Notice Provisions – Has the Drafting Pendulum Swung Too Far?

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Introduction

Notice provisions have become one of the most consequential features of modern construction contracts. A single missed notice may determine whether a Contractor recovers substantial Cost, obtains an extension of time, or is denied relief altogether. Failure to give notice may not merely deprive the Contractor of its own remedy; it may expose the Contractor to substantial liability to the Employer. The stakes are therefore exceptionally high, particularly in the context of project delay, where notice regimes exert some of their most significant effects.[1]

The growing importance of notice provisions reflects a broader shift in construction law and practice. Modern standard forms such as FIDIC, NEC, and JCT increasingly rely upon tightly drafted, time-limited notice requirements, often expressed or interpreted as conditions precedent to entitlement. More recently, similar concepts have begun to appear in legislation. Article 816(3) of the UAE Civil Code, for example, elevates notice from a contractual mechanism to a statutory obligation, further reinforcing the central role which notice now occupies in project administration and risk allocation.

Yet the practical realities of construction projects sit uneasily with this increasing formalisation. Contractors often operate on modest margins, face commercial pressures that discourage confrontation, and work within project environments in which deference may be rewarded and assertiveness perceived as undesirable. These behavioural and psychological factors help explain why notices are sometimes not given, despite their obvious importance. They also help explain why the consequences of non-notification may appear commercially disproportionate.

The conventional justification for strict notice regimes is familiar. Notice is said to promote better project management by enabling contemporaneous investigation, facilitating mitigation, permitting re-planning or acceleration, and providing opportunities to avoid or reduce loss. These objectives are undoubtedly legitimate. However, this presentation suggests that an important implication of those justifications has received insufficient attention. If notice is required because it provides opportunities for investigation, mitigation, re-sequencing, acceleration, or other responsive measures, then those

[1] The issue of conditions precedent is, however, pervasive and not limited to notice provisions: see in insurance law, for example, Attleys Roofing v QBE [2026] EWHC 2742 (Comm), in which Pearce J held that specified hot works precautions imposed absolute obligations. Even an innocent or negligent failure could engage the condition precedent; recklessness was unnecessary.

same considerations should also provide the logical measure of the consequences of non-notification. Put differently, the rationale advanced for a notice provision should also determine the valuation of its breach.

That proposition points towards a counterfactual inquiry. The relevant question is not simply whether notice was omitted, but what difference timely notice would realistically have made. What opportunities were actually lost? What mitigating measures could credibly have been implemented? What financial consequences would likely have followed? Once the issue is framed in that way, automatic forfeiture becomes more difficult to justify. The connection between the commonly asserted rationale for notice provisions and the severe consequences often attached to their breach becomes less obvious than is sometimes assumed, yet is hardly if ever explored in the law or commentaries.

This presentation examines those issues through the lens of project delay, using a hypothetical based upon the FIDIC 2017 Red Book. It explores the practical realities of modern notice drafting, the judicial treatment of notice provisions, and the phenomenon of Contractor "double exposure", under which a Contractor may lose its own prolongation Cost whilst simultaneously becoming liable for the Employer's Delay Damages, even where the Employer's breach is itself the root cause of the delay.

The presentation then considers whether more balanced solutions are available, including reciprocal notice obligations, attenuation of remedies, mandatory consideration of factors such as prejudice, waiver, estoppel and prior knowledge, and counterfactual valuation grounded in the very objectives said to justify notice provisions. It concludes by asking whether the severe consequences now commonly attached to non-notification genuinely follow from the reasons advanced for requiring notice in the first place.

The Centrality of Time in Construction Claims

Critical time is very often the cornerstone, some would say obsessive focus, of claims on construction projects.[2]

[2] For the relevance, and potential importance, of often overlooked non-critical delays, see Franco Mastrandrea, *Localised Delays: The Poor Relation in Construction Claims?*, [2023] The International Construction Law Review 112.

Consider the following hypothetical example, in which the FIDIC 2017 Edition of the Red Conditions apply:

The Employer, under obligation to hand over the Site to the Contractor on 2 March 2026, failed to assemble or acquire ownership over it in sufficient time, and instead handed over the Site only on 1 September 2026. Neither Party furnished an advance warning. The Contractor first issued a Sub-Clause 20.2.1 notice on 3 April 2026, and on every monthly anniversary thereafter, until 3 September 2026. The Contractor's prolongation Cost ran at an average of USD 0.5million/week over the period. The Employer's Delay Damages were pre-determined and specified at USD 1million/week.

What should be the appropriate financial outcome of the Employer's 26 weeks' default?

The Contractor's Dilemma

Experience across international construction markets shows that Contractor margins, save in innovative, specialist, or niche sectors, are typically modest. That commercial fragility helps explain why a significant proportion of Contractors are reluctant to engage in open confrontation with Employers; notices of claim are frequently perceived as an expression of unwelcome assertiveness.

A further, and often underestimated, factor is psychological. Anecdotal evidence, particularly in the international marketplace, suggests that many contractors exhibit a marked anxiety about initiating conflict. A deferential and asymmetrical commercial relationship can emerge. The Contractor adopts a deferential posture, particularly in the early stages of a project, whether to avoid criticism, to cultivate a favourable impression, or because the Employer wields greater political or economic power. In some cases, the Contractor hopes that such deference will enhance prospects of a positive appraisal by the Employer in the eyes of others, or secure consideration for future work.

These sorts of factors also explain why a number of contractors who fail to give the relevant notices slide into insolvency, reducing the number of viable contractors in the marketplace and in consequence increasing prices to employers generally.

Strict notice regimes can thus increase Contractor risk premiums, reduce competition, and ultimately increase Employer costs.

Contractual and Statutory Notice Obligations

Although notice regimes in construction contracts are typically contractual in origin, the modern trend shows an increasing willingness of legislatures to impose statutory notice obligations that mirror, and in some cases exceed, the strictness found in standard forms. These statutory provisions elevate the concept of notice in contemporary project administration and further the consequences of non-notification.

A recent example is found in the UAE Civil Code, where Article 816(3), which took effect on 1 June 2026, now requires the Contractor to notify the employer immediately if any event or circumstance arises that may impede the proper execution of the work. Failure to do so results in the Contractor bearing the consequences of the unnotified matter. The provision is notable for three reasons.

First, it adopts the same early-warning philosophy that underpins modern standard forms such as FIDIC, NEC, and JCT. The statutory obligation is not merely procedural; it is substantive, attaching direct financial consequences to non-notification.

Second, it reflects a broader international trend: the normalisation of notice obligations. What began as a contractual device has evolved into a legal norm, with legislatures increasingly treating notice as a fundamental component of risk allocation and project governance.

Third, the statutory obligation underscores the asymmetry of risk borne by contractors. In many jurisdictions, statutory notice obligations apply only to contractors, not employers. This reinforces the imbalance already present in many standard forms, where contractors face severe consequences for non-notification while employers' own notice obligations are either non-existent or less stringent or consequential.

The emergence of statutory notice regimes therefore provides important context for understanding the contractual provisions examined in this lecture. They suggest that strict notice obligations form part of a broader legal movement, one whose implications merit careful scrutiny.

The Realities of Modern Notice Provisions

From time to time the Courts express reluctance to classify terms a condition precedent, given that such can have the effect of depriving a party to a contract of a right because of a trivial breach which has little or no prejudicial effect on the other and causes that other little or no loss: see, for example, the judgment

Beatson LJ in *Heritage Oil and Gas Limited v Tullow Uganda Limited* [2014] EWCA Civ 1048 at [33], suggesting that clear words are needed for a condition precedent to be found.

The reality, however, is that the trend is increasingly for notice provisions to be (1) time-limited, (2) drawn in narrow formal terms (see FIDIC Red Sub-Clause 1.3(b), for example), and (3) with precipitous consequences if not satisfied.

Consider, for example, NEC 4, Clause 61.3, which provides:

'…If the Contractor does not notify a compensation event within eight weeks of becoming aware that the event has happened, the Prices, the Completion Date or a Key Date are not changed unless the event arises from the Project Manager…giving an instruction…'

Clause 2.27 of JCT SBC/Q 2024 provides:

'1. If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice to the A/E of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event.

2. In respect of each event identified in the notice the Contractor shall, if practicable in such notice or otherwise in writing as soon as possible thereafter, give particulars of its expected effects, including an estimate of any expected delay in the completion of the Works or any Section beyond the relevant Completion Date.'

Loss and/or expense is made the subject of separate notification by way of clause 4.21:

1. The Contractor shall notify the A/E as soon as the likely effect of a Relevant Matter on regular progress… becomes (or should have become) reasonably apparent to him.

2. That notification shall be accompanied by or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and/or expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable… (ascertainment of)… the loss and/or expense incurred.'

Perhaps a more stringent example is to be seen at FIDIC Red Sub-Clause 20.2.1, which provides for **triggering** notices as follows:

'**The claiming Party** shall give a Notice to the Engineer, **describing the event or circumstance** giving rise to the cost, loss, delay…for which the Claim is made 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 (the "Notice of Claim" in these Conditions).
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 (in the case of the Employer as the claiming Party), **the Time for Completion (in the case of the Contractor as the claiming Party)** … **shall not be extended**, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.' (Emphasis supplied)

All of these provisions can be advanced - in argument - as conditions precedent to recovery: see in relation to the loss and/or expense provisions the case of an earlier version of the JCT terms *Walter Lilly v. Mackay*.[3]

[3] [2012] EWHC 1773 (TCC) from [463].

The significance of the point from the perspective of this presentation is that they can lead to the Contractor's double exposure.

The Claimed Justifications

A review of the now voluminous case-law and legal and technical literature can be reduced to two main propositions – that notice provisions such as these
(1) are aids to better project management, and (2) serve useful functions, such as to:

1. Warn the party entitled to the notice of the other party's intention to make a claim[4] which:
    a. secures an adjustment to the contract price or terms, or
    b. prolongs the stipulated time for completion of the contract by the notifying party;
2. Enable matters to be investigated while they are still current and to be acted upon as appropriate, thereby ensuring that the passage of time does not:
    a. obscure the elements of proof, or
    b. remove from the party entitled to the notice a proper opportunity to respond;
3. Inform the party entitled to the notice of the cause of the problem, to afford it an opportunity to remove that offending cause; and
4. Provide the party entitled to the notice the opportunity to mitigate adverse consequences by, for example:
    a. omitting work,
    b. otherwise varying the work,
    c. exploring/employing alternate remedial procedures, and/or
    d. requiring re-planning or acceleration of the Works.

Whilst these explanations appear to be reasonable and logical, they carry an often-overlooked implication. If notice is said to be required because it affords opportunities for investigation, mitigation, re-planning, acceleration, or other responsive measures, then the absence of notice should logically be valued by reference to the loss of those opportunities. The rationale for the notice provision therefore appears to require a counterfactual inquiry: what would the recipient of the notice actually have done had timely notice been given, and what financial difference would that have made? Once framed in that way, automatic forfeiture ceases to appear self-evidently connected to the justification advanced for the provision itself..

[4] The rationale for extending such protection to a party already in breach of contract may not always be self-evident.

In any event, many see such provisions as serving partisan interests by (1) representing one-sided, unnecessarily burdensome, overly-formalistic, contractual requirements, and (2) acting as administrative tripwires to deprive the (usually) less well informed, the unwary, or the non-contentious of an otherwise available remedy. They also see them as encouraging (a) an unnecessary proliferation of protective or fail-safe notices, such as, in relation to delay, notices of every possible delaying event, whether on or off the perceived critical path at the time (to reduce the risk that on one or other form of the diverse methods of available delay analysis, that event may turn out to have been on **a** critical path thrown up by such analysis), (b) increases in the costs of construction through the need to have in place resources dedicated to scouring for events to advance as notices, (c) reduction in vigilance, diminished understanding of project developments, and dilution of responsibility on the part of the Contract Administrator and (d) a convenient peg upon which a dispute resolver may be tempted to rely, thereby avoiding the more demanding exercise of addressing difficult issues of delay or valuation.

The Contractor's Double Exposure

In our hypothetical example a Contractor who fails to issue a qualifying notice, will fail to secure any of its own prolongation Cost (in our hypothetical case, of $13 million), **and** will be exposed to the full brunt of the Employer's Delay Damages (in our hypothetical case, of $26 million).

This extreme outcome (of a $39 million downside for the Contractor in our hypothetical example) does not sit well with the root cause of the problem - the Employer's failure to grant access to the Site to the Contractor. Nor does it sit well with the rationale behind the supposed justification for the notice provision. In particular, it fails in this latter respect to provide a valuation which reflects that contended-for justification.

It does not, in furtherance of that exercise, recognise the extent to which the Employer's Delay Damages would be reduced by: the cost/loss in accommodating any variations that the Employer would have introduced, any Contractor's/others' prolongation/disruption costs that would have remained regardless,

or the additional recoverable Cost to the Contractor/others that there would have been in any re-planning, acceleration, disruption, etc.

Any valuation of a remedy driven by the claimed justifications would logically require the Employer to show,[5] in light of the event which could have been the subject of a Contractor's notice: (1) the **specific actions** that the Employer would have taken in response (e.g., the introduction of particular variations/re-ordering of sequence/acceleration),[6] and (2) what the **resulting net loss/additional cost** would have been to the Employer had it taken the avoiding or ameliorating actions that it alleges it would have implemented had it been put on notice.

Judicial Responses to Notice Provisions

Common law jurisdictions have long explored a whole array of potential reasons for not enforcing a notices regime, including, in no particular order, that:

1. Upon a proper construction of the contract, the notice provision is not a condition precedent. On balance, many of the provisions in common use are likely to be construed as conditions precedent;[7]
2. To hold that the notice is a condition precedent would render the agreement commercially nonsensical, or unrealistic;
3. An alternative basis for recovery is preserved by the relevant contract;
4. The notice requirement has been waived by the person entitled to receive the notice;[8]
5. An estoppel operates against the person entitled to the notice;

[5] See, for a pointer that this may be the appropriate approach, and as to where the burden of proof lies in such cases, *Dawco Construction, Inc. v. United States*, 18 Cl. Ct. 682 (1989) (reversed in part on other grounds at 930 F.2d 872 (1991))

[6] Thus, in *Dawco Construction, Inc. v. United States*, 18 Cl. Ct. 682 (1989), it was found on the facts of the case at p. 695, that the defendant could not anyway have made any changes to its benefit, even had prompt notice been given.

[7] For a leading case on the general question whether a provision is a condition precedent, see *Bremer Handelsgesselschaft mbH v. Vanden Avenne-Izegem PVBA*, [1978] 2 Lloyd's Rep. 109, HL, concluding that (1) the setting of a definite time limit within which the notice is to be served; and (2) making it expressly plain that, unless the notice is served within that time, the party making the claim will lose its rights under the clause, are the exemplar components of such a provision.

[8] See, for example, *Education 4 Ayrshire Ltd. v. South Ayrshire Council*, [2009] ScotCS CSOH_146, in which Lord Glennie said at [19]:
'In some cases there is scope for the application of the principles of waiver or personal bar to operate so as to prevent a party, who has proceeded on the basis of a defective notice without taking the point, from subsequently raising it as a technical defence to the claim.'

The notice provision should succumb to a higher-ranking principle, such as the rule against prevention;[9]

6. As long as the spirit of the notice obligation has been complied with,[10] or the gist of the information to be conveyed has been provided,[11] the requirement for notice is satisfied;
7. A principle of *'futility'* operates,[12] rendering the notice provision irrelevant and/or unnecessary because the person for whose protection the provision is drawn is, absent the notice, in fact in no worse a state of knowledge (see also FIDIC Red Sub-Clause 20.2.5). This appears in English law to have been relegated to application only in circumstance where information is to be provided, and to have no application where the notice acts as a trigger for the running of time for the purposes of other specific contractual obligations;[13]
8. The person entitled to receive the notice suffers no prejudice (see also FIDIC Red Sub-Clause 20.2.5);[14]
9. There exists an arbitration agreement permitting the unsatisfied notice provision to be dispensed with;
10. The prescribed damages are, as a result of the stringent notice requirements, rendered a penalty (a concept alien to civil law jurisdictions);

[9] It has been held in England by *North Midland Building Ltd. v. Cyden Homes Ltd.*, [2018] EWCA Civ 1744, CA, however, that the prevention principle is not to be regarded as an overarching principle of law, but instead operates by way of an implied term (which, on general principle, can thus be crowded out by incompatible express terms, such as are the subject of this presentation).

[10] See, for example, *Ace Constructors, Inc. v. United States*, 70 Fed. Cl. 253 (2006).

[11] See, for example, *Winship Construction, Inc. v. City of Portland*, 2008 WL 3867849 (2008).

[12] See, for example, *Barrett Bros (Taxis) Ltd. v. Davies (Lickiss and Milestone Motor Policies at Lloyd's)*, [1966] 1 WLR 1334, [1966] 2 Lloyd's Rep. 1, [1966] 2 All ER 972, CA, in which Lord Denning MR said at p. 1339, in the context of an insurance contract making notification of particulars of any accident a condition precedent to liability of the insurer:
'… it was unnecessary for the motor-cyclist to send the documents to the insurers. They had all the relevant facts, and that absolved the motor-cyclist from doing more… Seeing that they had received the information from the police, it would be a futile thing to require the motor-cyclist himself to give them the self-same information. The law never compels a person to do that which is useless and unnecessary.'

[13] See, for example, *Glencore Grain Ltd. v. Flacker Shipping Ltd. (The "Happy Day")*, [2002] EWCA Civ. 1068, [2002] 2 Lloyd's Rep. 487, [2002] 2 All ER(Comm) 896, CA

[14] See, for example, *Alfred McAlpine Plc v. BAI (Run-Off) Ltd.*,[1998] 2 Lloyd's Rep. 694, (1998) 66 Con. LR 57, confirmed on appeal at (2000) 69 Con. LR 87, [2000] 1 All ER(Comm) 545, CA.
Cf. *Ace Constructors, Inc. v. United States* ,70 Fed. Cl. 253 (2006).
Cp. *Shinedean Ltd. v. Alldown Demolition (London) Ltd.*, [2006] EWCA Civ. 939, [2006] BLR 309, CA, in which a provision that information and assistance be provided to the insurer in order to enable the insurer to settle or resist any claim or institute proceedings had been breached by the insured was construed a condition precedent to liability. On the facts, insurers were entitled to receive information in good time whether they were in the end prejudiced by the insured's failure to achieve this or not.

11. A reservation of rights to make further claims in the future is made;[15]
12. Considerations of good faith apply (which enjoys a narrow bandwidth of encouragement in common law jurisdictions outside the United States, and, increasingly, Australia).

The Limited Success of Defences

Apart from waiver and estoppel (which are typically both heavily fact-specific and dependent), or express alternative remedies provisions, these grounds have, for a variety of reasons, largely failed in common law jurisdictions, where notice provisions tend to be strictly enforced, particularly in the current climate of "plain reading" interpretation of contractual provisions.

Some have suggested that to allow the party entitled to the notice to rely on its absence would be to allow that party to take advantage of its own separate wrong.[16] That however does not contend with the way English law approaches such matters - of construing the parties' objective intentions, and holding in the leading case of *King Crude Carriers SA and Others v. Ridgebury November LLC and Others*[17] that there is no general legal presumption that a party may not take advantage of its own breach of contract.

Is Any Relief Available to the Contractor Who Fails to Provide a Notice?

What, then can be done by the Contractor to try to salvage something from the wreckage of a failure to give a timely triggering notice?

FIDIC Red Sub-Clause 20.2.5 appears on first reading to be promising. It provides:

'If the Engineer has given a notice under Sub-Clause 20.2.2 [Engineer's initial response]…the Claim shall nevertheless be agreed or determined in accordance with Sub-Clause 20.2.5. The agreement or determination shall include whether or not the Notice shall be treated as a valid Notice…The circumstances which may be taken into account **(but shall not be binding)** may include

- whether or to what extent the other Party would be prejudiced by acceptance of the late submission (our item 9 above);
- …any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim… (our item 8 above). (Emphasis supplied)

[15] See, for example, *Graham Construction and Engineering (1985) Ltd. v. LaCaille Developments Inc.*, 2006ABQB 898, (2006) 70 Alta. L.R. (4th) 181, finding that the Contractor had provided notice to the owner that they should anticipate further claims when it reserved its rights in Change Orders.
[16] See, for example, *Keating on Construction Contracts*, 12th Edition, 2025, at paragraph 8-033.
Cf. Alghussein Establishment v. Eton College, [1988] 1 WLR 587, HL.
[17] [2025] UKSC 39 at [78].

This provision raises a number of concerns, however, such as its limited scope and the fact that it is expressed as a power, not an obligation.

The UNIDROIT Principles of International Commercial Contracts may alternatively be of assistance where no governing law is specified, or where those Principles are expressly invoked by the contract. Article 7.1.2 of the 2016 Edition, which appears to bear a close affinity with the common law prevention principle,[18] provides:[19]

'A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event as to which the first party bears the risk'.

Whilst a positive remedy for the claiming Contractor who fails to furnish a notice under an unamended FIDIC Red set of conditions and the UNIDROIT Principles do not apply may thus be faint, such a Contractor might nevertheless explore:

1. A variations-based remedy, which may not require a notice – such FIDIC Red Sub-Clause 20.2;

2. Non-critical path, i.e. localised, delay claims, which may avoid the need to comply notices for EOT.

Additionally, the Contractor may, where the Employer is the claiming party and the contract requires an Employer notice, seek to defend itself against a positive Employer claim by pressing for a strict satisfaction by the Employer of its notice requirements - where they exist, such as the FIDIC Red Sub-Clause 8.8, which provides:

'If the Contractor **fails to comply** with Sub-Clause 8.2 [Time for Completion], the Employer shall be entitled **subject to Sub-Clause 20.2 [Claims for Payment and/or EOT]** to payment of Delay Damages by the Contractor **for this default**'**.** (Emphasis supplied).

But even those provisions appear to allow the Employer much greater latitude, by pointing to a substantially later date for the giving of the Employer notice than the date by which the Employer became aware, or should have become aware that the then Time for Completion would not be met by the

[18] Explained by Jackson J (as he then was) in *Multiplex Constructions (UK) Ltd. v. Honeywell Control Systems Ltd. (No. 2)*, [2007] EWHC 447 (TCC), at [47], as:
'The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing.'

[19] Interestingly, it provides the following illustration:
'A agrees to perform building work on B's land beginning on 1 February. If B locks the gate to the land and does not allow A entry, B cannot complain that A has failed to begin work. B's conduct will often amount to non-excused non-performance either because of an express provision entitling A to access the land or because B's conduct infringes the obligations of good faith and co-operation.'

Contractor. This opens the door to an asymmetrical notice system - with the Contractor being judged against progress, whilst the Employer would be judged only against completion.

Other Contractor self-help remedies

Clause 4.24 of JCT SBC/Q 2024 provides that the provisions of Clauses 4.20 to 4.23 shall not limit or affect any other rights and remedies of the Contractor. This is a pointer to the Contractor's otherwise common law remedies. Put differently, the loss and/or expense provisions are not the Contractor's sole remedy for the relevant matters covered expressly by the loss and/or expense provisions: a matter we have seen at item 3 in the judicial responses lists above. [20]

That will not, however, save the Contractor from paying LADs unnecessarily.

Stringent notice provisions might, however, encourage aberrant behaviour in a Contractor who sees no other way out for itself where it was not otherwise at fault. One possible avenue - where the express provisions do not otherwise preclude it - may be to choose to accelerate the works in view of the employer's breach, spending - and being entitled to recover from the Employer - just as much in getting, or attempting to get, to the original contract date. Although non-US common law does not openly recognise constructive acceleration, it does not close the door on acceleration in circumstances where the Contractor is denied an extension of time and where acceleration can properly be attributed to measures taken in mitigation of the Employer's breach.[21]

But the only safe advice for the Contractor is clear and simple: (1) comply with the notice provisions, or run a serious risk of harsh consequences, and do not rely on either (2) the Contract Administrator or (3) the broader law for relief.

[20] See, for example, *WW Gear Construction Ltd. v. McGee Group Ltd.*, [2010] EWHC 1460 (TCC), in which Akenhead J said, at [10] in relation to a contract providing for the condition precedent issue of notices:
'The Employer through its Counsel has expressly conceded that Clause 4.25 (a provision expressly reserving the parties' common law rights)… does not operate to prevent the Contractor's claims at common law, including claims for damages for breach of contract, from being pursued even if Clause 4.21 as a whole has not been complied with by the Contractor. In my judgement, that was a proper concession to make.'
[21] See, for example, *Cleveland Bridge UK Ltd v Severfield-Rowen Structures Ltd.* [2012] EWHC 3652 (TCC).

Is a More Balanced Solution Available?

Given these imponderables, it is legitimate to ask whether a more balanced solution is available in circumstances where the Contractor fails to issue a qualifying notice. Several possibilities merit exploration.

A first option is true reciprocity: both parties should be subject to an obligation to give notice, governed by identical triggering criteria and identical timing requirements. Many standard contractual provisions provide no reciprocal notice obligations let alone equivalent ones. In the context of project delay, this would mean that both Contractor and Employer should issue a notice to protect their respective interests, and that failure to do so would preclude either from recovering delay related financial remedies against the other. Such symmetry would address the current structural imbalance, in which the Contractor alone bears the brunt of non-notification.

A second option would be a form of mutual attenuation: neither party would be entitled to a financial remedy against the other if it failed to give the required notice. This approach would still retain a meaningful deterrent effect, because the party who fails to notify would lose the positive financial remedy it would otherwise have enjoyed - such as the Contractor's prolongation Cost in the case of delay - while avoiding the extreme and often unjust inversion of liability seen under current drafting.

A third option would be to include a more comprehensive and mandatory list of circumstances that justify the non-issue of a notice. Such circumstances could be drawn from the established jurisprudential exceptions - futility, absence of prejudice, prior knowledge, waiver, estoppel, and so forth. Crucially, these factors would be mandatory considerations, not discretionary ones left to an interested party such as the Engineer under the FIDIC forms. This would bring greater balance and predictability to the regime.

A fourth, and arguably the most principled, approach would be a valuation-based counterfactual exercise grounded in the very justifications advanced for strict enforcement of notice provisions - namely, that timely notice would have enabled the Employer to take ameliorating steps. Under this approach, the financial outcome would be determined by assessing what the Employer could credibly have done had notice been given, and what the resulting net effect would have been.

Applying this to the hypothetical example: suppose the Employer could show that, had it been notified, it could have re arranged the Works and released access to the Site five weeks earlier. Five of the twenty six weeks of delay could therefore have been avoided. The valuation would then proceed as follows:

Employer Delay Damages for the avoidable period: Five weeks at USD 1 million per week = USD 5 million. No Delay Damages would be recoverable for the remaining delay, as its source would still be the Employer's original breach.

Contractor's additional cost of implementing the amelioration: The varied work, re planning, acceleration, disruption, etc., required to achieve the five week improvement - say USD 5 million.

Contractor's prolongation Cost for the remaining delay: Twenty one weeks at USD 0.5 million per week = USD 10.5 million.

The net outcome would be: – USD 5 million + USD 5 million + USD 10.5 million = USD 10.5 million payable to the Contractor.
This is less than the USD 13 million prolongation Cost actually incurred, but it reflects the Employer's hypothetical ability to mitigate, had notice been given.

A refinement of this approach would be to cap the Contractor's recovery at the actual prolongation Cost incurred, so that the counterfactual exercise cannot produce a windfall.

The same methodology could be applied to neutral causes of delay, such as exceptionally adverse climatic conditions.

In our hypothetical, however, the Employer would almost certainly have been unable to improve the date of Site handover. The counterfactual exercise would therefore produce the same result as if the Contractor had given a timely notice: recovery of USD 13 million in prolongation Cost and no Delay Damages. That outcome would by many be regarded as entirely defensible on the facts.

Conclusion

Notice provisions have evolved from modest procedural devices into powerful instruments of risk allocation, entitlement, and forfeiture. Their increasing formalisation across standard forms - and, in some jurisdictions, their elevation into statutory obligations - has transformed the landscape of delay claims. Yet the strictness of these regimes sits uneasily with the commercial, behavioural, and administrative realities of construction projects.

The consequences of non-notification can be extreme. A Contractor who fails to issue a notice may lose its entitlement to prolongation Cost and simultaneously become liable for the Employer's Delay Damages, even where the Employer's breach is the root cause of the delay. This phenomenon of **double exposure** can produce outcomes in which the party responsible for the underlying problem secures a substantial financial advantage through the operation of a procedural mechanism.

The justifications commonly advanced for strict notice regimes are that they promote better project management, permit contemporaneous investigation, enable mitigation, and create opportunities to avoid or reduce loss. Those objectives are legitimate. However, they carry an often-overlooked implication. If notice matters because it creates opportunities to investigate, mitigate, re-plan, accelerate, or otherwise reduce adverse consequences, then the absence of notice should logically be assessed by reference to the value of those lost opportunities. The rationale for the notice provision therefore points towards a counterfactual inquiry. The question becomes not simply whether notice was omitted, but what difference timely notice would realistically have made.

Viewed through that lens, automatic forfeiture becomes difficult to justify. A complete loss of entitlement bears no necessary relationship to the opportunities allegedly lost through non-notification. Indeed, in many cases, a counterfactual examination may reveal that timely notice would have made little or no practical difference. In others, it may demonstrate that genuine opportunities for mitigation existed and that an appropriate reduction in recovery should follow. Either way, the financial consequences become connected to the very reasons said to justify the notice regime in the first place.

The conventional debate has largely asked whether notice provisions should exist and whether they should be enforced. Those questions are important, but they may not be the most important questions. A more fundamental inquiry is whether the consequences of non-notification have become disconnected from the purposes for which notice provisions are said to exist. If the justification for notice lies in preserving opportunities for investigation and mitigation, then the appropriate response to non-notification should ordinarily be measured by reference to the value of those lost opportunities, not by automatic forfeiture untethered from any demonstrated prejudice.

There remain a number of possible routes towards a more balanced regime, including reciprocal notice obligations, mandatory consideration of factors such as prejudice, prior knowledge, waiver, estoppel and futility, attenuation of remedies, and more balanced drafting generally. Yet the most principled solution may be the simplest: to require the party relying upon non-notification to demonstrate what it would actually have done had notice been given, and what financial difference that would realistically have made.

Notice provisions were originally intended to facilitate project management. Increasingly, they determine substantive outcomes irrespective of project management. The real question is no longer

whether notice matters. It is whether the severe consequences now attached to non-notification genuinely follow from the reasons usually advanced for requiring notice at all. This presentation does not propose a free-standing policy preference. It seeks to derive the valuation exercise from the very rationale advanced by proponents of strict notice provisions.

In summary, I distil three propositions:

1. Notice has a legitimate project-management function.
2. But automatic forfeiture may bear no relationship to the loss caused by late notice.
3. The principled inquiry is: what would timely notice realistically have changed?

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