix to tender or contract data.[88] In other words, a timeous notice served via email and fax may not preserve a claim if they are not included in the relevant document. This definition has been criticised, considering that especially email is now the most widely used mean of communication in the construction industry, and that it is hard to see any logic behind imposing the behavior of novice users in the sense of requiring contracting parties to print a notice saved through email and to send it by hand or through mail or courier.[89] We depart from this position by arguing that devices like smartphones and laptops are within arm's reach of contracting parties, and the FIDIC's practice may encourage contracting parties to think before incorporating such electronic means in the relevant document and thus reduce the influx of informal communication. Otherwise, it would be difficult if not impossible to discern claim notices. Accordingly, contracting parties should be careful about incorporating email and fax into the relevant document as proper ways to serve claim notices if they wish to use both the 1999 FIDIC Forms and 2017 FIDIC Forms.

30. Similar to the 1999 FIDIC Forms, there is a gap in Sub-Clause 20.2 of the 2017 FIDIC Forms as to the form of notices. While the 1999 FIDIC Forms does not include a definition for '*notice*,' it is a defined term under Sub-Clause 1.1.56 of the 2017 FIDIC Forms, according to which a notice is '*a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [Notices and Other Communications]*.' Thus, employers and contractors must issue notices in accordance with Sub-Clause 1.3 of the 2017 FIDIC Forms. Although the end result is the same as the 1999 FIDIC Forms which also requires a notice to be issued in writing and in accordance with Sub-Clause 1.3 of the 1999 FIDIC Forms, inserting the definition of such an essential concept into the 2017 FIDIC Forms is still very much beneficial.

However, Sub-Clause 1.3 has been amended in such a way that claim notices under the 2017 FIDIC Forms are subject to more stringent requirements than they are under the 1999 FIDIC Forms. In order to be

[88] Baker, Mellors, Chalmers and Lavers (n 10) 303.

[89] Andrew Tweeddale and Nick Culatto, 'Clause 1' 18 (*Corbett & Co. Knowledge Hub*, 2016) <http://corbett.co.uk/wp-content/uploads/Clause-1-1.pdf > accessed 10 December 2021.

considered as a valid and effective claim notice under the 2017 FIDIC Forms, correspondence must be in writing,[90] expressly describe itself as a notice, and refer to the clause under which it has been given.[91] It follows that new requirements prevent contracting parties from circumventing notice requirements by taking advantage of informal records to reserve their entitlements. Sub-Clause 8.3(6) of the 2017 FIDIC Forms explicitly states that contractors cannot base their claims on any programme or supporting report, but on proper and prompt notices. As such, a claim will expire, albeit over such informal records, as long as contracting parties do not effectively file a notice by the prescribed deadline according to Sub-Clause 20.2.1 of the 2017 FIDIC Forms.

31. Such rigid formalities incorporated in the 2017 FIDIC Forms are rooted in the wayward application and interpretation practices, an obvious example of which is the *Obrascon* judgment. On the one hand, new formal requirements are likely to create immense legal certainty as to whether a particular communication constitutes a notice. This outcome aligns with the FIDIC's aim of improving clarity and certainty in producing the 2017 FIDIC Forms. On the other hand, pushing civil law countries for greater formalism would backfire and undermine the enforceability of contract terms. This is the point where FIDIC actually contradicts itself. Indeed, new requirements are nothing but the source of additional issues as to whether formal flaws will be fatal to contracting parties' claims. Would it be fair if contracting parties lost the entitlement upon a comprehensive letter that only fails to describe itself as a notice or contain a reference to a specific clause of the contract? We will return to this question later in the last chapter.

3. THE TIMING OF NOTICES

3.1 Employer's Claim Notices under Sub-Clause 2.5 of the 1999 FIDIC Forms

32. Claim notices must be given '*as soon as practicable after the [e]mployer became aware of the event or circumstance giving rise to the claim.*'[92] This provision does not specify a time period within which employers must serve their claim notices,[93] nor does it provide guidance on how to determine the meaning of '*as soon as practicable.*'[94] Furthermore, notices are not included in Sub-Clause 1.3(2) of the 1999 FIDIC Forms,

[90] Sub-Clause 1.3(1) of the 2017 FIDIC Forms.
[91] Sub-Clause 1.3(1)(b) of the 2017 FIDIC Forms.
[92] Sub-Clause 2.5(2) of the 1999 FIDIC Forms.
[93] The FIDIC Contracts Guide (n 20) 79.
[94] Bell and Hall (n 62).

which prohibits communications from being '*unreasonably withheld or delayed.*'[95] Employers must provide a notice regarding an extension of the defects notification period before such period expires;[96] otherwise, they cannot claim an extension under Sub-Clause 11.3.[97] According to Sub-Clause 11.3, it is not possible to extend a defects notification period '*by more than two years.*'

33. That Sub-Clause 2.5 does not specify a time period has drawn severe criticism from contractors. Indeed, contractors have interpreted the wording of Sub-Clause 2.5 as employers being able to submit claim notices whenever they wish, and argued that there could be no convincing reason behind requiring them to give claim notices within a prescribed period.[98] However, a prevailing opinion in the literature emphasizes that Sub-Clause 2.5 does not grant a long period to employers to notify their claims,[99] and the time frame is likely to be limited depending on the circumstances of each project.[100] In fact, the wording of Sub-Clause 2.5 is more suitable for civil law countries in the sense that the enforceability of notice provisions may be strengthened, but employers should ensure that claim notices are provided as soon as possible just to be on the safe side.

34. Sub-Clause 2.5 adopts only a subjective standard and focuses on whether employers have '*actual knowledge of the event or circumstance*'[101] in determining the starting point of the notification period. Since an additional objective standard is not included using, for example, a wording like '*should have become aware,*' employers are not required to give notice before their actual knowledge even if the surrounding circumstances justify the fact that they would have become aware of the event or circumstance. Before turning to contractor's claim notices under the 1999 FIDIC Forms, we may clarify that the lack of an objective standard allows greater flexibility to employers, given that contractors must give notices earlier following their constructive knowledge of the event or circumstance.[102]

---

[95] Sub-Clause 1.3(2) of the 1999 FIDIC Forms: '*Approvals, certificates, consents and determinations shall not be unreasonably withheld or delayed. ...*'
[96] Sub-Clause 2.5(2) of the 1999 FIDIC Forms.
[97] The FIDIC Contracts Guide (n 20) 79.
[98] Bell and Hall (n 62).
[99] ibid.
[100] Jeremy Glover, 'Employer claims under the FIDIC form' (*International Quarterly by Fenwick Elliott LLP*, 2015) <http://www.fenwickelliott.co.uk/sites/default/files/issue_015_-_iq_2015.pdf> accessed 24 December 2021.
[101] Baker, Mellors, Chalmers and Lavers (n 10) 338.
[102] ibid 320.

3.2 Contractor's Claim Notices under Sub-Clause 20.1 of the 1999 FIDIC Forms

35. Contractors must serve claim notices '*as soon as practicable*' within a maximum of 28 days commencing on the date when contractors '*became aware, or should have become aware, of the event or circumstance*' triggering the claim.[103] In this regard, one noteworthy difference between employer's and contractor's claim notices in the 1999 FIDIC Forms lies in the time period adopted for the service of such notices. While both Sub-Clause 2.5 and Sub-Clause 20.1 requires claim notices to be given '*as soon as practicable*,' Sub-Clause 2.5 does not introduce a specified time period for employers to serve their claim notices. However, Sub-Clause 20.1 explicitly imposes a 28-day period on contractors.

36. Given that the stricter time requirements imposed on contractors have the potential to create a severe risk of losing the entitlement, it is of essence to pinpoint precisely when the 28-day term will commence. When the wording of Sub-Clause 20.1 is carefully analyzed, one may consider that there are three options to be evaluated, which are as follows: (**i**) the stage when the event or circumstance triggering the claim occurs, (**ii**) the stage when contractors become aware or should have become aware of the event or circumstance, or (**iii**) the stage when contractors consider themselves to be entitled to an extension of time and/or additional payment as a result of that event or circumstance.[104] For the purpose of protecting the contractor's entitlement, judges and arbitrators in any jurisdiction should take a more flexible approach by providing a standard to require contractors to give claim notices at the later stage as much as possible.[105]

37. Fortunately, *Justice Akenhead* refused to apply a strict line in the landmark common law judgment of *Obrascon*, which indicated a strong tendency to protect contractors in identifying the starting point of the 28-day period. This case was regarding an extension of time claim, and the court read Sub-Clause 20.1 together with Sub-Clause 8.4 of the 1999 FIDIC Forms, the relevant part of which states that contractors are entitled to an extension of time for completion '*if and to the extent that completion … **is***

[103] Sub-Clause 20.1(1) of the 1999 FIDIC Forms.

[104] The FIDIC Contracts Guide (n 20) 312; Axel-Volkmar Jaeger and Gotz-Sebastian Hok, FIDIC-A Guide for Practitioners (Springer 2010) 374; KJ Park, 'Claim Notice: When Should the Contractor Notify?' (*Corbett & Co. Knowledge Hub*, 24 May 2016) <https://corbett.co.uk/claim-notice-by-when-should-the-contractor-notify-2/> accessed 9 December 2021.

[105] Baker, Mellors, Chalmers and Lavers (n 10) 319.

or will be delayed ...'[106] As such, contractors can give claim notices for an extension of time for completion within the period of 28 days, which starts to run at the time (**i**) when it is evident that a delay will occur, or (**ii**) when the delay has started to be incurred.[107]

38. Before *Obrascon*, the traditional position was that the wording '*event or circumstance*' in Sub-Clause 20.1 should be interpreted as including '*suffering of delay or incurring of cost*' as Baker/Mellors/Chalmers/Lavers stated by relying on Sub-Clause 2.1 in the Red Book 1999; however, the 28-day time period would start to run when contractors were aware or should have been aware of the potential delay or cost.[108] *Justice Akenhead* disavowed this traditional interpretation requiring contractors to notify both '*actual and potential delay events*,'[109] and the absence of a wording like '*is or will be delayed,* ***whichever is the earliest***'[110] led him to conclude that it is left to the discretion of contractors to notify at either point.[111] Accordingly, contractors can give notice at an earlier stage if they reasonably believe that there will be a delay; however, the 28-day time period only starts to run when there is an actual delay in the sense that the time bar will operate to disentitle contractors from claiming.[112] It is worth noting here that the *Obrascon* judgment may be regarding an extension of time claim, but the same logic is applicable to an additional payment claim in the sense that contractors may defer the

[106] Sub-Clause 8.4 of the 1999 FIDIC Forms (emphasis added). Obrascon v Gibraltar (n 62) 312.
[107] Obrascon v Gibraltar (n 62) 312.
[108] Baker, Mellors, Chalmers and Lavers (n 10) 319. Sub-Clause 2.1(3) of the Red Book 1999: '*If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Employer to give any such right or possession within such time, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to: ...*'
[109] David Robertson, 'When must a contractor give notice of an entitlement under FIDIC's condition precedent clause?' (*The Practical Law Construction Blog*, 17 June 2014) <http://constructionblog.practicallaw.com/when-must-a-contractor-give-notice-of-an-entitlement-under-fidics-condition-precedent-clause/> accessed 28 December 2021.
[110] Obrascon v Gibraltar (n 62) 312 (emphasis added).
[111] Park (n 104); Mike R. Steward and Camilla A. de Moraes, 'FIDIC Update: Clarity on Notice Provisions and Time Bars' (*K&L Gates Construction Law Blog*, 19 May 2014) <https://www.klconstructionlawblog.com/2014/05/fidic-update-clarity-on-notice-provisions-and-time-bars/> accessed 9 December 2021.
[112] Park (n 104).

submission of claim notices to the point at which the cost has started to be incurred.[113]

39. To illustrate, in *Obrascon*,[114] the background to the dispute was a project for a tunnel and dual carriageway. A variation instruction was issued in June to widen a part of the dual carriageway. Even though it was foreseeable at that time that the variation would extend the period for constructing the dual carriageway, it was not foreseeable that it would delay the overall works. It became clear after the dual carriageway was started in October that the overall works would be delayed by variation; however, the delay actually happened in November. *Justice Akenhead* held that the contractor was entitled to an extension of time when it was clear that delays would happen (October) or when delays happened (November); however, the 28-day period started to run from November.

40. As long as contracting parties do not amend the FIDIC contracts in a way to require contractors to give notice at an earlier stage, contractors may benefit from a greater flexibility so as to wait until they actually suffer delay or incur cost to give their claim notices by relying on the *Obrascon* judgment.[115] We even consider that this ruling may inspire civil law countries when providing some comfort to contractors. However, the question arises with regard to whether contractors are able to refrain from giving notice until they actually suffer delay or incur cost although it is clear at an earlier stage that they will suffer delay or they will incur cost. Arguably, knowing that delay or cost will occur but waiting until it has actually been incurred runs contrary to Sub-Clause 20.1, which requires notice to be given '*as soon as practicable.*' In addition, avoiding notice and thus deferring the 28-day time period to run contradicts Sub-Clause 1.3 of the 2017 FIDIC Forms, which introduces the requirement that all notices shall '*not be unreasonably withheld or delayed*.' As such, contractors should not assume that the *Obrascon* judgment will justify their late submission in any case.

---

[113] ibid.

[114] For this analysis, see, Obrascon v Gibraltar (n 62) 312.

[115] Park (n 104); David Thomas, 'Time-bars Revisited' (*Construction Law International*, December 2014) <https://w
ww.ibanet.org/Article/NewDetail.aspx?ArticleUid=9199af06-e541-4c36-a1a7-a5ad4de00c81#10> accessed 11 De- cember 2021.

3.3 Claim Notices under Sub-Clause 20.2 of the 2017 FIDIC Forms

41. The wording in Sub-Clause 20.2.1 of the 2017 FIDIC Forms is identical to Sub-Clause 20.1 of the 1999 FIDIC Forms. Indeed, contracting parties must serve claim notices '*as soon as practicable*' within a maximum of 28 days commencing on the date when they '*became aware, or should have become aware, of the event or circumstance*' triggering the claim. As such, the discussions as to contractor's claim notices under Sub-Clause 20.1 of the 1999 FIDIC Forms, including the *Obrascon* judgment, are still relevant when adopting the 2017 FIDIC Forms.

42. As a final *caveat*, contracting parties are not required under the 1999 FIDIC Forms to respond to claim notices other than providing receipt under Sub-Clause 1.3(a),[116] and the absence of such rebuttal should not constitute agreement.[117] However, under Sub-Clause 20.2(2) of the 2017 FIDIC Forms, contracting parties must give counter notice including reasons within 14 days after receiving claim notices only if they consider there is a delay in serving claim notices. Otherwise, late claim notices will be deemed to be valid.[118] Upon receiving counter notice, the claiming party must indicate justifications for its late service of claim notices in the fully detailed claim,[119] which will be submitted to the employer's representative within the period of 84 days '*after the claiming [p]arty became aware, or should have become aware, of the event or circumstance giving rise to the [c]laim.*'[120] Subsequent to receiving a fully detailed claim, the employer's representative may proceed in accordance with belated claim notices if circumstances justify the late submission.[121] When approving the late submission, the employer's representative may take the following into account: (**i**) whether approving belated claim notices would have any detrimental effect on the receiving party and (**ii**) whether the receiving party has already known the event triggering the claim before the service of belated claim notices.[122] This discretion somewhat softens the strict application of the time bar of 28 days. Nevertheless, contracting parties should ensure that they comply with the requirements of Sub-Clause 20.2.1

[116] The FIDIC Contracts Guide (n 20) 79-80.
[117] ibid 80.
[118] Sub-Clause 20.2.2(2) of the 2017 FIDIC Forms.
[119] Sub-Clause 20.2.2(3) of the 2017 FIDIC Forms.
[120] Sub-Clause 20.2.4 of the 2017 FIDIC Forms.
[121] Sub-Clause 20.2.5 of the 2017 FIDIC Forms.
[122] ibid.

by giving timely notice of claims, irrespective of jurisdiction, in order to avoid any uncertainty.

43. Contracting parties are not obliged to respond to claim notices in cases where the claiming party fails to comply with the requirements as to the content and form of notices, and silence on the part of the receiving party should not be taken as an indication of agreement. It is worth noting here that the enforceability of this provision, namely requiring the receiving party to respond to claim notices within 14 days, might be undermined in civil law countries, given that circumstances may justify the silence or late submission of counter notices.

4. THE LEGAL NATURE OF CLAIM NOTICES

4.1 The Common Law Perspective

44. Courts and arbitrators in common law countries engage in an essential intellectual activity when dispelling the darkness hanging over the legal nature of the notice requirements, since the condition precedent label put on the notice requirements constitutes a benefit to only one party and an outright detriment to the other.[123] Here, we will first explain the criteria a notice provision needs to fulfill to be considered as a condition precedent,[124] and then evaluate the legal nature of the notice requirements under the 1999 FIDIC Forms and 2017 FIDIC Forms according to the relevant criteria.

45. A condition precedent is a contractual stipulation, the fulfillment of which triggers a right or obligation to arise.[125] A gold standard is derived from *Bremer Handelgesellschaft*, and a notice provision will be construed as a condition precedent in common law jurisdictions, if (**i**) it prescribes a specific time frame within which the notice is to be provided, and (**ii**) it clearly states that the rights will be lost in the event that notice is not provided within that time frame.[126] Considering its harsh effect, common law courts and arbitrators tend to apply greater weight to '*clear [terms] and commercial certainty*'[127] and refrain from labeling a notice requirement as a

[123] *Steria Ltd v Sigma Wireless Communications Ltd* [2007] EWHC 3454 (TCC) 89.

[124] For further information: see, Claire King and Rebecca Ardagh, 'Conditions Precedent: Will they bite?' (*Fenwick Elliott*, June 2020) <https://www.fenwickelliott.com/research-insight/newsletters/insight/86> accessed 19 December 2021.

[125] Bailey (n 1) 164.

[126] *Bremer Handelgesellschaft mbH v. Vanden Avenne Izegem P.V.B.A* [1978] 2 LLR 109: '*Had it been a condition precedent, I should have expected the clause to state the precise time within which the notice was to be served and to have made plain by express language that unless the notice was served within the time, the sellers would lose their rights under the clause.*'

[127] Glen Water v Northern Ireland Water (n 75) 64.

condition precedent until a clear language is used.[128] As long as the contract explicitly states that the failure to duly notify prevents a claim being made, the outcome will not change depending on whether contracting parties '*leave no stone unturned*' in pursuing their claim.[129] However, '*genuine ambiguity*' as to the existence of a condition precedent will lead us to accept that there is a condition precedent.[130]

46. The wording of the contract should be evaluated very carefully when determining whether the legal nature of a notice provision is a condition precedent. We may assume that a notice provision is a condition precedent as long as the wording of the contract is clear enough to indicate the intention of contracting parties to establish '*a conditional link*'[131] when interpreted as a whole.[132] In this sense, a notice provision does not have to carry the specific labels like '*condition*'[133] or '*condition precedent*,'[134] as long as it is clear that the right or obligation is contingent on the satisfaction of the specific conditions.[135] Again, '*subject to*'[136] may operate as a condition precedent.[137] Although we mentioned that there are two prerequisites for a condition precedent to exist in light of *Bremer Handelgesellschaft*, the common law courts and arbitrators may tend to be overzealous in enforcing condition precedents. Indeed, the courts in *Jetoil* and *Steria* held that the clauses requiring notice to be provided promptly[138]

[128] Stephen Furst, Vivian Ramsey, Sarah Hannaford, Adrian Williamson, Donald Keating and John Uff, *Keating on Construction Contracts* (Sweet & Maxwell 2012) 286. See also, *Temloc v Errill Properties* [1987] 39 BLR 30; *CMA Assets Pty Ltd v John Holland Pty Ltd* [No. 6] [2015] WASC 217.

[129] Glen Water v Northern Ireland Water (n 75).

[130] Steria v Sigma Wireless (n 123) 89.

[131] *Aspen Insurance UK Ltd v Pectel Ltd* [2009] 2 All ER (Comm) 873.

[132] *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2016] 1 All E.R. (Comm) 536.

[133] *Schuler (LG) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235.

[134] *Eagle Star Insurance Company Ltd v Cresswell & Ors* [2004] EWCA Civ 602; *O'Brien v TTT Moneycorp Ltd* [2019] EWHC 1491.

[135] King and Ardagh (n 124) 1.

[136] *Heritage Oil And Gas Ltd & Anor v Tullow Uganda Ltd* [2014] EWCA Civ 1048.

[137] King and Ardagh (n 124) 1.

[138] *Mamidoil-Jetoil Greek Petroleum Company SA & Anor v Okta Crude Oil Refinery AD* [2002] EWHC 2210 (Comm) 134: '*I would have been inclined to hold that notice provision in the 1993 contract is a condition precedent. The form of the notice provision is imperative; a party "invoking force majeure shall give prompt notice to the other party". The implication behind that imperative is that if the party does not then it cannot rely on force majeure. The reason for requiring notice to be given must be that the "other party"*

or '*within a reasonable period*'[139] may be specific enough to be treated as a condition precedent, and it is not necessary to insert an express wording regarding the consequences of failure to comply with the notice requirements. However, in *Bremer Handelgesellschaft*, the court concluded that the notice clause did not constitute a condition precedent, since the time frame for serving notice was not fixed. Here, the definitive fact was that a fixed time limit was introduced elsewhere in the contract. As such, the contract should be evaluated as a whole in determining whether the intention of contracting parties is to form a conditional link.[140]

4.1.1 *Employer's Claim Notices under Sub-Clause 2.5 of the 1999 FIDIC Forms*

47. Sub-Clause 2.5 does not specify any sanction if employers fail to give claim notices to contractors promptly and in a particularized form. As such, the question arises as to whether employer's claims are subject to a condition precedent, and thus whether employers are precluded from requesting payment and/or extension of the defects notification period from contractors in cases where claim notices are not given in accordance with Sub-Clause 2.5. Having regard to the different wording used in Sub-Clause

can then investigate the alleged force majeure at the time. It can challenge whether it does prevent performance or delay in performance by the party invoking force majeure. Alternatively it can see if there are other means of enabling performance to be continued. Lastly, if the notice provision is only an innominate term, then I find it difficult to see when the innocent party could allege it had suffered additional damage as a result of not being told promptly of the force majeure event other than the very damages that it would wish to recover for the first party's failure to perform the contract at all. These factors would all lead me to conclude that the parties intended the notice provision to be a condition precedent.'

[139] Steria v Sigma Wireless (n 123) 90: '*... 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*** *in itself any reason for arguing that it is* ***unclear in its meaning and intent***.' (emphasis added); Steria v Sigma Wireless (n 123) 91: '*... 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 ... 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 ... 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'.'* (emphasis added).

[140] *Davy Offshore Ltd v Emerald Field Contracting Ltd* (1992) 55 BLR 1; King and Ardagh (n 124) 1.

20.1, which explicitly states that any claim to time or money will be lost if contractors fail to give claim notices promptly and in a specified form, the stance has generally been in the literature that employer claims would not be subject to a condition precedent.[141] As mentioned earlier,[142] the writers holding this opinion probably interprets the contract as a whole and considers the absence of the sanction as an indication that the drafters do not have an intention to create a conditional link.

48. In this regard, *NH International* and *J Murphy*[143] shed some light on the nature of Sub-Clause 2.5.[144] However, divergent positions have been adopted on whether employers are precluded from making claims against contractors if the formal requirements in Sub-Clause 2.5 have not been satisfied.[145]

49. In the English case of *NH International*, one of the issues was whether employers are precluded from bringing a claim if they have not served a notice in accordance with Sub-Clause 2.5.[146] The court held that employer's claims might also be subject to condition precedent even if a different wording is used in the 1999 FIDIC Forms.[147]

Contracting parties adopted the unamended 1999 Red Book for the construction of a hospital in Tobago.[148] The contractor made a request from the employer to submit the financial arrangements under Sub-Clause 2.4[149] proving its ability to pay the contract price, and the parties fell into dispute as to whether the employer had submitted sufficient evidence.[150] Depending

[141] Glover (n 100); William Godwin, International Construction Contracts: A Handbook with commentary on the FIDIC design-build forms (Wiley-Blackwell 2013) 38.
[142] See, 4.1.
[143] *J Murphy & Sons Ltd v.Beckton Energy Ltd* [2016] EWHC 607 (TCC).
[144] Bell and Hall (n 62).
[145] ibid.
[146] NH International v National Insurance Property (n 56) 36ff.
[147] Glover (n 100).
[148] NH International v National Insurance Property (n 56) 1, 4.
[149] Sub-Clause 2.4 of the Red Book 1999 [*Employer's Financial Arrangements*] states that: '*The Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price ... in accordance with Clause 14 [Contract Price and Payment]. ...*' Sub-Clause 2.4 of the Yellow Book 1999 and Silver Book 1999 contains the same requirement. Sub-Clause 14 sets out the contract price and procedure for payment, including provisions for interim certificates and a final certificate, referred to as '*Payment Certificates.*'
[150] NH International v National Insurance Property (n 56) 10-16.

on Sub-Clause 16,[151] the contractor first suspended the works,[152] and eventually terminated the contract due to non-compliance with Sub-Clause 2.4.[153] Relying on Sub-Clause 16.4(c),[154] the contractor claimed its financial losses arising out of the termination of the contract.[155] In response to the contractor's claim for such losses, the employer submitted various counter-claims in the arbitration proceedings, and sought to set-off its own claims against the contractor.[156] However, these counter-claims had not been notified in accordance with Sub-Clause 2.5 at any stage subsequent to the conclusion of the contract. Accordingly, the contractor alleged that it had heard of the counter-claims for the first time during the arbitration proceedings, and that Sub-Clause 2.5 barred any set-off by the employer.[157]

An employer's attempt to set-off its claims against a contractor during the course of an arbitration were banned, because the employer had not followed the formal notice requirements in Sub-Clause 2.5.[158] The arbitrator determined that the contractor was entitled to terminate the contract as a result of the employer's failure to provide reasonable evidence as to its financial arrangements to cover the contract price.[159] In appeal, the court disagreed with the arbitrator's finding, and made it clear that if an employer wants to raise a claim it must do so promptly and in a particularized form.

---

[151] Sub-Clause 16.1 of the Red Book 1999 [*Contractor's Entitlement to Suspend Work*] gives the contractor a right to suspend work (or reduce the rate of work), by giving 21 days' notice, in the event of the employer's failure to provide such reasonable evidence. Sub-Clause 16.2 of the Red Book 1999 [*Termination by Contractor*] gives the contractor a right to terminate the contract if it has not received such reasonable evidence within 42 days of exercising its right of suspension for such failure. Sub-Clause 16.3 of the Red Book 1999 [*Cessation of Work and Removal of Contractor's Equipment*] provides that the contractor should cease all work and leave the site on termination under Sub-Clause 16.2. The Yellow Book 1999 and Silver Book 1999 provide the same suspension and termination rights to contractors.

[152] NH International v National Insurance Property (n 56) 12.

[153] ibid 14.

[154] Sub-Clause 16.4 of the Red Book 1999 [*Payment on Termination*] entitled the contractor to be paid '*the amount of any loss of profit or other loss or damage sustained by the [c]ontractor as a result of the termination*' after a notice of termination under Sub-Clause 16.2 of the Red Book 1999 [*Termination by Contractor*] has taken effect.

[155] NH International v National Insurance Property (n 56) 15.

[156] ibid 16-19.

[157] ibid 36.

[158] ibid.

[159] ibid 18.

If followed,[160] the stance in *NH International* maintains parity between employers and contractors in the sense that their right to bring claims may be equally subject to condition precedent, when the 1999 FIDIC Forms does govern the relationship between contracting parties.[161]

50. On the other hand, the issue in the English case of *J Murphy* was regarding whether the employer's right to deduct delay damages was subject to compliance with the procedure under Sub-Clause 2.5, and a negative answer was given by the court.

In this case, contracting parties adopted the 1999 Yellow Book with substantial amendments for the design, construction, testing and commissioning of a combined heat and intelligent power plant in East London. There was a significant delay in the progress and completion of the works. The employer notified the contractor first of its entitlement to delay damages with express reference to Sub-Clause 2.5, and then of its intention to make a call on the contractor's on-demand performance bond for its failure to pay the delay damages within 30 days pursuant to the amended Sub-Clause 8.7. However, the contractor claimed that the employer was not entitled to delay damages under the amended Sub-Clause 8.7, since there had been no agreement or determination of the amount to be paid to the employer as required by Sub-Clauses 2.5 and 3.5. In fact, Sub-Clause 8.7 allowed for the employer to recover delay damages from the contractor in certain circumstances. While Sub-Clauses 2.5 and 3.5[162] remained the same, the parties substantially amended Sub-Clause 8.7, and deleted the terms that the obligation to pay delay damages be subject to Sub-Clause 2.5. In other words, the amended Sub-Clause 8.7[163] made no mention of the process of

[160] See, 4.1.3.

[161] Bell and Hall (n 62).

[162] Sub-Clause 3.5 of the Yellow Book 1999 [*Determinations*] states that: '*Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.*'

[163] The unamended Sub-Clause 8.7 [*Delay Damages*] of the Yellow Book 1999 states that: "*If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall subject to Sub-Clause 2.5 [Employer's Claims] pay delay damages to the Employer for this default.*"

The amended Sub-Clause 8.7 [*Delay Damages and Bonus*] in this case stated that:

"*8.7.1 If the Contractor fails to:*

a) achieve the ROC Acceditation Milestone by the ROC Accreditation Date the Contractor shall pay or allow to the Employer liquidated damages for such delay at the daily rate of

agreement or determination by which the amount of damages was to be fixed between the parties in accordance with Sub-Clauses 2.5 and 3.5. As such, it was necessary for the court to address the inconsistency between Sub-Clauses 2.5 and 3.5 on the one hand and Sub-Clause 8.7 on the other as to the requirement for an agreement or determination of damages, and accordingly to decide whether the employer could recover delay damages from the contractor under Sub-Clause 8.7.

The contractor relied on the *NH International* judgment, and claimed that Sub-Clause 2.5 must apply, given that Sub-Clause 2.5 was very widely drafted so as to include any claim for payment for delay damages under Sub-Clause 8.7, and that Sub-Clause 8.7 is not listed as one of the limited exceptions to Sub-Clause 2.5. The contractor also emphasized the fact that the employer had notified of its entitlement to delay damages with express reference to Sub-Clause 2.5. Moreover, it argued that the contract provided checks and balances through the role of the engineer, and one would expect there to be clear words if its provisions were to be outside of the regime in Sub-Clause 2.5. On the other hand, the employer relied on Sub-Clause 8.7, and asserted that the obligation to pay delay damages arose independently of Sub-Clauses 2.5 and 3.5, and was not therefore contingent on the engineer's determination. It further claimed that the court should take into consideration the fact that Sub-Clause 8.7 was drafted specifically by the parties whereas Sub-Clause 2.5 was unamended from the Yellow Book 1999. Besides, the absence of the words '*subject to Sub-Clause 2.5*' in Sub-Clause 8.7 of the standard Yellow Book 1999 suggested that the parties did not intend for their Sub-Clause 8.7 to be subject to Sub-Clauses 2.5 and 3.5.

The court stated that agreements should be '*read as a whole and construed as far as possible to avoid inconsistencies between different parts*

£4,000 for each day commencing from the ROC Accreditation Date until the earlier of the achievement of i) the ROC Accreditation Milestone or ii) 31 March 2015; and
b) achieve the ROC Accreditation Milestone by the ROC Eligibility Change Date the Contractor shall pay or allow to the Employer a Bullet Payment; and
c) achieve the Taking-Over Date for the Works within the Time for Completion,
the Contractor shall pay or allow to the Employer liquidated damages for delay. Such liquidated damages shall be payable at the daily rate of £23,000 for each day after the Time for Completion for the Works up to and including the Taking-Over Date for the Works …
8.7.4 Delay damages due pursuant to this Sub-Clause 8.7 shall be deducted from the next applicable Notified Sum following the end of the month in which such delay occurred or where no such Notified Sum is applicable or is disputed, shall be payable within 30 days of the end of the week in which such delay occurred."

on the assumption that the parties had intended to express their intentions in a coherent and consistent way.'[164] The court acknowledged that Sub-Clause 2.5 was widely drafted, and was applicable in all cases in which the employer was entitled to payment under the FIDIC contract terms, subject to the exceptions set out in Sub-Clause 2.5 (which did not include Sub-Clause 8.7).[165] However, it interpreted the fact that the words '*subject to Sub-Clause 2.5*' had been deleted from Sub-Clause 8.7 of the standard Yellow Book 1999 as indicative of the parties' intentions that Sub-Clause 2.5 was not meant to apply.[166] The court concluded that the employer's right to claim delay damages under Sub-Clause 8.7 was not subject to the mechanism in Sub-Clauses 2.5 and 3.5, meaning that the employer could recover delay damages without an agreement or determination by the engineer.

51. Considering the significance of Sub-Clause 2.5, the restrictive approach adopted in *NH International* should be followed by courts.[167] Having been inspired by the case of *Jetoil*, we observe that the form of Sub-Clause 2.5 is '*imperative*,' and the logic behind requiring notice is generally enabling the contracting parties investigating the event or circumstances.[168] Therefore, we believe that Sub-Clause 2.5 is a condition precedent and the failure to comply with the notice requirements will invalidate the claim.

4.1.2 *Contractor's Claim Notices under Sub-Clause 20.1 of the 1999 FIDIC Forms*

52. An aspect which notably distinguishes contractor's claims from employer's claims is that Sub-Clause 20.1(2) does expressly specify the consequences of contractors' failure to give claim notices to employers promptly and in a particularized form. Indeed, in cases where contractors do fail to comply with the notice requirements, they will not receive an extension of time and/or additional payment, and employers will be discharged from all liability in connection with an otherwise valid claim. Accordingly, Sub-Clause 20.1 is a well-drafted provision, the legal nature of which is a condition precedent.[169]

53. Let us leave aside for an instant the issue regarding to what extent this formal notice provision is enforceable especially in civil law countries.

[164] Murphy v Beckton (n 143) 43.
[165] ibid 45-46.
[166] ibid 48.
[167] Bell and Hall (n 62).
[168] Jetoil (n 138) 134.
[169] Baker, Mellors, Chalmers and Lavers (n 10) 320, 6.220.

Considering that the silence of Sub-Clause 2.5 as to the consequence of employer's failure to give timely and proper claim notices has sparked a bitter controversy among scholars, we highly appreciate the FIDIC's clear position in drafting Sub-Clause 20.1 in a way to make contractor's claims be subject to a condition precedent.

4.1.3 *Claim Notices under Sub-Clause 20.2 of the 2017 FIDIC Forms*

54. Sub-Clause 20.2.1 of the 2017 FIDIC Forms regulates the consequence of failure to comply with notice requirements in a comprehensive way, and states that, should contracting parties fail to give claim notices promptly within a fixed time and in a particularized form, they will not receive an extension of time and/or any additional payment, as well as the other party will be discharged from all liability in connection with the claim. Accordingly, the 2017 FIDIC Forms are remarkable for making employer's claims subject to a similar condition precedent to that imposed upon contractors, and thus providing a level playing field between employers and contractors. The contracting parties here should be cautious to consistently amend the clauses in the 2017 FIDIC Forms introducing a condition precedent in order to prevent courts from engaging in contract interpretation to identify their intention as to the legal nature of the relevant notice provisions.

55. With regard to employer's claim notice in the 1999 FIDIC Forms, although Sub-Clause 2.5 of the 1999 FIDIC Forms does not clearly specify the consequence of employers' failure to give claim notices to contractors promptly and in a particularized form, some practitioners considered that there was no need to make any amendments to this clause in the light of *NH International* where the court already confirmed that the right of employers and contractors to bring claims under the FIDIC forms of contracts may both be subject to certain condition precedent.[170] However, we believe that it is pertinent to reflect the position in *NH International* to the FIDIC contracts in the sense that it ends the debates in the literature as to the legal nature of employer's claim notice, and provides certainty and clarity.

C. LEGAL ARGUMENTS TO DEFEAT THE NOTICE REQUIREMENTS

56. To what extent claim provisions in the FIDIC contracts are enforceable depends on the law applicable to the contract. Almost invariably, courts and arbitrators in common law countries attach paramount

[170] Glover (n 100).

importance to the fundamental tenet of freedom of contract, and shied away from interfering with contracting parties' will.[171] As such, one may assume that the contractual notice requirements are strictly enforced in common law countries. In this sense, a flexible approach has emerged in common law countries in 2014 subsequent to the judgment of *Obrascon*, which may allow a notice to be served at a later date or in a different form, considering the potentially harsh effects of notice requirements. Even though this judgment has been regarded as a precursor for a softened approach to spread across common law countries, the importance of a proper and prompt notification of claims was reinforced in 2017 in *Glen Water*, where a strict compliance with '*clear and unambiguous*' notice provisions was required without leaving the door open for them to rely on employers' constructive or even actual knowledge of a potential claim event to avoid the notification duties.[172]

As such, a properly drafted notice provision is enforceable as a condition precedent in common law jurisdictions however difficult and unconscionable the outcome might be.[173] Furthermore, a party invoking the condition precedent does not need to show that it has been prejudiced by the breach, at all.[174] Considering that common law countries harken back to the traditional approach, employers and contractors are advised to comply with the contractual notice requirements.

57. Likewise, the primacy of express terms and the freedom of contract are at the heart of the civil law of contract. As such, contracting parties may be required to adhere to the notice requirements in the FIDIC contracts in the absence of any special circumstance. Nonetheless, it is conceivable in civil law countries to limit the principle of freedom of contract by way of

[171] Smiley and Rawal (n 22) 60-62.

[172] For more judgments adopting a strict approach, see for instance: *Eriksson v Whalley* [1971] 1 NSWLR 397; *Central Provident Fund Board v Ho Bock Kee* [1980-1981] SLR 180; [1981] SGCA 4; *West Dunbartonshire Council v William Thompson & Sons (Dumbarton) Ltd* [2015] CSIH 93; *John L. Haley v Dumfries & Galloway Regional Council* [1988] 39 GWD 1599; *Ben Cleuch Estates Ltd v Scottish Enterprise* [2008] CSIH 1.

[173] Andrew Tweeddale, 'FIDIC's clause 20 a common law view' (*Construction Law International*, 1 June 2006) <http://corbett.co.uk/wp-content/uploads/FIDIC-Clause-20-a-common-law-view.pdf> accessed 1 December 2021; Smiley and Rawal (n 22) 60-62. See for example, *City Inn Limited v Shepherd Construction Limited* [2003] CILL 2009; *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC); Obrascon v Gibraltar (n 62); Steria v Sigma Wireless (n 123).

[174] *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 1 LLR 274.

grounds for legislative and judicial interventions.[175] That is to say, a failure to comply strictly with the contractual notice requirements may not necessarily invalidate a claim for money and/or time on the basis of arguments available under the governing civil law.

58. This section will carve out the legal arguments which are typically deployed by contracting parties with the aim of rebutting a condition precedent defence, and conclude that civil law jurisdictions may have a potential to adopt a more lenient approach than common law jurisdictions precisely when discretion is used efficiently.[176]

1. THE LEGAL NATURE OF THE 28-DAY PERIOD: LIMITATION PERIOD OR STATUTE OF REPOSE?

59. Broadly speaking, in order to determine whether a time-bar provision is enforceable or not in civil law countries, one should evaluate the following questions under the governing civil law: (**i**) whether a limitation period (Verjährung, zamanaşımı) is established by the governing law for construction claims, (**ii**) whether this limitation period can be varied by contract, and (**iii**) whether a limitation period can be converted into a statute of repose (Verwirkungsfristen, hak düşürücü süre) by contract. At this point, we reach an excellent opportunity to elaborate a little more on these questions through the examples of Turkey, Poland, Italy and the United Arab Emirates, respectively.

60. The Turkish Court of Cassation disregarded its ample discretion in several judgments. By giving very little legal reasoning, it confirmed that the FIDIC notice provisions are valid and the legal nature of the 28-day period is a statute of repose.[177] We would expect the court to determine the ambit of the Turkish law in detail and to fortify its stance with solid legal analysis, the starting point of which should have been the definition at least of a statute of repose. Here we will fill the gaps in these judgments as much as possible.

61. A statute of repose is defined in the literature as follows: a specified period imposed by law until the end of which the right holders have to

[175] For more information about freedom of contract and its limitations in Turkish law, see: Erdem Büyüksağiş, 'Turkish Contract Law Reform: Standard Terms, Unforeseen Circumstances, and Judicial Intervention' (2016) 17(3) European Business Organization Law Review 423-449.

[176] Glover (n 21); Smiley and Rawal (n 22) 68.

[177] Turkish Court of Cassation 15th Civil Chamber, E. 2001/5595, K. 2002/3931, T. 17.09.2002; Turkish Court of Cassation 15th Civil Chamber, E. 2000/4429, K. 2001/1032, T. 26.02.2001.

perform a particular act (such as, declaring their intent, filing a lawsuit or performing a legal act like inspecting the goods and notifying the defects in sales contracts); otherwise, they will lose their rights.[178] On the other hand, a limitation period is an upper bound by which a right can be claimed.[179] Unlike a statute of repose, the expiry of a limitation period does not cut off the right itself; however, it equips the counterparties with a defense to abstain indefinitely from performing their obligation.[180] In determining whether there is a statute of repose or a limitation period, the wording and *ratio legis* of the provision should be evaluated very carefully.[181] Unless this evaluation requires us to adopt otherwise, we may assume that formative rights are subject to a statute of repose, while receivable rights are subject to a limitation period.[182]

62. Arts. 479-486 of the Turkish Code of Obligations No: 6098, which are devoted to contracts for work, require contracting parties to give notice either of the defects or of other circumstances endangering the work to be carried out as required or on time. Those notice provisions are so superficial that they do not specify any particular form and content for the defect notices. Furthermore, language regulating the timing of such notices is inconsistent and somewhat vague, considering that notices must be issued '*immediately*'[183] for the defects in site and construction materials provided by the employer, '*within a reasonable time*'[184] after the inspection for the

[178] Necip Kocayusufpaşaoğlu Hüseyin Hatemi, Rona Serozan and Abdülkadir Arpacı, Borçlar Hukuku Genel Bölüm Birinci Cilt (Filiz 2017) 51, N. 12; Selahattin Sulhi Tekinay, Sermet Akman, Haluk Burcuoğlu and Atilla Altop, Borçlar Hukuku Genel Hükümler (Filiz 1993) 1032; Rona Serozan: Medeni Hukuk Genel Bölüm (Vedat 2005) 207; Mehmet Erdem, Özel Hukukta Zamanaşımı (On İki Levha 2010) 25; M. Kemal Oğuzman, M. Turgut Öz, Borçlar Hukuku Genel Hükümler Cilt-1 (17th edn, Vedat 2019) 619, N. 1902.

[179] Oğuzman and Öz (n 178) 619, N. 1903.

[180] ibid.

[181] ibid 620, N. 1905.

[182] ibid; Kocayusufpaşaoğlu (n 178) 52-53, N. 13.

[183] Art. 472/III of the Turkish Code of Obligations: "*If it is found when the work being carried out that the material or the place provided by the employer is defective, or that another circumstance arises endangering the production of the work as required or on time; the contractor shall immediately notify the employer of this circumstance; otherwise, be responsible for the consequences.*"

[184] Art. 474/I of the Turkish Code of Obligations: "*The employer shall inspect the work in due course subsequent to the delivery of the work, and if there are defects, notify the contractor of the defects within a reasonable time.*"

defects in the work, and '*without delay*'[185] for the defects in the work discovered later until the acceptance. Unless a defect notification period is specified in the contract, courts will decide the accurate meaning of the applicable standard on a case-by-case basis in light of the good faith principle.

63. Apart from notification of the defects, no claim is contingent upon providing notice within a certain period under the Turkish Code of Obligations No: 6098. In fact, there is no explicit provision in the Turkish Code of Obligations No: 6098 granting contractors a claim for an extension of time for completion[186] and requiring them to give notice for such claims. When it comes to an additional payment, contracting parties are entitled to claim their receivables within the limitation period of ten years as a rule but of five years in case of gross negligence of contractors under Art.s 146, 147(6) of the Turkish Code of Obligations No: 6098, respectively. It is not possible under Art. 148 of the Turkish Code of Obligations No: 6098 to deviate from those limitations by contract.

64. Since the notice provisions in the FIDIC contracts clearly state that the claiming party will not be entitled to additional time or money, one may instinctively consider that the legal nature of the 28-day period is a statute of repose in Turkish law. However, there is no consensus in the literature regarding whether a statute of repose may be foreseen by contract, and the majority considers that a contractual statute of repose is not valid.[187] Since the Court of Cassation did not encapsulate its reasoning, we cannot know whether it did not concur with the majority of the scholars or whether it just overlooked this opinion.

65. In Poland, there has been a consensus among the lower instance courts until 23 March 2017 that the notice provisions in the FIDIC contracts are unenforceable.[188] However, their reasoning was slightly different. Some

[185] Art. 477/III of the Turkish Code of Obligations: "*If the defect in the work emerges later, the employer shall notify the contractor of the circumstance without delay; otherwise, the work shall be deemed to be accepted.*"

[186] H Ercüment Erdem, 'Türk Hukuku ve FIDIC Kapsamında Ek Süre' (*Erdem & Erdem Hukuk Postası*, April 2009) <http://www.erdem-erdem.av.tr/yayinlar/hukuk-postasi/turk-hukuku-ve-fidic-kapsaminda-ek-sure/> accessed 1 December 2021.

[187] Erdem (n 178) 31.

[188] For more information, see: Monika Leszko, 'Notification of Claims - The Deadline and the Effects of its Expiry - Some Considerations on the Basis of the 1999 and 2017 Versions of the FIDIC Conditions of Contract' (*DLA Piper Publications*, 1 June 2018) <https://www.dlapiper.com/pl/poland/insights/publications/2018/07/new-fidic-conditions-

of them have considered the 28-day notification period as shortening the limitation period; however, Art. 118 of the Polish Civil Code determines the limitation period for construction claims to be three years from the event or circumstance, and such period cannot be modified by contract according to Art. 119 of the Polish Civil Code.[189] The rest has characterized the 28-day notification period as a statute of repose, which cannot be introduced in contracts according to the majority of the scholars.[190] However, the Supreme Court deviated from these rulings and decided (in case no: V CSK 449/16) on 23 March 2017 that the notification period in FIDIC contracts is a statute of repose and such a period can be introduced in contracts.[191] In other words, a notification period of 28 days in the FIDIC contracts is valid and enforceable under Polish law.

66. There is an explicit provision in Art. 2965 of the Italian Civil Code (*Codice Civile*) stating that, any contractually imposed time limits which makes it excessively difficult for a party to exercise the right under a contract are invalid. This provision may be a ground for the Italian judges to declare that the 28-day period in the FIDIC family is onerously short and that the notice provision is invalid.[192] We believe that, even in civil law countries where there is no such an explicit provision, the judges may still render a judgment in the same way as in the Italian Civil Code on the basis of the principles of good faith and unlawful exercise of rights.

67. A contractual time-bar provision may be regarded as the modification of the limitation period, from which contracting parties cannot deviate in some jurisdictions. In those jurisdictions, a claiming party may argue that a time-bar provision that contravenes the civil code is unenforceable. For example, Art. 487(1) of the UAE Civil Code provides that limitation periods cannot be modified by contract.[193]

---

of-contract-for-construction-polish-perspective/> accessed 9 December 2021; Dominika Jędrzejczyk, 'Sub-clause 20.1 of the FIDIC Under Polish Law - Is It an Enforceable Time Bar?' (*K&L Gates Construction Law Blog*, 16 March 2018) <https://www.klconstructionlawblog.com/2018/03/sub-clause-20-1-of-the-fidic-under-polish-law-is-it-an-enforceable-time-bar/> accessed 9 December 2021.

[189] ibid.

[190] ibid.

[191] ibid.

[192] See also, Smiley and Rawal (n 22) 69.

[193] For other civil codes containing identical provisions, see for example: Art. 354 of the Oman Civil Code, Art. 418 of the Qatar Civil Code, Art. 453 of the Kuwait Civil Code, and Art. 380 of the Bahrain Civil Code.

2. BREACH OF THE PRINCIPLE OF GOOD FAITH

68. The first and maybe the most fearsome argument available in civil law jurisdictions is the breach of the good faith obligation. The good faith principle allows courts the room to maneuver to determine '*standards of fair and honest behavior.*'[194] According to Art. 2 of the Turkish Civil Code No. 4721, for example, all persons must act in good faith when exercising their rights and performing their obligations, and the manifest misuse of a right is not protected by law.[195]

69. In view of this obligation, a party who receives a belated or inaccurate notification of a claim under the FIDIC contracts may not rely upon non-compliance with the notice requirements in cases where it is acting in bad faith. For instance, if a party receiving a belated notification is already aware of the circumstances of which the other party is required to give notice, invoking a time bar may be seen as acting in bad faith.[196] Likewise, an employer may not rely on a time bar provision if it causes delay to the completion of the works by its own breach. Indeed, employers may cause delay when they instruct the contractor to perform additional works, suspend the works, fail to give access to site or to issue approvals or drawings on time.[197]

3. THE PREVENTION PRINCIPLE

70. Since common law courts are reluctant to take advantage of the '*overriding*'[198] good faith principle, freedom of contract prevails over this principle.[199] However, there may be some other '*piecemeal*'[200] instruments

---

[194] Hans-Bernd Schäfer and Hüseyin Can Aksoy, 'Good Faith' (2015) Encyclopedia of Law and Economics 1, 1.

[195] See for example, (**i**) 'Treu and Glauben' in § 157 and § 242 of the German Civil Code, (**ii**) 'Bonne Foi' in Art. 1134 of the French Civil Code (*Code Civil*), (**iii**) 'Redelijkheid en Billijkheid' in Art. 6:248 of the Dutch Civil Code (*Burgerlijk Wetboek*), (**iv**) Art. 246(1) of the UAE Civil Code, and (**v**) §1-304 of the Uniform Commercial Code of the United States.

[196] Glover (n 50) 106.

[197] Peter Godwin, Dominic Roughton, David Gilmore and Emma Kratochvilova, 'The prevention principle, time at large and extension of time clauses' (*Herbert Smith Construction dispute avoidance newsletter*, 21 August 2009) <https://www.lexology.com/library/detail.aspx?g=09e90e60-fa47-411b-813d-0e3c6427f836> accessed 24 December 2021.

[198] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433; [1988] 1 All ER 348, 353.

[199] Smiley and Rawal (n 22) 68; Alexander Di Stefano: 'Good Faith in the AS11000: Has the Eagle Landed?' (2017) 33 Building and Construction Law Journal 13, 14. See also, Marilyn Warren, 'Good Faith: Where Are We At?' (2010) 34 (1) Melbourne University

available in certain circumstances so as to set the tone for fairness, for example, where the delay is caused by the employer. Indeed, the so-called prevention principle may constitute an impediment to the enforcement of a contractual obligation of the contracting party who prevents the counter party from performing its obligations,[201] the basis of which is the principle that no one is entitled to benefit from its own breach of contract.[202] The relevance of the prevention principle is observed where employers preclude contractors from completing the work by the date for completion and the contract does not contain a provision granting an extension of time for an employer-caused delay.[203] In this case, the prevention principle serves the function of rendering the contractual completion date '*at large*,' meaning that contractors have a reasonable time to complete the works and employers wholly lose their entitlement to recover damages arising out of the delay.[204] Obviously, the prevention principle offers a solution on all or none basis.

71. It is important to note that Sub-Clause 8.4(e)[205] of the 1999 FIDIC Forms and Sub-Clause 8.5(c) of the 2017 FIDIC Forms enable contractors to seek an extension of time for an employer-caused delay, provided that they adhere to the notice requirements. Considering that the legal nature of claim notices is a condition precedent to the contractor's right to claim an extension of time, the question arises here regarding whether employers will retain their right to claim damages for an employer-caused delay, in case where contractors are deprived of their right to claim an extension of time because of the failure to serve a Sub-Clause 20.1 notice.[206] In the Australian case of *Gaymark*,[207] '*the prevention principle took precedence over the notification provisions, notwithstanding the fact that such provisions had clearly been drafted as a condition precedent.*'[208] As such, the prevention

Law Review 344, 50 suggesting that '*the implication of an obligation of good faith in a contract might be seen to fly in the face of freedom in contractual relations.*'

[200] Interfoto v Stiletto (n 198) 353.

[201] Godwin, Roughton, Gilmore and Kratochvilova (n 197).

[202] Garry Kitt, 'Construction Claims in the UK' in Lukas Klee (ed), International Construction Contract Law (2nd edn, John Wiley & Sons 2018) 381.

[203] Smiley and Rawal (n 22) 65.

[204] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111.

[205] Sub-Clause 8.4(c) in the Silver Book 1999.

[206] Kitt (n 202) 382; Tweeddale (n 173) 28.

[207] *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143, 69-71.

[208] Kitt (n 202) 382.

principle presented an impediment to the employer's claim for delay damages based on its own delays, and the contractor was not deprived of their right to claim for an extension of time in spite of their failure to serve a valid notice. However, contractors should be aware that *Gaymark* has been highly criticised both by commentators and judges in other common law countries.[209] Against this backdrop, *Ian Duncan* asserted that '*Gaymark is in error … a hard case, not for the first time, may have produced bad law.*'[210] Also, in the English case of *Multiplex*, *Justice Jackson* explained his doubt as to whether *Gaymark* judgment represented the law in England, by stating that '*[i]f Gaymark is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set the time at large.* '[211]

72. The modern position in common law countries is that the failure of contractors to serve a notice for an extension of time in respect of employers' preventing conduct is fatal to the contractors' argument of '*time at large.*'[212] As such, it is evident that the argument of '*time at large*' is rarely successful,[213] and thus contractors are not able to set time at large by intentionally serving a defective notice by taking advantage of an employer-caused delay. Conversely, the failure to issue a notice for an employer-caused delay could have a catastrophic impact on contractors.

73. Before proceeding to the next legal instrument, it is worth noting here that employers prefer in practice to hinder the application of the prevention principle by inserting a provision which enables employers to unilaterally extend time.[214] In the literature, one commentator considers that

---

[209] Kitt (n 202) 382.

[210] Ian D Wallace, 'Prevention and Liquidated Damages: A Theory Too Far?' (2002) 18 Building and Construction Law 82, 87. See also, Tweeddale (n 173) 29; Hamish Lal, 'The Rise and Rise of Time-Bar Clauses: The Real Issue for Construction Arbitrators' (2007) International Construction Law Review 118. For a contrasting view defending the reasoning in *Gaymark*, see for instance: Doug Jones, 'Can Prevention be Cured by Time Bars?' (2009) 26 International Construction Law Review 57.

[211] Multiplex v Honeywell (n 15) 95-105. See also, Steria v Sigma Wireless (n 123); Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2) (2012) 287 ALR 360, 62.

[212] Turner Corporation Ltd v Austotel Pty Ltd (1994) 13 BCL 374, 384-85; Turner Corporation Ltd v Co-ordinated Industries Pty Ltd (1995) 11 BCL 202.

[213] Jennifer Varley, 'Time to change "time at large"?' (*The Practical Law Construction Blog*, 27 August 2014) <http://constructionblog.practicallaw.com/time-to-change-time-at-large/> accessed 7 December 2021.

[214] Katrina Mae, 'Preventing Improper Liability for Delay but not Preventing Disputes: Re-thinking the Implications of the Prevention Principle in Australia and Abroad' (2019) International Construction Law Review 24; Smiley and Rawal (n 22) 65-66.

this solution is actually the source of an additional problem given that negotiations on the independence and impartiality of contract administrators may escalate into debates; and thus suggest that courts should determine the length of the extension of time and the date for completion of work and calculate the amount of damages according to that date.[215]

4. UNLAWFUL EXERCISE OF RIGHTS

74. The second argument, which may be employed in civil law countries, is an '*unlawful exercise of rights.*'[216] For instance, the exercise of rights are prohibited under Art. 106(2)(c) of the United Arab Emirates Civil Code '*if the interests desired are disproportionate to the harm that will be suffered by the other party*.'[217] In this sense, an employer's reliance on a purely technical breach of a contractor may constitute an unlawful exercise of rights depending on the surrounding circumstances.[218] Especially where a notice of a substantial claim is served slightly late without any prejudice being suffered by the other party, reliance on the time bar would be unlawful.[219]

5. JUDICIAL CONTROL ON THE STANDARD CONTRACT TERMS

75. Contracting parties may be able to resort to the judicial control mechanism applicable to standard contract terms in civil law jurisdictions and to challenge the validity of a claim provision.[220] Generally speaking, contract terms may justify the judges to intervene if those terms are preformulated unilaterally by one of the contracting parties for several contracts to be concluded in the future.[221] We believe that even if the restrictive language like '*terms drafted by one of* ***the contracting parties***' is interpolated into any governing law when defining standard contract terms, it should be interpreted broadly so as to encompass the terms drafted by the third parties, such as lawyers, consultants, occupational organisations, and

---

[215] Mae (n 214).

[216] See for example, Art. 106 of the UAE Civil Code.

[217] See also, Art. 249 of the UAE Civil Code prohibiting the parties from exercising their rights in an oppressive or abusive manner.

[218] Glover (n 21).

[219] Smiley and Rawal (n 22) 69.

[220] For the same opinion, see: Budak (n 30) 95; Claus H. Lenz, 'Procedures for Contractors' and Employers' Claims and Pitfalls - In Particular under FIDIC Contracts' in Yeşim M. Atamer, Ece Baş Süzel and Elliott Geisinger (eds), Uluslararası İnşaat Sözleşmeleri ve Uyuşmazlık Çözüm Yolları (On İki Levha 2018) 242-243.

[221] See for example, §305 of the German Civil Code, Art. 20 of the Turkish Code of Obligations.

so on.[222] More specifically, judicial review for standard contract terms should also apply to the FIDIC family of contract templates, although they are drafted by an independent organisation rather than contracting parties.

76. As such, one should analyze whether there are provisions regulating standard contract terms in the codes of the governing civil law, and determine the scope of application of the relevant codes. This task may become very challenging especially in the countries where the provisions on standard contract terms are dispersed throughout several laws and where there exist loopholes or vague expressions undermining the purview of the law. By way of illustration, we will give a detailed account especially of Turkish legislation and determine the controversies regarding personal and material scope of application of the legislation on standard contract terms. As a starting point of this analysis, we would like to remind the reader that both parties to the FIDIC forms are merchants. Therefore, our analysis will specifically focus on the extent of the judicial review of the contract terms presented to merchants.

77. In Turkey, for example, the practitioners are confronted with several codes including provisions on standard contract terms, such as the Bank Cards and Credit Cards Law No: 5464[223] (+ Regulation on Bank Cards and Credit Cards[224]), Consumer Protection Law No: 6502,[225] Art. 55(f) of the Turkish Code of Commerce No: 6102 and Art. 20-25 of the Turkish Code of Obligations No: 6098. One may consider that Art. 20-25 of the Turkish Code of Obligations No: 6098, as a general provision, should be applicable to both merchants and non-merchants. However, there is a doctrinal debate regarding whether the control mechanism in Art. 20-25 of the Turkish Code of Obligations is applicable to merchants.[226] Although the Turkish Court of

[222] In Turkish law, for the opinion interpreting the wording of the law broadly so as to cover the standard contracts drafted by the third parties, see: Ayşe Havutçu, Tüketicinin Genel İşlem Şartlarına Karşı Korunması (Güncel 2003) 76; Yeşim M. Atamer, Sözleşme Özgürlüğünün Sınırlandırılması Sorunu Çerçevesinde Genel İşlem Şartlarının Denetlenmesi (2nd edn, Beta 2010) 66.

[223] Official Gazette 01.03.2006, 26095.

[224] Official Gazette 10.03.2007, 26458.

[225] Official Gazette 28.11.2013, 28835.

[226] For legal scholars who consider that Art. 20-25 of the Turkish Code of Obligation is applicable to merchants, see for example: Adem Yelmen, Türk Borçlar Kanunu'na Göre Genel İşlem Koşulları (Yetkin 2014) 72; Abdüssamet Yılmaz, Haksız Rekabet Hukukunda Genel İşlem Şartı Kullanımı (Seçkin 2015) 142; Yeşim M. Atamer, 'Genel İşlem Koşulu Mu Bireysel Pazarlıkla Kurulan Sözleşme mi?' in Çiğdem Kırca (ed), Yeni Türk Borçlar Kanunu ve Yeni Türk Ticaret Kanunu Sempozyumu (Vedat 2013) 103-138. To gain more

Cassation found that the personal scope of Art. 20-25 of the Turkish Code of Obligations is not limited,[227] there are cases where it lied heavy on the obligation to act prudently and refused to exercise judicial control.[228] Under such a legal system, it may not be predictable for the merchants whether their construction contracts based on the FIDIC forms will be subject to judicial review. For the avoidance of any doubt, we believe that control mechanism on standard contract terms may apply to merchants.

78. On the one hand, countries like Germany, Switzerland and Turkey, restrict the material scope of application of the control mechanism to the terms which are not negotiated.[229] When evaluating whether contract terms are negotiated, all reasons behind the irrational behaviour of the counter-party should be detected. Generally speaking, a merchant may be at a disadvantage *vis-à-vis* another merchant as well, albeit in rather exceptional cases due to the fact that a merchant's bargaining power is strengthened by information symmetry and economic balance between contracting parties.[230] For instance, merchants may lack the power to bargain especially in the sectors where standard contracts with the same content are dominantly used.[231] Our stance is that this is usually not the case in the construction sector; however, there may be particular exceptions where the balance is distorted to the detriment of contractors. The following paragraph will suffice to present the situation in the construction sector from our standpoint.

79. Although the FIDIC forms have been the foremost contracts in the construction industry and this looks set to continue, there are a number of alternative standard forms published by JCT, RIBA, ICE, ENAA, and so on.

accurate information on the counter position, see for example: O. Gökhan Antalya, Borçlar Hukuku Genel Hükümler Cilt 1 (Legal 2018) 409ff; O. Gökhan Antalya and E. Doğa Doğancı, 'Genel İşlem Koşullarında Saydamlık Kuralının, Bunun TBK m. 20 vd.'daki Görünümlerinin ve TTK m. 55 f. 1 f ile TBK m. 20 vd.'nın Birlikte Uygulanabilirliğinin Değerlendirilmesi' (2018) 24(2) MÜHFHAD 823, 836.

[227] See for instance, Turkish Court of Cassation 11th Civil Chamber, E. 2016/4676, K. 2017/3160, T. 29.5.2017; Turkish Court of Cassation 3rd Civil Chamber, E. 2014/13539, K. 2014/16751, T. 18.12.2014.

[228] See for instance, Turkish Court of Cassation 11th Civil Chamber, E. 2019/4467, K. 2020/3054, T. 22.6.2020.

[229] For the criticism of this limitation, see: Erdem Büyüksağiş, 'İçerik Denetiminin Müzakere Edilmemiş Sözleşme Hükümleriyle Sınırlanması Üzerine: Mostaza Claro'nun Düşündürdükleri' (2013) 8 (Special Issue) Yaşar Üniversitesi E-Dergisi 675.

[230] Yeşim M. Atamer, Tacirlerin Genel İşlem Şartlarına Karşı Korunması Yolları (İTO 2001) 10-11.

[231] ibid 11.

The FIDIC forms' extensive use, on the contrary, leads the users to become so familiar with these forms that they may even remember the numbers of some articles. Even in cases where the contracting parties have no experience in using the FIDIC forms, these forms are rather accessible in the sense that the practitioners are able to buy them online through the FIDIC's web page, to review the terms under no time pressure, and to determine their rights and obligations. In addition, the FIDIC's main aim is to achieve a fair and balanced risk sharing and, by introducing the Golden Principles 2019, it even seeks to discourage the drafters from exacerbating the contractual imbalance.[232] As such, the FIDIC contracts are likely to fall outside of the control mechanism in jurisdictions where the material scope of application is restricted to the terms which are not negotiated.

80. On the other hand, the standard contracts are subject to control of the content in countries like France, Belgium, Norway, Finland and Denmark where the judicial control of the standard contract terms are not limited to non-negotiated terms.[233] In the control of the content, the judges will evaluate whether the contractual balance is undermined to the detriment of the counterparty. The FIDIC forms are likely to pass muster the control of the content, considering that the rights and obligations of contracting parties are determined in a balanced way.

7. UNJUST ENRICHMENT

81. The final another argument available both in civil law and common law countries is unjust enrichment, the application of which varies depending on the governing law.[234] Generally speaking, unjust enrichment may be identified as the enrichment of a person at the expense of another without justification, and the enriched party must return the benefit.[235] When it comes to the construction contracts, employers may not refrain from making payment to contractors on the basis of non-compliance with the notice requirements for the works which have been already carried out.[236]

---

[232] Tyson (n 31) 4.

[233] Büyüksağiş (n 229) 689.

[234] See, David Sawtell, 'Enrichment-based Claims for a Quantum Meruit in Construction Disputes' (2019) International Construction Law Review 101; Brice Dickson, 'Unjust Enrichment Claims: A Comparative Overview' (1995) 54(1) The Cambridge Law Journal 100.

[235] ibid. See for example: Art. 318 and Art. 319 of the UAE Civil Code; Art. 77-82 of the Turkish Code of Obligations No: 6098.

[236] Glover (n 69).

CONCLUSION

Construction contracts often contain claim procedures requiring contracting parties to notify certain issues, which often lead to a price change or an extension of time, so that they are immediately solved prior to the completion of the project. Even though proper and timely notification of claims is highly beneficial both to employers and contractors, contracting parties often fail to comply with the notice requirement, the underlying reason for which is generally related to how contracting parties perceive this requirement. On the one hand, the receiving parties tend to regard a formal notice of claims as an aggressive act, rather than an act by way of which they are aware of the likelihood that the notifying parties may claim. This understanding leads contracting parties to engage in informal negotiation of the matter. On the other hand, the notifying parties are more likely to perceive notification of claims as unnecessarily onerous.

However, the parties should always remember that contractual notice provisions are part of the deal they have reached, and the sanction attached to the failure to comply with these provisions are rather heavy. Furthermore, courts are reluctant to interfere with contracting parties' freedom of contract even in civil law countries. This is probably because of the fact that the contracting parties in the construction sector are merchants who are expected to act prudently. As such, employers and contractors are advised to comply with the notice requirements set forth by the contract. Otherwise, the notifying party may lose its entitlement considering that the legal nature of the notice provisions in the FIDIC Forms are condition precedent.

This is particularly the case when the 2017 FIDIC Forms governs the relationship between contracting parties, given that more formal requirements were introduced for the validity of a notice than that in the 1999 FIDIC Forms, and that it is unclear how strictly courts and arbitrators will determine the issue of compliance with these further requirements. As the significance of claim notices becomes more widely understood, many courts and arbitrators will strictly enforce those provisions, which has the serious effect of vitiating a party's contractual right to claim. We believe that courts and arbitrators will adopt a flexible approach when the civil law is governing the 2017 FIDIC Forms given that the increased level of formalism actually provide them a reason to interfere with the contracts to curb the unfair consequences.

Employers and contractors should not hesitate to engage in contract negotiations where they believe that it is not conceivable for them to comply with the draft notice provisions, and amend them in a way to meet their

expectations. Thus, it will be easier for them to comply with customized contract terms. However, this drafting should be done very carefully, and a notice provision should be reasonable, clear and precise. Otherwise, they may inevitably be involved in an arbitration or a court process as in the case of *J Murphy* where court proceedings would have been avoided simply by listing Sub-Clause 8.7 with the other clauses excepted from the requirements of Sub-Clauses 2.5 and 3.5.

In case where contracting parties are unsure about whether an event or circumstance triggers the relevant contract provision which requires notice, it will be better to give notice of the potential impact. We must admit that this perception will cause the increase in the correspondence exchanged between the contracting parties. However, we believe that the risk here is not proportional and the notice may always be withdrawn after the basis for a claim is discovered to be wrong. Indeed, if notice is not given, the parties will put their potentially meritorious entitlement for additional time and/or cost in jeopardy.

BIBLIOGRAPHY

Akıncı Z, Milletlerarası Özel Hukukta İnşaat Sözleşmeleri (Adalet 1996).

Antalya O G, Borçlar Hukuku Genel Hükümler Cilt 1 (Legal 2018).

Antalya O G and Doğancı E D, 'Genel İşlem Koşullarında Saydamlık Kuralının, Bunun TBK m. 20 vd.'daki Görünümlerinin ve TTK m. 55 f. 1 f ile TBK m. 20 vd.'nın Birlikte Uygulanabilirliğinin Değerlendirilmesi' (2018) 24(2) MÜHFHAD 823.

Atamer Y M, 'Genel İşlem Koşulu Mu Bireysel Pazarlıkla Kurulan Sözleşme mi?' in Çiğdem Kırca (ed), Yeni Türk Borçlar Kanunu ve Yeni Türk Ticaret Kanunu Sempozyumu (Vedat 2013).

Atamer Y M, Sözleşme Özgürlüğünün Sınırlandırılması Sorunu Çerçevesinde Genel İşlem Şartlarının Denetlenmesi (2nd edn, Beta 2010).

Atamer Y M, Tacirlerin Genel İşlem Şartlarına Karşı Korunması Yolları (İTO 2001).

Bailey J, Construction Law (2nd edn, Informa Law from Routledge 2016).

Baker E, Mellors B, Chalmers S and Laver A, FIDIC Contracts: Law and Practice (Informa 2013).

Bell A, Hall N, 'Employer Claims under FIDIC: Where Are We Now?' (*Turkish Commercial Law Review*, Winter 2016) <http://the-tclr.org/employer-claims-fidic-now/> accessed 15 December 2021.

Bremen J, Ammar L B, 'Contractors' Claims, Remedies and Reliefs' (*Global Arbitration Review*, 12 December 2017) <https://globalarbitrationreview.com/chapter/1145221/contractors-claims-remedies-and-reliefs> accessed 18 December 2021.

Budak S A, 'Türk Eser Sözleşmesi Hukuku Işığında FIDIC Sözleşmeleri' in Yeşim M. Atamer, Ece Baş Süzel and Elliott Geisinger (eds), Uluslararası İnşaat Sözleşmeleri ve Uyuşmazlık Çözüm Yolları (On İki Levha 2018).

Büyüksağiş E, 'İçerik Denetiminin Müzakere Edilmemiş Sözleşme Hükümleriyle Sınırlanması Üzerine: Mostaza Claro'nun Düşündürdükleri' (2013) 8 (Special Issue) Yaşar Üniversitesi E-Dergisi 675.

Büyüksağiş E, 'Turkish Contract Law Reform: Standard Terms, Unforeseen Circumstances, and Judicial Intervention' (2016) 17(3) European Business Organization Law Review 423.

Clayton B, 'Can a Contractor Recover when Time-barred?' (2005) International Construction Law Review 341.

Corbett E, 'Adding the Best Bits of FIDIC 2017 to the 1999 Forms' (*Corbett & Co. Knowledge Hub*, 29 October 2018) <https://www.corbett.co.uk/cherry-picking-fidic-2017/> accessed 11 December 2021.

Corbett E, 'FIDIC 2017 – First Impressions of the 3-Kilo Suite' (*Corbett & Co. Knowledge Hub*, 13 December 2017) <https://www.corbett.co.uk/fidic-2017-first-impressions-of-the-3-kilo-suite-kilo/> accessed 12 December 2021.

Davis R O, 'Advantages of Standard Contract Forms' (1986) 2(2) Journal of Management in Engineering 79.

Di Stefano A, 'Good Faith in the AS11000: Has the Eagle Landed?' (2017) 33 Building and Construction Law Journal 13.

Dickson B, 'Unjust Enrichment Claims: A Comparative Overview' (1995) 54(1) The Cambridge Law Journal 100.

Ekşi N, 'FIDIC Sözleşmelerinde Yer Alan Uyuşmazlık Çözümüne İlişkin 20. Maddeden Kaynaklanan Sorunlar' in Yeşim M. Atamer, Ece Baş Süzel and Elliott Geisinger (eds), Uluslararası İnşaat Sözleşmeleri ve Uyuşmazlık Çözüm Yolları (On İki Levha 2018).

Ekşi N, Milletlerarası Ticaret Hukuku (2nd edn, Beta 2015).

Erdem H E, 'Türk Hukuku ve FIDIC Kapsamında Ek Süre' (*Erdem & Erdem Hukuk Postası*, April 2009) <http://www.erdem-erdem.av.tr/yayinlar/hukuk-postasi/turk-hukuku-ve-fidic-kapsa

minda-ek-sure/> accessed 1 December 2021.

Erdem H E, 'Türk Hukuku ve FIDIC Kapsamında Ek Ücret' (*Erdem & Erdem Hukuk Postası*, May 2009) <http://www.erdem-erdem.av.tr/yayinlar/hukuk-postasi/turk-hukuku-ve-fidic-k
apsaminda-ek-ucret/> accessed 1 December 2021.

Erdem M, Özel Hukukta Zamanaşımı (On İki Levha 2010).

FIDIC Rainbow Suite ed.2017 - Second edition of the Red, Yellow & Silver Books, FIDIC, 1 March 2018 <http://fidic.org/sites/default/files/press%20release_rainbow%20suite_20
18_0
3_1.pdf> accessed 10 December 2021.

Furst S, Ramsey V, Hannaford S, Williamson A, Keating D and Uff J, Keating on Construction Contracts (Sweet & Maxwell 2012).

Giblin K and Hall I, 'If it isn't broken…: A practical guide to the effective use of standard forms of contract' (*K&L Gates Construction Law Blog*, 21 February 2019) <https://www.klconstru
ctionlawblog.com/2019/02/if-it-isnt-broken-a-practical-guide-to-the-effective-use-of-standard-forms-of-contract/> accessed 15 December 2021.

Glover J, 'Employer claims under the FIDIC form' (*International Quarterly by Fenwick Elliott LLP*, 2015) <http://www.fenwickelliott.co.uk/sites/default/files/issue_015_-_iq_2015.pdf> accessed 24 December 2021.

Glover J, 'FIDIC: an overview – The Latest Developments, Comparisons, Claims and Force Majeure' (*FIDIC*, 17 Eylül 2017) <https://bit.ly/3uUBaa4> accessed 15 December 2021.

Glover J, 'Sub-Clause 20.1 – the FIDIC Time Bar under Common and Civil Law' (*Fenwick Elliott*, 2015) <https://www.fenwickelliott.com/research-insight/articles-papers/contract-iss
ues/sub-clause-fidic-time-bar> accessed 24 December 2021.

Glover J, 'Time bars in an international context' (*Fenwick Elliott Annual Review 2015/2016*, 6 November 2015) <https://www.fenwickelliott.com/research-insight/annual-review/2015/ti
me-bars-international-context> accessed 24 December 2021.

Godwin W, International Construction Contracts: A Handbook with commentary on the FIDIC design-build forms (Wiley-Blackwell 2013).

Godwin P, Roughton D, Gilmore D and Kratochvilova E, 'The prevention principle, time at large and extension of time clauses' (*Herbert Smith*

Construction dispute avoidance newsletter, 21 August 2009) <https://www.lexology.com/library/detail.aspx?g=09e90e60-fa47-411b-813d-0e3c6427f836> accessed 24 December 2021.

Havutçu A, Tüketicinin Genel İşlem Şartlarına Karşı Korunması (Güncel 2003).

Jaeger A.-V. and Hok, G.-S., FIDIC-A Guide for Practitioners (Springer 2010).

Jędrzejczyk D, 'Sub-clause 20.1 of the FIDIC Under Polish Law - Is It an Enforceable Time Bar?' (*K&L Gates Construction Law Blog*, 16 March 2018) <https://www.klconstructionlawblog.com/2018/03/sub-clause-20-1-of-the-fidic-under-polish-law-is-it-an-enforceable-time-bar/> accessed 9 December 2021.

Jones D, 'Can Prevention be Cured by Time Bars?' (2009) 26 International Construction Law Review 57.

Kaplan İ, İnşaat Sözleşmeleri Hukuku ve Endüstri Yatırım Sözleşmeleri (Yetkin 2013).

Kim S H, Han M and Khalil U, 'The Application of the United Nations Convention on Contracts for the International Sale of Goods to Manufacturing and Supply Contracts for International Construction Projects' (2019) International Construction Law Review 352.

King C and Ardagh R, 'Conditions Precedent: Will they bite?' (*Fenwick Elliott*, June 2020) <https://www.fenwickelliott.com/research-insight/newsletters/insight/86> accessed 19 December 2021.

Kitt G, 'Construction Claims in the UK' in Lukas Klee (ed), International Construction Contract Law (2nd edn, John Wiley & Sons 2018).

Klee L, International Construction Contract Law (2nd edn, John Wiley & Sons 2018).

Kocayusufpaşaoğlu N, Hatemi H, Serozan R, Arpacı A, Borçlar Hukuku Genel Bölüm Birinci Cilt (Filiz 2017).

Köksal T, International Construction Law (Adalet 2013).

Lal H, 'The Rise and Rise of Time-Bar Clauses: The Real Issue for Construction Arbitrators' (2007) International Construction Law Review 118.

Lane Patrick M M, 'The Tension Between the Application of Good Faith and *Pacta Sunt Servanda*' (2020) International Construction Law Review 294.

Lenz C H, 'Procedures for Contractors' and Employers' Claims and Pitfalls - In Particular under FIDIC Contracts' in Yeşim M. Atamer, Ece Baş

Süzel and Elliott Geisinger (eds), Uluslararası İnşaat Sözleşmeleri ve Uyuşmazlık Çözüm Yolları (On İki Levha 2018).

Leszko, M, 'Notification of Claims - The Deadline and the Effects of its Expiry - Some Considerations on the Basis of the 1999 and 2017 Versions of the FIDIC Conditions of Contract' (*DLA Piper Publications*, 1 June 2018) <https://www.dlapiper.com/pl/poland/insights/publications/2018/07/new-fidic-conditions-of-contract-for-construction-polish-perspective/> accessed 9 December 2021.

Mae K, 'Preventing Improper Liability for Delay but not Preventing Disputes: Re-thinking the Implications of the Prevention Principle in Australia and Abroad' (2019) International Construction Law Review 24.

Mellors B, 'FIDIC 2017's enhanced contract management provisions' (*Practical Law Construction Blog*, May 22, 2019) <http://constructionblog.practicallaw.com/fidic-2017s-enhanced-contract-management-provisions/> accessed 26 December 2021.

Moss S, 'Swiss Law vs. English Law on Contract Interpretation: Is Swiss Law Better Suited to the Realities of International Construction Contracts' (2015) International Construction Law Review 470.

Mulero Clas G, 'Clause 20: Employer's and Contractor's Claims' (*Corbett & Co. Knowledge Hub*, 27 January 2018) <https://www.corbett.co.uk/clause-20-employers-and-contractors-claims/> accessed 15 December 2021.

Ndekugri I, Chapman P, Smith N and Hughes W, 'Best Practice in the Training, Appointment, and Remuneration of Members of Dispute Boards for Large Infrastructure Projects' (2014) 30(2) Journal of Management in Engineering 185.

Oğuzman M K, Öz M T, Borçlar Hukuku Genel Hükümler Cilt-1 (17th edn, Vedat 2019).

O'Reilly M, Civil Engineering Construction Contracts (2nd edn, Thomas Telford Ltd 1999).

Park KJ, 'Claim Notice: When Should the Contractor Notify?' (*Corbett & Co. Knowledge Hub*, 24 May 2016) <https://corbett.co.uk/claim-notice-by-when-should-the-contractor-notify-2/> accessed 9 December 2021.

Robertson D, 'When must a contractor give notice of an entitlement under FIDIC's condition precedent clause?' (*The Practical Law Construction Blog*, 17 June 2014) <http://constructionblog.practicallaw.com/when-must-a-contractor-give-notice-of-an-entitlement-under-fidics-condition-precedent-clause/> accessed 28 December 2021.

Sawtell D, 'Enrichment-based Claims for a Quantum Meruit in Construction Disputes' (2019) International Construction Law Review 101.

Schäfer H B and Aksoy H C, 'Good Faith' (2015) Encyclopedia of Law and Economics 1.

Schneider M E, 'A Typology of Risk Allocation – The Example of FIDIC Suite of Contracts' in Yeşim M. Atamer, Ece Baş Süzel and Elliott Geisinger (eds), Uluslararası İnşaat Sözleşmelerinde Beklenmeyen Hal Kavramı (On İki Levha 2020).

Schwenzer I and Hachem P, 'Article 1' in Ingeborg Schwenzer (ed), Commentary on the UN Convention on the International Sale of Goods (CISG) (4th ed., Oxford 2016).

Schwenzer I, Ranetunge J and Tafur F, 'Service Contracts and the CISG' (2018) 10 The Indian Journal of International Economic Law 170.

Seppälä C R, 'Contractor's Claims Under the FIDIC Contracts for Major Works' (2005) 21(4) International Construction Law Review 278.

Serozan R, Medeni Hukuk Genel Bölüm (Vedat 2005).

Smiley A and Rawal R, 'Locked behind Time Bars' (2018) International Construction Law Review 60.

Sözen Z, FIDIC Genel Koşullarından Örneklerle İnşaat Sözleşmelerinin Yönetimi (Legal 2015).

Steward M R and de Moraes C A, 'FIDIC Update: Clarity on Notice Provisions and Time Bars' (*K&L Gates Construction Law Blog*, 19 May 2014) <https://www.klconstructionlawblog.c
om/2014/05/fidic-update-clarity-on-notice-provisions-and-time-bars/> accessed 9 Decem- ber 2021.

Tekinay S S, Akman S, Burcuoğlu H and Altop A, Borçlar Hukuku Genel Hükümler (Filiz 1993).

The FIDIC Contracts Guide (FIDIC 2000).

Thomas D, 'Time-bars Revisited' (*Construction Law International*, December 2014) <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=9199af06-e541-4c36-a1a7-a5ad4de00c81#10> accessed 11 December 2021.

Tuzcuoğlu T, Avrupa Birliği Normları ve 6098 Sayılı Türk Borçlar Kanunu Hükümleri Işığında Genel İşlem Şartları (Seçkin 2020).

Tweeddale A, 'FIDIC's clause 20 a common law view' (*Construction Law International*, 1 June 2006) <http://corbett.co.uk/wp-content/uploads/FIDIC-Clause-20-a-common-law-view.pdf> accessed 1 December 2021.

Tweeddale A and Culatto N, 'Clause 1' (*Corbett & Co. Knowledge Hub*, 2016) <http://corbett.co
.uk/wp-content/uploads/Clause-1-1.pdf > accessed 10 December 2021.

Tyson V, 'Employers Beware' (*Corbett & Co. Knowledge Hub*, 16 December 2015) <https://corb
ett.co.uk/employers-beware/> accessed 1 December 2021.

Tyson V, 'FIDIC's Golden Principles – holding back the tide?' (*Corbett & Co. Knowledge Hub*, 10 March 2020) <https://www.corbett.co.uk/fidics-golden-principles-holding-back-the-tide/> accessed 1 December 2021.

Varley J, 'Time to change "time at large"?' (*The Practical Law Construction Blog*, 27 August 2014) <http://constructionblog.practicallaw.com/time-to-change-time-at-large/> accessed 7 December 2021.

Wallace I D, 'Prevention and Liquidated Damages: A Theory Too Far?' (2002) 18 Building and Construction Law 82.

Wardle N, 'FIDIC contracts – a preview of what is to come' (*The Practical Law Construction Blog*, 13 January 2021) <http://constructionblog.practicallaw.com/fidic-contracts-a-preview
-of-what-is-to-come/> accessed 18 December 2021.

Warren M, 'Good Faith: Where Are We At?' (2010) 34 (1) Melbourne University Law Review 344.

Wilson M, 'The importance of timely and proper notice of a claim under a contract' (*Nuts & Bolts | Construction Law Blog*, 22 February 2018) <https://www.greensfelder.com/nuts-bolts-construction-law-blog/importance-of-timely-and-proper-notice-of-claim-under-contract#page=1> accessed 18 December 2021.

Yelmen A, Türk Borçlar Kanunu'na Göre Genel İşlem Koşulları (Yetkin 2014).

Yılmaz A, Haksız Rekabet Hukukunda Genel İşlem Şartı Kullanımı (Seçkin 2015).

CASE-LAW

Australia

CMA Assets Pty Ltd v John Holland Pty Ltd [No. 6] [2015] WASC 217.

Eriksson v Whalley [1971] 1 NSWLR 397.

Gaymark Investments Pty Ltd v Walter Construction Group Ltd [1999] NTSC 143.

Jennings Construction Ltd v QH&M Birt Pty Ltd [1986] 8 NSWLR 18.

Kane Constructions Pty Ltd v Sopov [2005] VSC 237.

Turner Corporation Ltd v Austotel Pty Ltd (1994) 13 BCL 374.

Turner Corporation Ltd v Co-ordinated Industries Pty Ltd (1995) 11 BCL 202.

Poland

Judgment of the Supreme Court of 23 March 2017, case no. V CSK 449/16.

Singapore

Central Provident Fund Board v Ho Bock Kee [1980-1981] SLR 180; [1981] SGCA 4.

The United Kingdom

Aspen Insurance UK Ltd v Pectel Ltd [2009] 2 All ER (Comm) 873.

Attorney General for the Falkland Islands v Gordon Forbes Construction (Falklands) Limited [2003] BLR 280.

Ben Cleuch Estates Ltd v Scottish Enterprise [2008] CSIH 1.

Bremer Handelgesellschaft mbH v. Vanden Avenne Izegem P.V.B.A [1978] 2 LLR 109.

City Inn Limited v Shepherd Construction Limited (2003) CILL 2009.

Davy Offshore Ltd v Emerald Field Contracting Ltd (1992) 55 BLR 1.

Eagle Star Insurance Company Ltd v Cresswell & Ors [2004] EWCA Civ 602.

Glen Water Ltd v Northern Ireland Water Ltd [2017] NIQB 20.

Goodwin & Sons v Fawcett [1945] EG 186.

Heritage Oil And Gas Ltd & Anor v Tullow Uganda Ltd [2014] EWCA Civ 1048.

HOE International Ltd v Andersen [2017] CSIH 9.

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] Q.B. 433; [1988] 1 All ER 348.

J Murphy & Sons Ltd v Beckton Energy Ltd [2016] EWHC 607 (TCC).

John L. Haley v Dumfries & Galloway Regional Council [1988] 39 GWD 1599.

Mamidoil-Jetoil Greek Petroleum Company SA & Anor v Okta Crude Oil Refinery AD [2002] EWHC 2210 (Comm).

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2) [2007] EWHC 447 (TCC).

NH International (Caribbean) Limited v National Insurance Property Development Company Limited (Trinidad and Tobago) [2015] UKPC 37.

Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC).

O'Brien v TTT Moneycorp Ltd [2019] EWHC 1491.

Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd [1970] 1 BLR 111.
Pioneer Concrete (UK) Limited v National Employers Mutual General Insurance Association Limited [1985] 1 LLR 274.
Schuler (LG) AG v Wickman Machine Tool Sales Ltd [1974] AC 235.
Scottish Power UK Plc v BP Exploration Operating Co Ltd [2016] 1 All E.R. (Comm) 536.
Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2) (2012) 287 ALR 360.
Steria Ltd v Sigma Wireless Communications Ltd [2007] EWHC 3454 (TCC).
Temloc v Errill Properties [1987] 39 BLR 30.
West Dunbartonshire Council v William Thompson & Sons (Dumbarton) Ltd [2015] CSIH 93.
WW Gear Construction Ltd v McGee Group Ltd [2010] EWHC 1460 (TCC).
Yates Building Co Ltd v Pulleyn & Sons (York) Ltd [1975] 273 EG 183.

Turkey

Turkish Court of Cassation 15th Civil Chamber, E. 2000/4429, K. 2001/1032, T. 26.02.2001.
Turkish Court of Cassation 15th Civil Chamber, E. 2001/5595, K. 2002/3931, T. 17.09.2002.
Turkish Court of Cassation 3rd Civil Chamber, E. 2014/13539, K. 2014/16751, T. 18.12.2014.
Turkish Court of Cassation 11th Civil Chamber, E. 2016/4676, K. 2017/3160, T. 29.5.2017.
Turkish Court of Cassation 11th Civil Chamber, E. 2019/4467, K. 2020/3054, T. 22.6.2020.