

LB/DOR/107/2018

**DEVELOPMENTS TO BE BROUGHT INTO
CONDITION PRECEDENT NOTICE PROVISION IN
CONTRACTOR'S CLAIM CLAUSE FOR
BETTERMENT OF THE CONTRACTOR:
CONTRACTOR'S PERSPECTIVE**

LIBRARY
UNIVERSITY OF MORATUWA, SRI LANKA
MORATUWA



Thiththalapitige Aroshi Kalhara Karunathilake

149114 L

Dissertation submitted in partial fulfillment of the requirement for the
degree Master of Science in Construction Law and Dispute Resolution

Department of Building Economics

TH 36064

CD ROM

University of Moratuwa

Sri Lanka

February 2018



TH3606

TH3606

69"18"

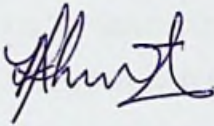
69:34(043)

DECLARATION

I declare that this is my own work and this dissertation does not incorporate without acknowledgement any material previously submitted for a Degree or Diploma in any other University or institute of higher learning and to the best of my knowledge and belief it does not contain any material previously published or written by another except where acknowledgement is made in the text.

Also, I hereby grant to University of Moratuwa the non-exclusive right to reproduce and distribute my dissertation, in whole or in part in print, electronic or other medium. I retain the right to use this content in whole or part in future works (such as articles or books).

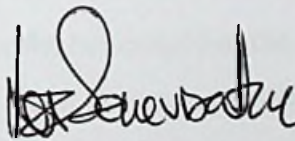
Signature:



Date: 22 / 06 / 2018 .

The above candidate has carried out research for the Masters Dissertation under my supervision.

Signature of supervisor:



Date:

22/06/2018

Department of Building Economics
Faculty of Architecture
University of Moratuwa
Sri Lanka

ABSTRACT

There is now a growing propensity to apply the “condition precedent” notice provision to the contractor’s claim clause in standard forms of contracts throughout the world. Accordingly, valid and meritorious claims of the contractors are forfeited if the contractor cannot comply with the time bar notice provision. The main intent of this notification is to alert the employer or the engineer at an early stage about the events that will take root to incur additional time and/or cost to the project and allow them to manage relevant consequences in fact. In that sense, it is questionable how the contractor can be deprived of his right to receive additional payment and/or time for a real claim situation, only because of the lack of timely notification. On the contrary, notification of the employer's claim is required to give as soon as possible after the employer became aware of the event giving rise to the claim. Therefore, the time bar notice provision in contractor’s claim clause is now argued critically both in the construction industry as well as in the judiciary worldwide.

Therefore, this document examines the importance of claim notification with respect to the opinion of contractors and the causes of non-compliance with the notification provision. To understand the perception of contractors in the industry, a survey of questionnaires and unstructured interviews was conducted. Therefore, several additional reasons were identified for the lack of claim notices despite the reasons available in the literature. Further, this paper examines challenges to condition precedent notice provision in contractor’s claim clause and proposes suitable developments to the same for the betterment of the contractor by addressing identified shortfalls in the contractor’s claim clause. According to the collected data and analysis procedures employed, the most affected challenges to contractor’s claim clause were: “Unjust enrichment”, “Conflicts with Prevention Principal”, “Defense for claims”, “Doctrine of Penalty”, “Unlawful exercise of rights” and “Loosing good faith obligation”. It is important to address those challenges when developing the contractor’s claim clause.

Keywords: Condition Precedent, Time bar, Notice Provision, Contractor’s Claim, Standard Forms of Contract.

DEDICATION

I dedicate this piece of work to my beloved

Parents, Sister



Husband.....

ACKNOWLEDGMENT

This dissertation is achieved to be in debt with much dedication and admiration from many people who have contributed in many ways. I express my gratitude to each and every individual for their encouragement, values and ideas, assistance and specially their commitment towards this research to make it a success.

It is my leading duty to pay my gratitude to the Department of Building Economics, University of Moratuwa, and all the academic as well as non-academic staff of the Department for the remarkable service rendered. I extend my gratitude to Dr. (Mrs.) Yasangika Sandanayake, Head of the Department of Building Economics, for her great interest, encouragement and the guidance to the achievement of producing this dissertation.

Furthermore, I should express my special gratitude to my supervisor, Ch.QS. Indunil Seneviratne, Senior lecturer Department of Building Economics, for his outstanding supervision, constructive criticism and guidance significantly contributed towards the success of this study. Moreover I'm grateful to senior and junior lectures of the Department of Building Economics and other visiting lectures for their valuable guidance throughout the research process.

Finally, I express my heartfelt thanks for my family members, colleagues and my company management for giving me an outstanding corporation to make this dissertation achievable.

Karunathilake T. A. K.

28th February 2018

TABLE OF CONTENT

DECLARATION.....	i
ABSTRACT	ii
DEDICATION.....	iii
ACKNOWLEDGMENT.....	iv
TABLE OF CONTENT	v
LIST OF FIGURES	ix
LIST OF TABLES	x
LIST OF ABBREVIATION.....	xi
LIST OF APPENDICES.....	xii
CHAPTER ONE.....	1
1 INTRODUCTION	1
1.1 Background	1
1.2 Research Problem.....	4
1.3 Aim.....	4
1.4 Objectives.....	4
1.5 Methodology	5
1.6 Scope and Limitation.....	6
1.7 Chapter Breakdown.....	7
CHAPTER TWO.....	8
2 LITERATURE REVIEW	8
2.1 Introduction	8
2.2 Time Bar Notice Provision in FIDIC and NEC Contracts	9

2.2.1	Standard Forms of Contract	10
2.2.2	Time Bar Notice Provision in Standard Forms of Contracts	10
2.2.2.1	The New Engineering Contract: ECC (NEC2 & 3) (1995, 2005)	11
2.2.2.2	FIDIC Conditions of Contract: 1999 (the Red Book).....	13
2.2.3	Notice Requirement in Contractor's Claim	14
2.3	Construction Claims and Importance of Notice Provision.....	15
2.3.1	Types of Claims	16
2.3.2	Contractual Claims Relates to Contractor.....	17
2.3.3	Importance of Notices for Contractor's Claims	19
2.3.4	Causes for Not Complying with Notice Provision.....	21
2.4	Traditional Challenges to Condition Precedent Notice Provision.....	23
2.4.1	Matter of Interpretation	23
2.4.2	Prevention Principle	24
2.4.3	Doctrine of Penalty	27
2.4.4	Duty to Act in Good Faith.....	29
2.4.5	Other Challenges to Condition Precedent Notice Provision.....	30
2.5	Conflicts in Time Bar Clauses.....	31
2.5.1	Conflicting Judgments relate to Time Bar Notice Provision	32
2.5.2	Better Approach to Time Bar Notice Provision.....	34
2.6	Chapter Summary	36
CHAPTER THREE		38
3	RESEARCH DESIGN AND METHODOLOGY	38
3.1	Introduction	38
3.2	Research Background.....	38
3.3	Research Design	39

3.3.1	Research Approach	40
3.3.2	Research Methodology.....	43
3.3.3	Research Strategy.....	44
3.3.3.1	Survey Research Strategy	45
3.3.3.2	Justification of using Survey Strategy	45
3.3.4	Research Technique	46
3.3.4.1	Data Collection Technique	46
3.3.4.2	Data Analysis Technique.....	49
3.4	Chapter Summary.....	51
CHAPTER FOUR.....		52
4	DATA ANALYSIS AND FINDINGS.....	52
4.1	Introduction	52
4.2	Preliminary survey	52
4.2.1	Findings from Preliminary Survey.....	53
4.3	Questionnaire Survey	56
4.3.1	Respondents' Profile	56
4.3.1.1	Respondent's Designations.....	56
4.3.1.2	Respondent's Experience.....	57
4.3.1.3	Respondent's Educational Background	59
4.3.2	Respondents' Experience with Time Bar Notice Provision.....	61
4.3.2.1	Projects with Condition Precedent Notice Provision.....	61
4.3.2.2	Regularity of Providing Notices	62
4.3.2.3	Claim Rejection due to Lack of Notices.....	62
4.3.2.4	Determination from the Engineer within a Reasonable Time	63
4.3.3	Importance of Condition Precedent Notice Provision	64

4.3.3.1	Is it important; notice provision as condition precedent?	64
4.3.3.2	Importance of Condition Precedent Notice Provision	65
4.3.3.3	Objections for Condition Precedent Notice Provision.....	66
4.3.3.4	Contractors' Inability to Comply with Notice Provision.....	67
4.3.4	Challenges to Condition Precedent Notice Provision	71
4.3.4.1	Does the Contractor Harmed by Condition Precedent Notice?	72
4.3.4.2	Factors Caused to Prejudice the Contractor.....	72
4.3.4.3	Significant Challenges to Condition Precedent Notice Provision	74
4.3.5	Developments for Contractor's Claim Clause	76
4.3.5.1	Is it Need to Develop Contractor's Claim Clause?.....	76
4.3.5.2	Proposed Developments to Contractor's Claim Clause.....	79
CHAPTER FIVE.....		82
5	CONCLUSION AND RECOMMENDATION.....	82
5.1	Conclusion.....	82
5.2	Recommendations	86
5.3	Further Research.....	87
REFERENCES		88
APPENDIX A		97
APPENDIX B.....		105

LIST OF FIGURES

Figure 1-1: Chapter breakdown	7
Figure 2-1: Illustration of prevention principle concept	25
Figure 3-1: Research onion	40
Figure 3-2: Research design format	42
Figure 3-3: Population, sample and individual cases.....	47
Figure 4-1: Respondent's designations	57
Figure 4-2: Respondent's experience.....	58
Figure 4-3: Respondents' experience in contractor background.....	59
Figure 4-4: Familiar Standard Forms of Contracts of respondents'	60
Figure 4-5: Projects with condition precedent notice provision	61
Figure 4-6: Frequency of providing notices.....	62
Figure 4-7: Claim rejection due to lack of notices.....	63
Figure 4-8: Did engineer determine within a reasonable time?.....	63
Figure 4-9: Is it important; notice provision as condition precedent?	64
Figure 4-10: RII analysis for reasons of failure to comply with notice provision	68
Figure 4-11: Does the contractor harmed by time bars?	72
Figure 4-12: Challenges to condition precedent notice provision	74
Figure 4-13: Should the condition precedent notice provision be developed?	76
Figure 4-14: Suitability of proposed developments to contractor' claim clause	79

LIST OF TABLES

Table 2-1: Claim Procedure of Standard Forms (NEC2, 3 and FIDIC 1999).....	15
Table 2-2: Contractor's entitlement for EOT & Contract Value as per PBA (2005)	18
Table 4-1: Experts' profile	53
Table 4-2: Designations of the respondents	56
Table 4-3: Experience of the respondents	57
Table 4-4: Respondents experience as a contractor	58
Table 4-5: Respondent's educational background	59
Table 4-6: Standard contract documents familiar with	60
Table 4-7: Importance of condition precedent notice provision	65
Table 4-8: Objections for condition precedent notice provision.....	66
Table 4-9: Common Reasons for not complying with notice provision	69
Table 4-10: Additional reasons for not complying with notice provision	70
Table 4-11: Factors caused to prejudice the contractor	73
Table 4-12: Important factors for developing time bar notice provision	78
Table 4-13: Suitable developments to the Contractor's claim clause	80
Table 4-14: Proposed developments to contractor's claim clause	81

LIST OF ABBREVIATION

Abbreviation	Description
CIOB	: Chartered Institute of Building
ECC	: Engineering and Construction Contract
EOT	: Extension of Time
FIDIC	: Fédération Internationale Des Ingénieurs Conseils (International Federation of Consulting Engineers)
GCC	: General Conditions of Contract for Construction
JBCC	: Joint Building Contract Committee
JCT	: Joint Contract Tribunal
LD	: Liquidated Damages
NEC	: New Engineering Contract
PBA	: Principal Building Agreement
RICS	: Royal Institute of Chartered Surveyors
SBD	: Standard Bidding Document
UK	: United Kingdom

LIST OF APPENDICES

Appendix	Description
Appendix – A :	Sample Questionnaire
Appendix – B :	Preliminary Interview Guide Line