ICCP

WEBINAR SERIES

NOTICES UNDER CONSTRUCTION CONTRACTS

BY BILL BORDILL

FRICS, FCIArb, FCInstCES, FICCP, MCIOB

INTRODUCTION

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

BILL BORDILL

- What does he do?
- Who does he work for?
- What experience has he got?
- What projects has he worked on?
- What are his interests?

INTRODUCTION

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

AIM OF WEBINAR

- Basic Concepts and Principles
- Jurisdiction
- Contracts
- Practicalities
- Conclusion / Summary
- What advice can I offer Practitioners?

BASIC CONCEPTS & PRINCIPLES

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Why have notice provisions?

- Informs, may happen or has happened
- Prompts preventative or remedial action
- Trip hazard

What events require notices?

- Payment (various)
- Termination
- Extension of Time
- Loss & Expense
- Early Warning
- Compensation Event

BASIC CONCEPTS & PRINCIPLES

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

What is a Condition Precedent?

- Satisfied before entitlement
- Clear consequences

What does it mean?

- Late notice is time barred

Test:

***Bremer Handelsgesellschaft GmbH v Vanden Avenne-Izegem PVBA [1978]* – 3 point test**

- Definite time limit
- Strict unequivocal language
- Clear consequences

Does not need to state it is a condition precedent clause.
Just needs to satisfy the 3 point test.

BASIC CONCEPTS & PRINCIPLES

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Broadly 2 types of notice provisions

- Mandatory – courts will enforce strictly
  - Notice

- Directory – courts avoid strict interpretation where possible
  - notice

notice may still be drafted as a condition precedent

BASIC CONCEPTS & PRINCIPLES

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

What constitutes a notice?

- ‘N’otice will be defined in the contract
- Address to legal entity
- Address to correct person / position
- Determine delivery protocol
- Determine receipt protocol
- Prescribe minimum requirements of a notice

Make sure your communication ‘N’ or ‘n’ makes it clear that this is a notice issued under the contract
BOLD CAPITALS IN TITLE

BASIC CONCEPTS & PRINCIPLES

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Well drafted notice clause will say:

- Appearance
- Delivery
- Information
- Who / Position
- Time
- Consequence if condition precedent

Practitioners should comply with every requirement of the notice clause otherwise you may lose entitlement to claim under the contract

JURISDICTION

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Frequent question: “If we fail to send a notice of claim, or we do not send the notice in time, will our claim be time-barred?”

Answer: “It depends.”

- Jurisdiction – Civil Law or Common Law
- Drafting – construction of contract

JURISDICTION

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Civil Law (UAE)

Fundamental principle to act fairly

- Does not sit easily with position where contractor time barred following employer act of prevention

UAE Civil Code States:

- **Article 243 (2)**

"With regard to the rights (obligations) arising out of the contract, each of the contracting parties must perform that which the contract obliges him to do."

JURISDICTION

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Civil Law (UAE)

- **Article 246 (1)**

  "The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith."

- **Article 106**

  "A person shall be held liable for an unlawful exercise of his rights."

  (2) (C), The exercise of a right shall be unlawful;

  (C) if the interests desired are disproportionate to the harm that will be suffered by others."

JURISDICTION

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Civil Law (UAE)

- **Article 318**

  "No person may take the property of another without lawful cause and if he takes it he must return it."

- **Article 319 (1)**

  "Any person who acquires the property of another person without any disposition vesting ownership must return it if that property still exists, or its like or the value thereof if it no longer exists, unless the law otherwise provides."

JURISDICTION

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

The unlawful dichotomy:

- Disproportionate to harm suffered
- Unjust enrichment
- Just claim never expires BUT late notice may not be regarded as acting fairly

JURISDICTION

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Common Law (UK)

View of the UK courts

- Directory unless expressly mandatory
- Strict compliance for conditions precedent

Gaymark Investments Pty Ltd v Walter Construction Group Ltd [1999] N.T.S.C. 143

LAD would be unmeritorious where there had been a delay caused by the Employer.

JURISDICTION

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Common Law (UK)

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007] EWHC 447 (TCC)

"Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current, furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent."

Mr Justice Jackson

"It depends!"

Contractor gains EOT
BUT
Employer does not gain LADs subject to construction of the contract

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

FIDIC

- Writing
- Signed
- Identified as a notice stating sub-clause
- Delivered
- Event

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

FIDIC

Obrascon Huarte Lain S.A. v Attorney General for Gibraltar [2015] EWCA

Akenhead J: Broad interpretation

EOT

Prospectively or Retrospectively “measurable impact on the completion date”

Termination

To Madrid offices “commercially realistic interpretation”

Maeda Corporation & Anr v Bauer Hong Kong Ltd

Chinn J: Strict interpretation

Narrow notice requirements (variation/L&E)

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

JCT

WW Gear Construction Ltd v McGee Group Ltd [2010] EWHC (TCC) – Akenhead J:

Entitlement compromised when failed to comply with notice provisions

Walter Lilly & Co Ltd v Mackay [2012] EWHC (TCC) – Akenhead J:

L&E can be prospective or retrospective, JCT ’98 can be interpreted same as FIDIC Yellow Book

Assume Judge will strictly apply the notice provisions in the contract <u>but</u> note above, same Judge, different outcome.

CONTRACTS

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

NEC

Compensation event within 8 weeks

- Time and money, Compensation Events under core clause 61.3
- Evaluation implications where no EWN

PRACTICALITIES

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Really important to get these right	Failing may give an opportunity to the other side
Who can serve notice	Name in contract – Practitioners beware!
Who should receive notice	Individual or position in contract or receptionist
Where should notice be served	Address in contract
Method of delivery	Post – beware return to sender Fax Email Personal delivery

All methods of delivery need a record of receipt

PRACTICALITIES

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Notice Delivery Issues

Cloud based information systems

The Trust Company (Australia) Ltd atf WH Buranda Trust v Icon Co. (Qld) PTY LTD & Anor

- Payment notice via Aconex
- Physical address – Solicitors office

TOP TIP

Don’t take a risk with notices. If in doubt, seek clarification.
Practitioners – don’t leave yourself exposed.

PRACTICALITIES

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Notice Delivery Issues

Email issues

- Delivery failure – not all proof of delivery is switched on
- Routing – sent on time, not received on time / Oslo data centre
- Filtering – can prevent delivery, unbeknown to recipient

Question: Who holds the risk if both parties agree to email delivery?

Whatever method of delivery, you must have a receipt.

PRACTICALITIES

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

UK Construction Act calls for service of a notice by any effective means.

Question:	Is the term ‘means’ meant generically to refer to a means of delivery such as ‘recorded’ or ‘hand delivery’ or email? Or, does ‘effective means’ refer literally to effective service in each case?
Answer:	My interpretation is that any means can only be deemed to be effective if evidenced by a record/receipt.

CONCLUSION / SUMMARY

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

Top Tips:

- Notice/notification may still be drafted as a condition precedent.
- Condition precedent clause does not need to state it is a condition precedent. It just needs to satisfy the 3 point test.
- Clearly state communication is a notice in bold capitals in the title.
- Comply with every requirement of a notice clause.
- Assume Judge will strictly apply notice provisions.
- All methods of delivery need a record of receipt.
- If in doubt seek clarification. Don’t take a risk with notices.

Guidance and templates for members on **ICCP website** but remember a Judge will consider the natural meaning and construction of the contract.

CONTACT DETAILS

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

TELL ME MORE

To learn more about the ICCP please visit: **www.instituteccp.com.**

For general enquiries please contact Nina Hewitt-Tyrrell: **nina.hewitt@instituteccp.com.**

For membership specific enquiries please contact: **membership@instituteccp.com.**