



ADMINISTERING CONDITION PRECEDENT NOTICES IN CONSTRUCTION CONTRACTS

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Notices represent a main area of concern for engineering and architecture professionals involved in construction contract administration, as the failure to satisfy their requirements can jeopardize the concerned party's performance under the contract. This is specifically true of those notices that are stated or inferred to be condition precedent to the preservation or the establishment of the rights of either party. A screening of all instances stipulating the issuance of notices under the standard conditions for the construction contract issued by the International Federation of Consulting Engineers (FIDIC) revealed that 41 out of the 93 encountered instances require condition-precedent notices to be issued for preserving or establishing relevant rights. This paper presents a detailed analysis of the three classes that were found to encompass these notices. As such, it sheds light on the distribution of the responsibilities for issuing them between the contractor, on one hand, and the owner or the Engineer on his behalf, on the other hand. It further discusses possible compositions of their structures, highlighting the time bars as well as the prerequisite events that are likely to be involved. The merit of the work lies in mapping these notices, with the aim of helping contract administration practitioners properly deal with them such that the contractual risks associated with their requirements can be avoided.

Keywords: Administration, Claims, Disputes, Rights, Waiver.

1 INTRODUCTION

The concept of condition precedent has long been used as a contractual tool in contract clauses to create “an obligation to be performed by one party to the contract, upon the performance of which a further obligation arises on the side of the other party” (Beck 1975). Likewise, in construction contracts, the condition precedent principle is employed in different clauses either to establish rights or to preserve them. In various standard forms of contract conditions, the notice of a claim is expressly stated as a condition precedent to the contractor's entitlement for an extension of time or extra compensation (Aibinu 2009). The non-compliance with the requirements of such a notice results in the lapse of the claim (Jaeger and Hök 2010). Enforcing strict compliance of notice provisions has been a controversial issue. Lal (2002) argued that allocating the risk of the cost of delay on the contractor is ‘perfectly reasonable’, and that making the notice of a claim a condition precedent is commercially sensible and fair. On the contrary, negative consequences of enforcing strict compliance were discussed by Spratt (2010), tackling the increase in costs for all parties as a result of strict compliance. To this end, it was stated that whenever changes are made, and there is a short period to realize the full impact and issue a notice for compensation, the contractor is likely to overestimate the cost of the change as a result

of uncertainty (Spratt 2010). On the other hand, condition-precedent notices are usually accompanied with time-bar stipulations governing the timely fulfillment of their requirements. Such stipulations enable the owner to investigate the event and its impacts, in order to verify the claim accordingly (Lim 2012). A review of a number of cases dealing with notice requirements revealed that courts react differently when determining the operability of condition-precedent requirements and the enforceability of time-bar clauses (Lal 2002, Clark 2008, Aibinu 2009, Glover 2011). Therefore, it is in the interest of all parties to carefully comply with notice requirements, specifically those deemed to operate as condition precedent (Lim 2012).

2 RESEARCH SCOPE AND METHODOLOGY

A classification study of the notices specified under the FIDIC's standard conditions for the construction contract (FIDIC 1999) revealed that 41 out of a total of 93 encountered instances calling for notices express a state of condition precedence for right entitlement (Abdul-Malak and Khalife 2017a). The aim of the work presented in this paper is to highlight the aspects of the works concerned with these notices and discuss the condition-precedent classes governing their triggering. The followed methodology included: (1) identifying the condition precedent notices and their relevant provisions, (2) deducing the type (class) of inherent condition precedence, (3) investigating the responsibilities of the concerned parties towards their issuance, and (4) shedding light on the potential complexity that characterizes their administration.

3 CONDITION PRECEDENT NOTICES

A comprehensive review of the twenty clauses found under the FIDIC conditions of contract unveiled a wide group of notices recognized to be condition precedent notices. These were identified and their provisions filtered out for analysis. Based on the language used in the relevant sub-clauses, three classes of condition-precedent notices were deduced: "explicit language for establishing a right", "jointly in conjunction with a specific sub-clause", and "implicit language for establishing a right" (Abdul-Malak and Khalife 2017b). For each mentioned class, the list of sub-clauses expressing condition precedence (whether explicitly, jointly, or implicitly) and the respective rights to be inherently established are identified. The notices serving these conditions, the party issuing them, and their prerequisites including the associated time periods are thereafter identified.

The above-mentioned characteristics for the first class of condition-precedent notices, where the sub-clauses explicitly state the need to serve the notices for certain respective rights to be established, are shown in Table 1. The right to claim entitlement by the contractor under Sub-Clause 20.1 is based upon serving this notice in reference to one of the 15 listed sub-clauses (see Figure 1) within 28 days after the contractor (CNT) "became aware or should have become aware" of the event (E) giving rise to the claim. The composition of this type of notice is illustrated in Figure 2 (Case 1). The prerequisites (P) for a number of these notices are as follows: first-tier notices under Sub-Clauses 1.9, 4.12, 4.24, and 16.1; instructions needed according to Sub-Clauses 7.4, 8.9, and 17.4; notice of force majeure under Sub-Clause 19.2; and the taking-over certificate as a prerequisite for notice under Sub-Clause 10.3. The other notices, served in accordance with Sub-Clauses 2.1, 4.7, 10.2, 13.7, and 18.1, do not have any prerequisites. The subsequent action (S) is to provide full supporting particulars for the claim within a 42-day period.

The second explicitly mentioned case is the right by either party to refer a matter to the Dispute Adjudication Board (DAB) as a result of a dispute arising in connection with any certificate, determination, instruction, opinion or valuation of the engineer (ENG), referred to

under the FIDIC conditions as forming part of the personnel of the employer (EMP). Preserving this right is conditional on the engineer serving in many such instances a determination notice (within 42 days in the case of claims raised pursuant to Sub-Clause 20.1).

Table 1. Explicit language for establishing right.

Entitlement	Relevant Sub-Clause	Condition Precedent Notice	Party Issuing Notice	Complexity (Prerequisites; Time Bars)
Right to entitlement under Sub-Clause 20.1	1.9, 2.1, 4.7, 4.12, 4.24, 7.4, 8.9, 10.2, 10.3, 13.7, 16.1, 17.4, 18.1, 19.4, 20.1	“Claim Notice” under Sub-Clause 20.1	Contractor	Structured (Case 1, in Figure 2), ≤ 28 days
Right to referral to adjudication (DAB) in connection with the time-barred determination	20.4	“Determination Notice” under Sub-Clause 3.5	Engineer	Structured, ≤ 42 days for determination in response to 20.1; no stipulation in response to other Sub-Clauses
Right to referral to arbitration	20.4	“Dissatisfaction Notice” under Sub-Clause 20.4	Party	Structured (Case 2, in Figure 2), ≤ 28 days
Right to be indemnified by the other party against an infringement claim	17.5	“Notice of a Claim Alleging an Infringement” under Sub-Clause 17.5	Party	Non-structured, ≤ 28 days
Right to terminate	19.6	“Notice of Force Majeure” under Sub-Clause 19.2	Party	Non-structured, ≤ 14 days

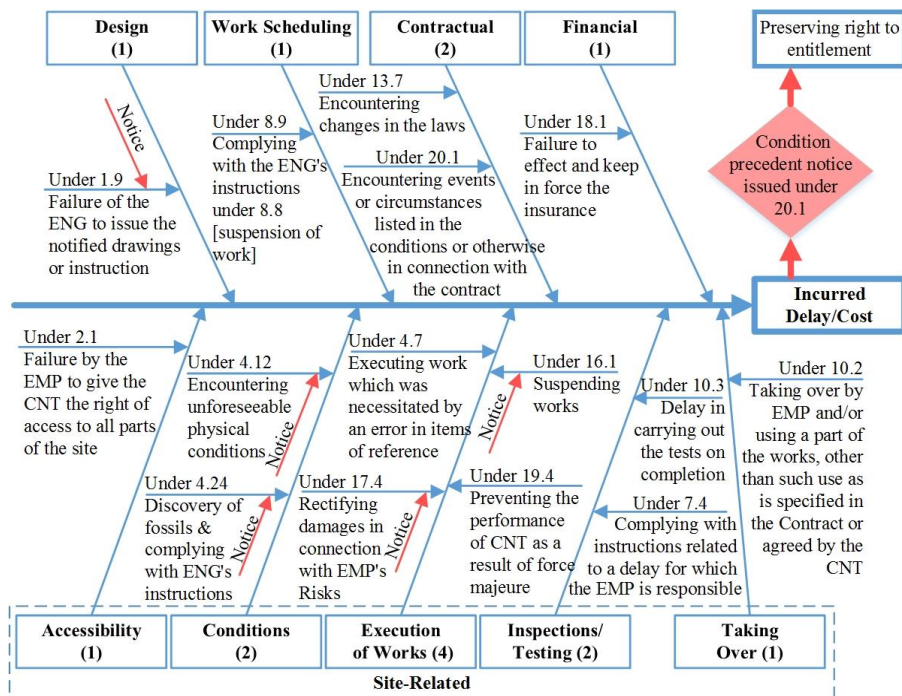


Figure 1. Circumstances for the condition-precedent notice under Sub-Clause 20.1.

The third case is in connection with establishing the right for referring a dispute to arbitration. Either party has the right to do so, provided that a notice of dissatisfaction has been issued within a period of 28 days after receiving the DAB’s decision or after the expiry of the 84-day period after the matter has been referred to adjudication. Case 2 in Figure 2 shows the composition of the structure governing the issuance of this notice. The prerequisite represents the action of dispute referral to adjudication, followed by this condition-precedent notice being served within 28 days from the issuance date of the DAB decision or the expiry of the given 84-day period with no decision having been given. The subsequent action represents the possibility of commencing arbitration on or after the 56th day from issuing the condition-precedent notice. The fourth situation is related to receiving an infringement claim. Either party has the right to be indemnified by the other party against this claim through issuing a notice within 28 days; otherwise, the concerned party “shall be deemed to have waived any right to indemnity under this Sub-Clause” (FIDIC 1999, Sub-Clause 17.5). Finally, the fifth case in which explicit language is used to formulate a condition precedent notice is the one related to the right to terminate the contract as a result of a force majeure condition. This right is preserved whenever a notice of force majeure was served under Sub-Clause 19.2. This is clearly stated under Sub-Clause 19.6, calling for this notice to be served within 14 days from being aware (or should have been aware) of the event constituting a force majeure.

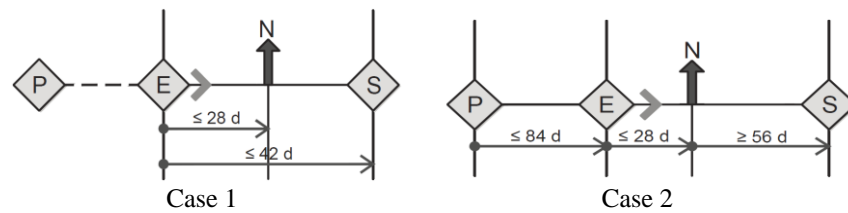


Figure 2. The composition of notices under Sub-Clauses 20.1 (Case 1) and 20.4 (Case 2).

As for the second class, where condition precedency is implicitly expressed under certain sub-clauses, the 12 instances referring to this class are detailed in Table 2. The owner’s right to claim for any payment and/or the extension of the defects notification period is established in association with the notice issued under Sub-Clause 2.5, in reference to any of the identified sub-clauses (see Figure 3). The different circumstances, which lead to this case, are elaborated in Figure 3. Another case included in the second class is the right to object to an interim payment certificate formulated based on records asserted to be inaccurate by the contractor. As such, the contractor shall issue a notice of inaccuracy within 14 days after being requested to examine the records; otherwise, they shall be accepted as accurate.

Table 2. Implicit language for establishing right.

Entitlement	Relevant Sub-Clause	Condition Precedent Notice	Party Issuing Notice	Complexity (Prerequisites; Time Bars)
Right to entitlement under Sub-Clause 2.5	2.5, 7.5, 7.6, 8.6, 8.7, 9.4, 11.3, 11.4, 15.4, 18.1, 18.2	“Employer's Claim Notice” under Sub-Clause 2.5	Employer or Engineer	Structured, time period: as governed by applicable laws
Right to object to interim payment certificate due to inaccurate measurements	12.1	“Notice of Inaccuracy” under Sub-Clause 2.1	Contractor	Structured, ≤ 14 days

The third class of condition precedent notices includes 9 notices found to be jointly in conjunction with Sub-Clause 2.5 or Sub-Clause 20.1 as shown in Table 3. These notices are to be administered jointly in conjunction with the claim notices, and – as such – they shall be served before issuing further notices under Sub-Clauses 2.5 or 20.1.

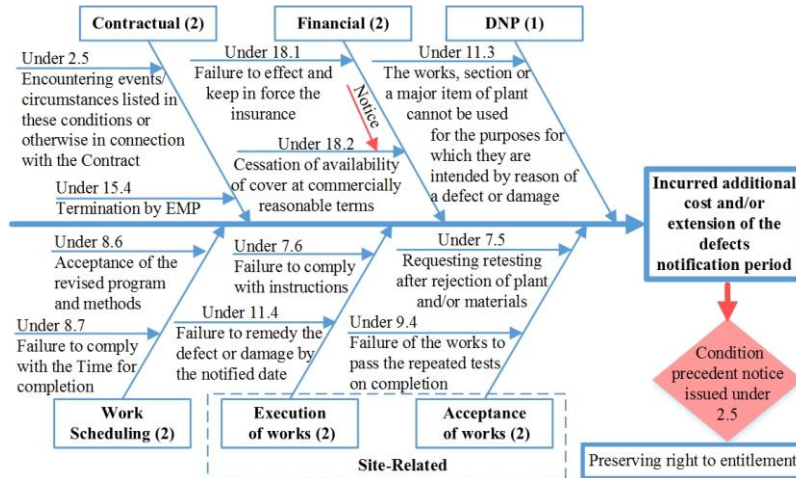


Figure 3. Circumstances for the condition precedent notice under Sub-Clause 2.5.

The first-tier notices, in conjunction with Sub-Clause 20.1, are represented in red arrows in Figure 2. To be noted is that all the listed notices have no time stipulation associated with their issuance except for the extension of time notice under Sub-Clause 8.4 where the notice needs to be issued within 28 days as per Sub-Clause 20.1.

Table 3. Condition Precedent notices under the third condition precedent class.

Entitlement and Relevant Sub-Clause	Condition Precedent Notice	Party Issuing Notice	Complexity (Prerequisites; Time Bars)
Jointly in conjunction with Sub-Clause 2.5	“Rejection of Plant and/or Materials Notice” under Sub-Clause 7.5	Engineer	Non-structured, time period not specified
	“Notice of Ceasing Availability of Cover at Commercially Reasonable terms” under Sub-Clause 18.2	Contractor	Non-structured, time period not specified
Jointly in conjunction with Sub-Clause 20.1	First-tier notices under Sub-Clauses 1.9, 4.12, 4.24, 16.1, 17.4	Contractor	Notices under Sub-Clauses 1.9 and 16.1 are structured,
	“Notice of Probable Future Events” under Sub-Clause 8.3	Contractor	Non-structured, Promptly
	“Extension of Time Notice” under Sub-Clause 8.4	Contractor	Structured, As soon as practicable and ≤ 28 days

4 NOTICE ISSUANCE RESPONSIBILITIES

The frequencies of instances calling for the issuance of condition-precedent notices by each party are as shown in Figure 4. The contractor has the highest number of condition-precedent notices to deal with, followed by the employer (or the engineer on his behalf). The engineer has two types of notices to be served as condition precedent: the determination notice and the rejection of plants and/or materials notice. However, the frequency of issuing a determination notice is

expected to be dominant throughout the course of construction. That is, there are 40 sub-clauses that refer to the determination notice, and they cover multiple aspects of the works. It can therefore be concluded that the contractor and the engineer have a prime responsibility in regards to serving the condition-precedent type of notices. Furthermore, when filtering the number of structured notices versus those that are non-structured, the ratio was found to be 36:5, respectively. The high number of structured notices indicates the need to understand the different compositions associated with these condition-precedent notices.

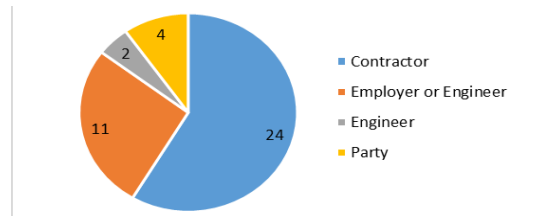


Figure 4. Number of instances calling for the issuance of condition-precedent notices by each party.

5 CONCLUDING REMARKS

The importance of identifying condition-precedent notices and the situations warranting their issuance is obviously very critical, in order for the parties to preserve their rights for certain entitlements. The condition-precedent notices, identified in reference to the 20 instances in which explicit language is used, were all found to have specific time bars governing their issuance. The findings revealed that the contractor carries the larger burden of having to administer such notices, with more than half of the notices called for being his responsibility to serve. Finally, the results showed that the vast majority of condition-precedent notices are structured, and parties shall therefore be well aware of the events, prerequisites, and time bars forming parts of their respective structures.

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