

# Atkin Chambers Barristers

## Conditions Precedent

Steven Walker QC



# Definition

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A condition precedent is a condition which must be fulfilled before any binding contract is concluded at all. The expression is also used to describe a condition which does not prevent the existence of a binding contract, but which suspends performance of it or an obligation under it until fulfilment of the condition; or to describe a contractual obligation that must be performed by one party before another contractual obligation of the counter-party arises.

Lewinson, *The Interpretation of Contracts*, 6<sup>th</sup> Ed.

## A question of interpretation

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“In the event of shipment proving impossible during the contract period by reason of any of the causes enumerated herein, sellers shall advise buyers of the reasons therefor.”

“Whether this clause is a condition precedent or a contractual term of some other character must depend on (i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law.”

Lord Wilberforce in *Bremer Handelgesellschaft v Vanden Avenne-Izegem* 2 Lloyd's Rep 109

## Fixed time limit

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- *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery* [2002] EWHC 2210 (Comm) the force majeure clause said that the party invoking the clause “shall give prompt notice” to the other party. The provision was found to be a condition precedent.
- *Steria v Sigma Wireless Communications* [2007] EWHC 3454 (TCC); [2008] BLR 79.

## Steria v Sigma

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The EOT clause included the following:-

“provided the Subcontractor 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 and all extra costs incurred by the Subcontractor in relation thereto shall be added to the Subcontract Price together with a reasonable allowance for profit.”

## **Steria v Sigma cont.**

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“I consider that 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.”

“This is an individually negotiated subcontract 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".”

# Ambiguity

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Ambiguity in an exclusion clause may have to be resolved by a narrow construction because an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law such as (in the present case) an obligation to give effect to a contractual warranty by paying compensation for breach of it. The parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect: see *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 per Lord Diplock at 717H, applied in *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691.

## Standard forms

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### NEC clause 61.3

“The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if

- The Contractor believes that the event is a compensation event and
- The Project Manager has not notified the event to the Contractor.

If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the event arises from the Project Manager or the Supervisor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption.”



# Compliance

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Akenhead J. in *Obrascon v HM AG for Gibraltar* [2014] EWHC 1028 (TCC); [2014] BLR 484 at [311]:

“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.”

# Compliance

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“Where parties have laid down in clear terms what has to be done by one of them if he is to claim certain relief, the court should be slow to seek to relieve that party from the consequence of failure.”

Lord Glennie in *Education 4 Ayrshire Ltd v South Ayrshire Council* [2009] CSOH 146 applied in *Glen Water v Northern Ireland Water* [2017] NIQB 20; [2018] BLR 141.

## Other issues: Waiver and statutory control

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- Waiver
- Civil Codes
- Unfair Contract Terms Act 1977.

# Steven Walker QC

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Silk 2012

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Steven specialises in advising and representing parties to complex commercial contracts relating to a wide range of subject matter including the design and delivery of buildings, oil and gas installations, power generation plant, process and engineering plant, ships, IT systems, telecommunications systems, PFI/PPP, facilities management and professional services.

He has extensive experience in the energy sector having been heavily involved in a number of projects concerning the design and construction of offshore wind farms, energy from waste plants and other forms of renewable energy.

Transport-related projects have formed an important part of Steven's practice over the past 25 years. His first case in the sector concerned the Eurostar high-speed train sets and since then he has been involved in numerous projects in the road, rail and air sectors including the construction of the HS1 high-speed rail link, airport runways and other airport infrastructure, overground and underground rail and tram systems, road construction/extension, and communication systems.

He has appeared as advocate in the Technology and Construction Court (TCC), the Court of Appeal, numerous arbitrations (including ICC, DIAC, UNCITRAL, HKIAC, LCIA and LMAA) and adjudications, and in expert determination and mediation. His arbitration experience includes substantial international experience.



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