

# Managing Change

**Lucy Garrett QC**  
**February 2021**



## Topics covered

**1**

**Requirements for  
instruction**

**3**

**Notice**

**2**

**Obligated to  
comply?**

**4**

**Discretion**



# 1

## Requirements for instruction



# Instructions oral or in writing

## FIDIC (2017)

1.3: ... the Notice or **other communication shall be in writing** and... (b) ... shall... include reference to the provision(s) of the Contract under which it is issued where appropriate.

3.5 The Engineer may issue to the Contractor (at any time) instructions which may be necessary for the execution of the Works, all in accordance with the Contract...

## LOGIC (for Construction)

2.1 All instructions, notices, agreements, authorisations, approvals and acknowledgments **shall be in writing**... Nevertheless, if for any reason it is considered necessary by the Company to give an instruction to the Contractor **orally** in the first instance, the Contractor shall comply with such instruction. Any such **oral instruction shall be confirmed in writing** as soon as is possible under the circumstances, provided that, if the Contractor confirms in writing any such oral instruction which is not contradicted in writing by the Company without delay, it shall be deemed to be an instruction in writing by the Company.

## SAJ

V.1 The Specifications may be modified and/or changed **by written agreement** of the parties hereto...

# Other requirements for instructions

- In some contracts there is a requirement for there to be a signature on an instruction, or for the instruction to come from a specific person in writing, either for the instruction to valid under the Contract or for it to be treated as a Change
- What happens if the Employer refuses to comply with such a requirement, either because it does not consider the instruction to represent a Change or because it does not consider that the matter requires an instruction?
- **Depends on whether the contract makes the relevant proviso a condition precedent, but if so:**

## *Swallowfalls Ltd v Monaco Yachting* [2014] 2 All ER (Comm) 185, CA

- Shipbuilding contract where payment due on achievement of milestones, but only if countersigned by Employer
- CA held that there was an implied term of co-operation by way of “the ordinary implication in any contract in performance of which co-operation is required. A shipbuilding contract is such a contract...” [32]

## *Brodie v Corporation of Cardiff* [1919] AC 337, CA

- Contract required variation orders to be in writing and the Employer’s Engineer honestly believed the work in question was within contractual scope so refused to issue anything
- House of Lords held (by a majority) that the arbitrator was entitled to review the actions of the Engineer in refusing to order an instruction, and the findings of the Tribunal “take the place of” or “supply the want of” the written instruction [pg 351]

# 1

**Requirements for  
instruction**

# 2

**Obligated to  
comply?**



## FIDIC (2017)

3.5 ...the **Contractor shall comply** with the instructions given by the Engineer or the Engineer's representative... on any matter related to the Contract.

If an instruction states that it constitutes a Variation, Sub-Clause 13.3.1... shall apply.

If not so stated, and the Contractor considers that the instruction:

(a) constitutes a Variation...

**(b) does not comply with the applicable Laws or will reduce the safety of the Works or is technically impossible**

the Contractor shall immediately, and before commencing any work... give a Notice to the Engineer with reasons. If the Engineer does not respond within 7 days after receiving this Notice, by giving a Notice confirming, reversing or varying the instruction, the Engineer shall be deemed to have revoked the instruction. Otherwise, the Contractor shall comply with and be bound by the terms of the Engineer's response

## LOGIC (for Construction)

4.4 **Except** to the extent that it may be **legally or physically impossible** or **create a hazard to safety** the Contractor shall comply with the Company's instructions and directions on all matters relating to the Work...

14.1(a) The Company has the right to issue instructions to the Contractor at any time...

14.1(b) An instruction under Clause 14.1(a) will constitute a Variation. When required by the Company, on receipt of any such Variation, the **Contractor shall proceed immediately as instructed even though the amount of any adjustment to the Contract Price and Schedule of Key Dates may not have been determined.**

30.1 The Company shall have the right by giving notice to terminate all or any part of the Work or the Contract...:

...

(b) ... in the event of any default on the part of the Contractor....



# SAJ (& shipbuilding forms generally)

## Non-compulsory Changes

V.1 The Specifications may be modified and/or changed by written agreement of the parties hereto, **provided that such modifications** and/or changes or an accumulation thereof **will not**, in the **Builder's judgment, adversely affect the Builder's planning or program in relation to the Builder's other commitments**, and provided, further, that **the Buyer shall first agree**, before such modifications and/or changes are carried out, **to alterations in the Contract Price, the Delivery Date and other terms and conditions of this Contract and Specifications** occasioned by or resulting from such modifications and/or changes.

## Compulsory Changes

V.2 In the event that, after the date of this Contract, any requirements as to class, or as to rules and regulations to which the construction of the Vessel is required to conform are altered or changed by the Classification Society... the following provisions shall apply:

- (a) If such alterations... are **compulsory** for the Vessel... **the Builder shall thereupon incorporate such alterations...** into the construction of the Vessel, **provided that the Buyer shall first agree** to adjustments required by the Builder in the **Contract Price, the Delivery Date and other terms and conditions** of this Contract and Specifications occasioned by or resulting from such alterations or changes.
- (b) If such alterations or changes are **not compulsory** for the Vessel, but the Buyer desires to incorporate such alterations... the Buyer shall notify the Builder of such intention. The **Builder may accept** such alterations... **provided that** [as per non-compulsory change].



# Disagreement as to adjustments required

## *Adyard v SD Marine Services*

[2011] EWHC 848 (Comm) at [244] - [256]

- Awkwardly amended version of SAJ – included a notice condition precedent in Art VIII.2
- Yard argued that if Buyer took the inconsistent position that the Builder both had to incorporate the changes and refused to agree a price for them, that this created a “contractual limbo” which amounted to an act of prevention, meaning that the Buyer could no longer rely on the Delivery Date and extension of time/Permissible Delay mechanisms
- Hamblen J (as he then was) construed Articles II, V and VIII (holding Art VIII was a “broad sweep up clause”) and preferred SDMS’ interpretation because:
  - Involved **construing the contract as a whole** and giving effect to its provisions in a complementary and coherent manner
  - Avoids the unsatisfactory consequence of the parties being in a “contractual limbo”
  - It is inherently unlikely that the parties would have intended there to be such a limbo, particularly in the “obviously foreseeable” situation that the parties could not agree on the price
  - Yet more so given the consequences of the application of the prevention principle
  - Where there is ambiguity the court should lean in favour of a **construction which makes the contract work**

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# Notice – the principles

## *Bremer v Vanden*

[1978] 2 Lloyd's Rep 109 at 113, 121, 128

**The principle: Whether clause a condition precedent depends on:**

- **The form of the clause itself**
- **The relation of the clause to the contract as a whole**
- **General considerations of law**

**On the clause in dispute, it was not a condition precedent:**

- The “cancellation” effected by the first sentence is **not expressed to be conditional upon compliance with the second sentence**. It is automatic on the happening of events.
- If a condition were intended a **definite time limit would be more likely to be set**.
- Provisions **elsewhere in the form** suggest that the second sentence is not intended as a condition (despite the form lacking consistency in many respects). Other stricter language did appear elsewhere.

## **The *Bremer* clause**

In case of prohibition of export, blockade or hostilities... preventing fulfilment, this contract or any unfulfilled portion thereof so affected shall be cancelled. **In the event of shipment proving impossible during the contract period by reason of any of the causes enumerated herein, sellers shall advise buyers without delay of the reasons therefor.** If required, sellers must produce proof to justify their claim for cancellation.



# Notice – the principles

## *Multiplex v Honeywell*

[2007] EWHC 1028 (TCC) at [103]

- Useful for clear statement of purpose of notice provisions:

“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.”



# Notice – the principles

*Steria Ltd v Sigma Wireless Communications Ltd*  
[2008] BLR 79 at [89] – [91]

## The principle:

- If there is genuine ambiguity as to whether or not notification is a condition precedent, then the notification should not be construed as such, since such a provision operates for the benefit of only one party... and operates to deprive the other party (the contractor) of rights which he would otherwise enjoy under the contract.

## On the clause in dispute, it was a condition precedent:

- The phrase “provided that... giving rise to the delay” is clear in its meaning.
- A notification requirement may operate as a condition precedent **even though it does not contain an express warning as to the consequence of non-compliance.**
- This clause makes clear in ordinary language that the right to EOT depends on notice

## The *Steria* clause

If by reason of any circumstance which entitles the Contractor to an extension of time for the Completion of the Works... then in any such case **provided** the Sub-Contractor shall have given within a reasonable period written notice to the Contractor of the circumstances giving rise to the delay, the time for completion hereunder shall be extended by such period as may in all the circumstances be justified...



# Notice – the principles

*WW Gear Construction Ltd v McGee Group Ltd*  
[2010] EWHC 1460 (TCC) at [17] – [19]

## The principle:

- **Ordinary principles of contractual construction apply to a notice clause.**

## On the clause in dispute, it was a condition precedent:

- The making of a written application was the trigger and thus an overall precondition to entitlement
- Wording such as “**provided always**” is often the strongest sign that the parties intend there to be a condition precedent
- The problem with the “condition precedent” wording was that the following words of the clause made no sense (because no entitlement arose under clause 4.21.1).
- It was construed as superfluous because the earlier parts of the clause were themselves sufficient to establish a condition precedent, and the Judge concluded the parties had intended to refer to clause 4.21 where an entitlement did arise

## The *WW Gear* clause

If the Trade Contractor makes written application... then the Construction Manager... shall ascertain the amount of such loss and/or expense...;  
**provided always that:** 1. the Trade Contractor's application shall be made as soon as and in any event not later than two months after it has become... apparent to him that the regular progress of the Works... has been or was likely to be affected..., and such application shall be formally made in writing..., **and it shall be a condition precedent** to the Trade Contractor's entitlement under this clause 4.21.1...



# Notice – the principles

*Obrascon Huarte Lain SA v AG for Gibraltar*  
[2014] EWHC 1028 (TCC), at [312] – [313]

## The principle:

- **Conceded by the contractor that notice was a condition precedent – issue was trigger for notice.**
- **Trigger should construed reasonably broadly, given its serious effect on what could otherwise be good claims**

## On the clause in dispute:

- Notice was only required once there actually was delay (of which the contractor was aware/should have been aware)
- The “event or circumstance” could mean either the incident causing delay or the delay which results or will inevitably result from that incident
- No particular form was called for so the clause permitted any claim provided made by notice in writing and it described the event or circumstance relied on

## The *Obrascon* clause (FIDIC)

If the Contractor considers himself to be entitled to any extension of the Time for Completion... the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice **shall be given as soon as practicable**, and not later than 28 days after the Contractor **became aware, or should have become aware**, of the event or circumstance.

**If the Contractor fails to give notice** of a claim within such period... the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability...



# Notice – the principles

## *The Golden Exquisite*

[2014] EWHC 4040 (TCC) at [65] – [70]

### The principle:

- **Emphasises the importance of receipt of notice to the Employer/Buyer so that aware of claims; particularly important in shipbuilding contracts due to termination rights arising as at the Delivery Date.**

### On the clause in dispute, it was a condition precedent:

- The words used are clear; in particular “any relief claimed” referred to exemption from liability for delay as well as an extension to the Delivery Date
- **However** the causes of delay caught by the clause (which was Art VIII.2 as amended) were those in Art VIII.1
- Cf *Adyard* at [249] – [251] although Leggatt J (as he then was) specifically agreed with Hamblen J observation that “*it is inherently unlikely that the parties would have intended there to be a limbo*” at [55]

## *The Golden Exquisite clause (SAJ\*)*

Within 7 days from the date of commencement of any delay on account of which the Builder claims that it is entitled under this Contract to an extension of time for the delivery of the Vessel, the Builder shall advise the Buyer by telefax or email confirmed in writing, of the date such delay commenced, and the reasons therefor....

In the event that the Builder shall not comply with the notices required to be sent under this clause, **they shall not be entitled to any relief claimed.**

\* Amended





# Notice – the clauses

## FIDIC (2017)

20.1(a) and (b): Applies to claims for payment by either party and to claims for EOT by Contractor: Clause 20.2 applies.

20.2: The claiming Party shall give a Notice to the Engineer, **describing the event or circumstance** giving rise to the [claim] **as soon as practicable**, and in any event **no later than 28 days** after the claiming party **became aware, or should have become aware**, of the event or circumstance...

If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party **shall not be entitled to any additional payment, the Contract Price shall not be reduced** [if Employer claiming], **the Time for Completion or the DNP shall not be extended** [as applicable], **and the other Party shall be discharged from any liability in connection with the event or circumstance** giving rise to the Claim.

## LOGIC

14.3(a) If the Contractor considers that an occurrence has taken place for which it is entitled to receive a Variation, the Contractor... shall request **without delay** in writing that the Company issue a Variation....

14.3(b) If the Contractor **fails to submit requests for Variations...** when it **considers or should reasonably have considered** that an occurrence has taken place and/or **fails to provide supporting estimates in accordance with Clause 14.4**, the Contractor shall, **at sole discretion of the Company, forfeit any right to receive such Variations and any rights concerning adjustment to the Contract Price and/or Schedule of Key Dates.**

15.3 (force majeure): The party that is or may be delayed... shall notify the other party without delay giving the full particulars thereof...

## SAJ

VIII.2 **Within 10 days after the date of occurrence of any case of delay**, on account of which the Builder claims that it is entitled under this Contract to postponement of the Delivery Date, the Builder shall notify the Buyer in writing... of the date such cause of delay occurred. Likewise, **within 10 days after the date of ending** of such cause of delay, the Builder shall notify the Buyer of the period, by which the Delivery Date is postponed by reason of such cause of delay, with all reasonable dispatch after it has been determined.

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# Discretion clauses

## *Bluewater Energy Services v Mercon Steel* [2014] EWHC 2132 (TCC) at [990] - [1012]

- The forfeiture provisions were subject to the “important qualification” that the rights shall be forfeit “at the sole discretion of Bluewater”
- This brought into play the **general law applying to contractual provisions allowing for one party to be given a discretion** as set out in *Socimer International Bank v Standard Bank London (No.2)* [2008] 1 Lloyd’s Rep 558, CA at [66].
- Bluewater’s exercise of the discretion is limited as a matter of necessary implication, by the “**need for the absence of arbitrariness, capriciousness, perversity and irrationality.**”
- Notice provisions are necessary so that Bluewater as the decision maker has information in a timely manner so that it can properly assess those adjustments... the absence of information given at a particular time may have no effect on those adjustments. If so it would be an abuse for Bluewater to reject the Variation.

## The *Bluewater* clause (LOGIC\*)

14.3(a) If the Contractor considers that an occurrence has taken place for which it is entitled to receive a Variation, the Contractor shall request without delay in writing that Bluewater issue a Variation.

14.3(b): If the Contractor fails to submit requests for Variations in accordance with Clause 14.3(a)... and/or fails to provide supporting estimates in accordance with Clause 14.1, the Contractor shall, **at the sole discretion of Bluewater, forfeit any right** to receive such Variations and any rights concerning adjustment to the Contract Price and/or Schedule of Key Dates.

\* Amended

**THANK YOU**

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