



Practical Approaches to Claim Entitlement

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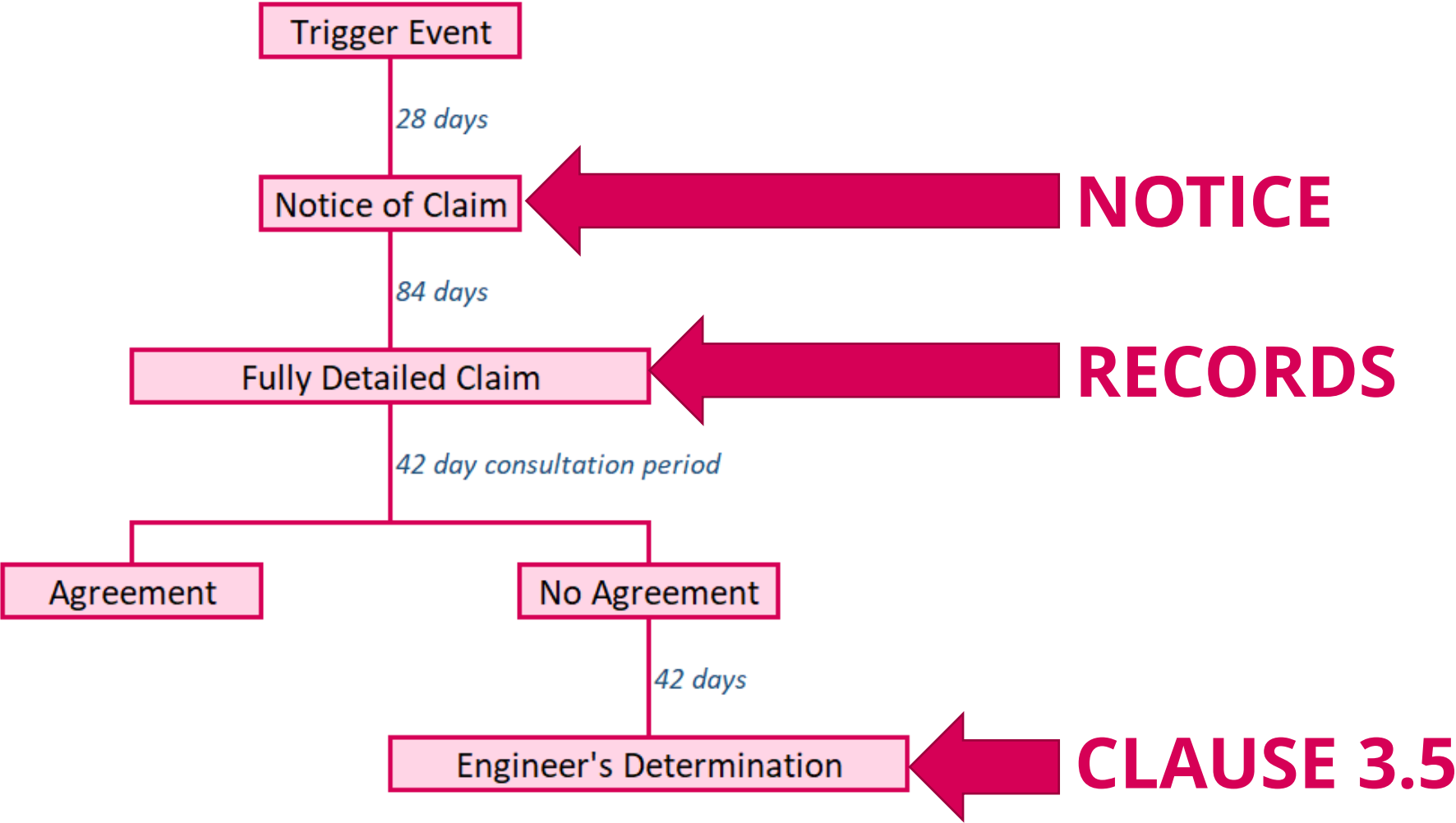
Overview



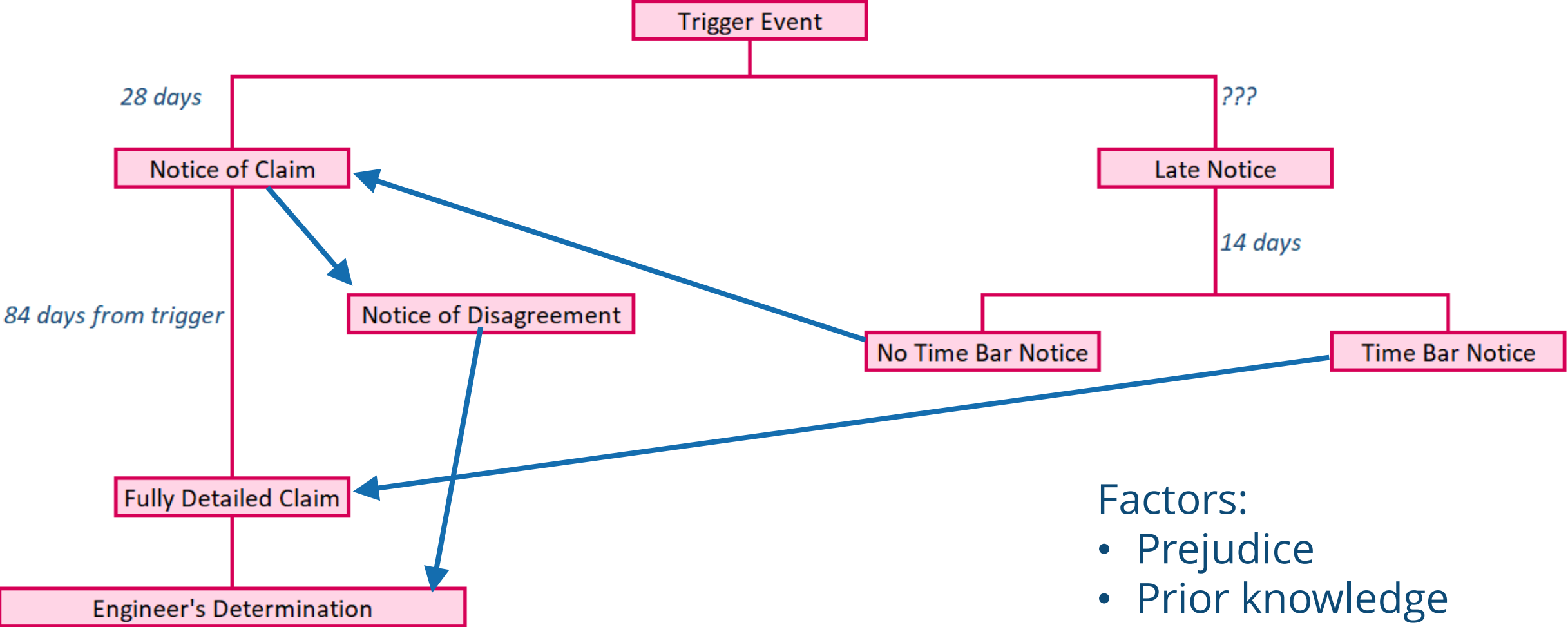
1. FIDIC 2017 Claims Procedure
2. Drop Dead Notices
3. Arguments around Notices
4. Dispute Resolution Mechanisms



FIDIC 2017: 20.2 Claims Procedure



FIDIC 2017: 20.2 Late Notices



- Factors:
- Prejudice
 - Prior knowledge

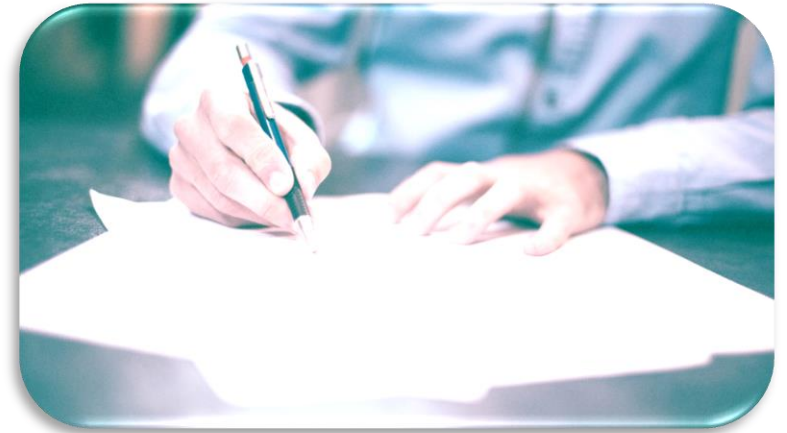
FIDIC 2017: 20.2.4 “Fully detailed claim”

- Description of the event or circumstance
- Statement of contractual and/or legal basis
- All contemporary records
- Supporting particulars of additional payment and/or EOT and/or DNP

84 days after
Trigger Event

FIDIC 2017: 20.2.3 Contemporary Records

- ***“Records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim.”***
 - Photos and drawings
 - Site diaries and notes
 - Correspondence and MoMs
 - Records of work
- Duty to maintain
- Right of Engineer to monitor and inspect records
- Engineer may instruct additional record keeping



AG Falkland Islands v Gordon Forbes (2003)

- **H v Schering Chemicals:** *“Records which a historian would regard as original or primary sources, that is documents which either give effect to a transaction itself or which contain a contemporaneous register of information.”*
- *“A sufficient nexus between that which is to be recorded and the act of recording. It clearly does not have to be instant.”*
- *“A witness statement cannot be a substitute for contemporary records.”*
- *“Where there is no contemporary record to support a claim, that claim fails.”*

When does the clock start to tick?

- 20.2

“The claiming Party shall give a Notice to the Engineer...as soon as practicable, and **no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance**”

- Q: 28 days after the event or circumstance?
- Q: 28 days after entitlement arises?

Obrascon v AG for Gibraltar (2014)

- Mr Justice Aikenhead:

“I see no reason why this clause should be construed strictly against the Contractor 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 Employer.”

- Cross ref clause giving rise to entitlement – e.g. 8.5:

“The Contractor shall be entitled subject to Sub-Clause 20.1...to EOT if and to the extent that completion... is or will be delayed.”

- EOT could be claimed either when it is clear that **there will be a delay** (prospective) or **when the delay has started to be incurred** (retrospective)

Valid Notices

- FIDIC 1.3
 - In writing
 - Paper original **OR** electronic original
 - Identified as a notice
 - Delivered by hand, mail or courier or in accordance with Contract Data
- Email service / electronic transmittal?
- Correctly addressed
- Authority to issue notices (see, eg Clause 4.3 –Contractor's Representative)

Arguments around notices

- FIDIC 20.2.2 / 20.2.4: Fully detailed claim can set out:
 - Reasons for disagreement with Engineer's time bar notice; **or**
 - Why late submission is justified
- ***Bremer v Vanden (1978)*** – is it a condition precedent?
 - States precise time for service of notice
 - Makes plain that unless notice is served, rights will be lost
- Civil law jurisdictions (eg Middle East):
 - UAE Art 246(1): Good Faith
 - UAE Art 106: Unlawful exercise of rights (proportionality)
 - UAE Arts 318 & 319: Unjustified enrichment

Waiver

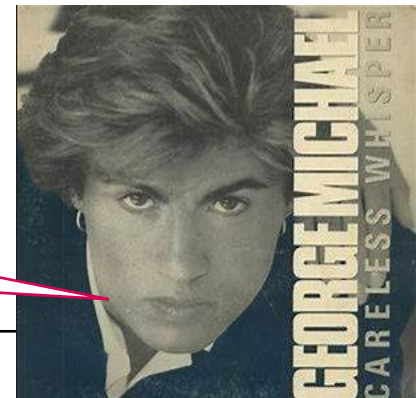
- Minutes of Meeting

“Employer requested that Contractor reduce the number of letters they are forwarding as items recorded in meetings will be sufficient from a contractual view point”

- Letter from Employer

“We wish to work with you in an environment where the mutual benefit of the project is paramount. In order to achieve this, we need information to be supplied that assists each party to obtain the best results and not where the proliferation of claim notices is the major consideration. We are sufficiently concerned with your management ethos that we strongly urge you to move away from the claim culture and instead provide us with clear and concise reports and technical queries that seek information rather than to pass on responsibility.”

We are not looking for compensation or to get caught in contractual negotiations



Negotiating a DRP

- Notices / impact of late notices
- When can you invoke the DRP – n.b. new Clause 3.7.5
- Multi-tiered dispute resolution procedures
- Requirement for negotiation or mediation?
- Contractual process – eg adjudication, DAB, DAAB,
- Litigation or arbitration?

Case Study

CONTRACT TASK FORCE

Contractor Claims
(EOTs, Variations,
Instructions)

Employer Claims
(LDs, over payment)

Technical

Commercial

Legal

- Addressed and dealt with by relevant person
- Queries answered / information provided
- Settled
- Narrowed matters in dispute

QS

Speaker Biog



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Clients say:

"Katherine is praised for her commercial acumen and her ability to apply the law to technically complex situations"

"She is proactive, hard-working and business savvy"

"She is a very good, astute lawyer"

"Katherine Doran has a good understanding of both construction and business allowing her to provide an overall approach, rather than simply the application of the law"

Katherine Doran is a Director in DWF's Construction, Infrastructure and Energy team. She has exclusively practiced construction law since she qualified over 15 years ago and is an accredited specialist in construction law by the Law Society of Scotland. Katherine is based in DWF's Glasgow office, but practices throughout the UK and internationally, including Europe, the Middle East, and Central America.

Katherine specialises in renewables, heavy engineering and infrastructure, with a focus on project advice, dispute avoidance, ADR, litigation and arbitration. She is regularly instructed on a range of matters including offshore wind, ports and terminals, hydro-electric, energy from waste, solar and infrastructure projects. Katherine has extensive experience in all forms of dispute resolution, including adjudication, DABs, mediation, arbitration and litigation. She also assists clients with complex front end work, including advising on, drafting and negotiating contract documents, appointments, subcontracts and ancillary security documents.



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