



SCL Türkiye 2nd Annual Construction Law Conference

NOTICE REQUIREMENTS AND TIME BARS THROUGH EXECUTION OF THE PROJECT

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FIDIC FIGURES RE. NOTICE AND CLAIM PROCEDURE

«Notices» in FIDIC

- In **1999 version**, “notices” played a major role: there were around 160 references to “notices”.
- In **2017 version**, there are now around 350 references to “notices”.

«Claim for Payment and EOT» in FIDIC

- In **1999 version**, Clause 20.1 [*Contractor’s Claims*] provided around 665 words.
- In **2017 version**, word count of Clause 20 [*Claims*] has increased to 2.300 words.

TOPICS OF DISCUSSION

- **Content of Notice and Communication Method**
how it should be given?

- **Timing of Notification**
when it should be given?

- **Outcome of Non-Compliance with Notice Procedure**
direct loss of right?

- **Enforceability and Validity of Notice Provisions**
are they valid per se?



CONTENT AND METHOD OF NOTICE

Turkish Law Approach

As per the principle of “Freedom of Contract”, contracting parties are free to structure the notice requirements at their own will.

Exceptions:

1. *Provisions shall not be immoral, and*
2. *Provisions shall not be against the imperative rules of law.*

FIDIC 2017 Position

From combined reading of Clauses 1.3 and 20.2, FIDIC 2017 further developed notification requirements.

“Notices” must be:

- in writing,
- signed by the authorised representative of the party named in the contract,
- identified as a Notice (*with a capital “N”*), and
- delivered to the address stated in the Contract Data (*formerly the Particular Conditions*).



CONTENT AND METHOD OF NOTICE

***WHAT MAY NOT QUALIFY AS A “NOTICE” -THUS AS A “CLAIM”-
AS PER FIDIC 2017?***

Daily / Weekly / Monthly Progress Reports

FIDIC 2017 Clause 4.20:

«However, nothing stated in any progress report shall constitute a Notice under a Sub-Clause of these Conditions.»

Programme & Revisions on the Programme/ Revised Schedule

FIDIC 2017 Clause 8.3:

«Nothing in any programme, the Programme or any supporting report shall be taken as, or relieve the Contractor from any obligation to give, a Notice under the Contract.»



TIMING OF NOTIFICATION

Turkish Code of Obligations Article 472 / para. 3:

“If, during the execution of the work (...) any event arises that would endanger the timely completion of the work, the contractor shall IMMEDIATELY NOTIFY the event to the employer; otherwise the contractor will be liable for the consequences.”

FIDIC 2017, Clause 20.2.1:

“The claiming Party shall give a Notice to the other Party, describing the event or circumstance (...) 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.”

SCL Delay and Disruption Protocol, Section 3.2:

“The Contractor should comply with the contractual procedural requirements relating to notices, (...) However, whatever the contract says, the Contractor should give notice to the CA of any Employer Delays AS SOON AS POSSIBLE.”

TIMING OF NOTIFICATION

WHEN DOES THE NOTIFICATION PERIOD START TO RUN?

Obrascon Huarte Lain SA v Gibraltar – [2014] EWHC 1028 Technology and Construction Court

Time starts either when:

- It becomes clear that there will be a delay (*prospective delay*); or
- Delay begins to be incurred (*retrospective delay*).

Panther Real Estate v Modern Executive Systems – [2022] DIFC CA 016

Obligation to give notice was triggered when the party became aware of the event or circumstance giving rise to the claim for an EOT, and not of the delay or likely delay.

SCL Delay and Disruption Protocol

Applications for an EOT should be made and dealt with as close in time as possible to the delay event that gives rise to the application. A ‘wait and see’ approach to assessing EOT is discouraged.



TIMING OF NOTIFICATION

IS A COUNTER-NOTICE NECESSARY IF THE CLAIM NOTICE IS BELATED?

FIDIC Approach

FIDIC 2017 (Clause 20.2.2) – counter-notice is essential:

«If the other Party considers that the claiming Party has failed to give the Notice of Claim within the period of 28 days (...) the other Party shall, within 14 days (...) give a Notice to the claiming Party accordingly (with reasons).»

«If the other Party does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice.»

TIMING OF NOTIFICATION

IS A COUNTER-NOTICE NECESSARY IF THE CLAIM NOTICE IS BELATED?

Governing Law Approach

- **In Civil Law**, the **Rule of Honesty** may obstacle the counter-party from arguing that the claim is belated, if the **counter-party remained silent for an unreasonable amount of time**.
- **In Common Law**, the **Prevention Principle** and **Estoppel** may be used as useful tools to set aside a late notice argument.
- **TATA Consultancy Services Ltd v. Disclosure and Barring Service - [2024] High Court of Justice EWHC 1185 (TCC) – May 2024**

Argument of Estoppel / Waiver is raised and the Court decided that the requirement of complying with the notice period had fallen away due to subsequent conduct of the parties.



LATE or INCOMPLETE NOTICE – LOSS OF RIGHT / ENTITLEMENT?

There is a common misconception that any late / incomplete notice will lead to an automatic loss of right / loss of entitlement.

It is critical to legally qualify the meaning of the notice provisions:

■ **Notice requirement may qualify as a “CONDITION PRECEDENT”**

In this scenario, non-compliance with the condition would lead to loss of right.

Notice requirement is (*implicitly*) assessed as a condition precedent by Turkish Supreme Court [15th Chamber, 2001/1032]

LATE or INCOMPLETE NOTICE – LOSS OF RIGHT / ENTITLEMENT?

- Notice requirement may qualify as an “**ONUS**” (*külfet*) or an “**OBLIGATION**”
-

In this scenario, non-compliance will NOT lead to direct loss of right.

Claiming party can still be entitled to the claim if it can prove that the outcome of the event would not have changed even if the notice requirement was fulfilled.

Article 472 / para. 3 of Turkish Code of Obligations qualifies the “**immediate notice requirement**” of the contractor as an “Onus” – not a condition precedent.

Similarly, German Courts tend to have a same understanding of the notice provisions.

LATE or INCOMPLETE NOTICE – LOSS OF RIGHT / ENTITLEMENT?

■ Notice provision may qualify as a “**CONTRACT ON PROCEDURAL MATTERS**” (Article 193 of Turkish Civil Procedure Law)

In this scenario, non-compliance will NOT lead to direct loss of right.

Effect of the agreement will be on the conclusiveness of the claim, and not on the entitlement to the claim.

Turkish Supreme Court ruled in one of its decisions that the notice requirements shall qualify as a “procedural contract” [15th Chamber, 2002/3931].



VALIDITY & ENFORCEABILITY OF NOTICE PROVISIONS

Applicable Law to the Contract would have a decisive role on the enforceability of notice provisions.

Turkish Law

Notice provisions are in principle enforceable by application of freedom of contract principle.

HOWEVER, if the provisions are too restrictive for the claiming party, then the provision can be set aside on the ground that it is against commercial moral.

Working example: What if the notice period is reduced to 2 days?

It gives a good argument for the claiming party that 2 days is unreasonably short and against the commercial moral.



VALIDITY & ENFORCEABILITY OF NOTICE PROVISIONS

MENA Region

Sharia law has the infamous concept: “A Just Claim Never Dies”

Saudi Arabia enacted its Civil Transactions Law (16 Dec 2023) – **Article 104 enables the notice provisions to be enforced.**

Qatar Civil Code Article 418, bans the parties from agreeing to a different prescription period than that set out in the law – which is argued to invalidate the time bar provisions.

Oman and UAE laws generally find the notice provisions enforceable.

Common Law

Time bars are considered –*in most cases*- as condition precedent and ruled out to be enforceable.

Potential arguments to set aside their applications are based on the **Prevention Principle** and **Estoppel**.



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Thank you...