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

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Thiththalapitige Aroshi Kalhara Karunathilake

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

Department of Building Economics

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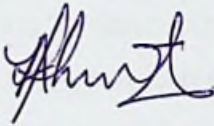
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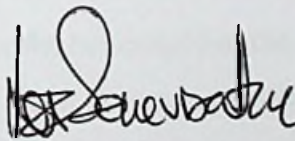
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Department of Building Economics
Faculty of Architecture
University of Moratuwa
Sri Lanka

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.

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Karunathilake T. A. K.

28th February 2018

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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

CHAPTER 01

INTRODUCTION

CHAPTER ONE

1 INTRODUCTION

1.1 Background

In modern construction industry, one of the facts that standard form of contracts appealing to its users is that it offers specific provisions or procedures that should be followed when executing works specifically with regard to claim notification procedures (Aibinu, 2009). Therefore, there is an increasing tendency in construction contracts to include time bar clauses which are intended to have the effect of disallowing the contractor a claim that might otherwise be legally recognizable (Glover, 2008).

As per Block (2013), many construction contracts include some form of notice provision, requiring one party to provide the other with written notice of a given event at a specified time in order to trigger certain rights or obligations under the agreement. A failure to satisfy such a notice requirement can, in certain circumstances, lead to the forfeiture of contractual rights.

However, as per Gould (2008), standard construction contract forms have not traditionally included time-bar provisions. Many standard forms required a notice to be given within a specified period.

It is now common to find time-bar provisions in many of the major forms of construction contracts. They appear in NEC 3, in the FIDIC suite of contracts and the ICE forms. Sub clause 20.1 of the FIDIC forms of contract, for example, creates a time-bar that gives a contractor 28 days to put in a notice of a claim for additional cost and/ or extension of time. Given that the effect of a failure to issue a 28 day notice is an apparent bar on any claim, it is unsurprising that time-bar clauses have been the

subject of much consideration and review. Recent decisions in the courts show that these clauses are being construed strictly (Tweeddale & Tweeddale, 2009).

The primary objective of time-bar provision is to alert the employer/contract administrator to the contractor's claim, allow speedy evaluation and to prevent the stock piling of claims (Lal, 2007). As explained by (Pickavance, 1997), a contractor's notice of delays is a form of communication. The contractor's notice would enable the owner consider the financial consequences (Aibinu, 2009).

The traditional view of UK courts regarding the time scales of notices in construction contracts is that it is "directory" rather than "mandatory", unless that is clearly state that the party with a claim will lose the right to claim if it fails to comply with the required time scale (Glover, 2008). Further, House of Lord in the case of *Bremer Handelgesellschaft mbH v Vanden Avenne Izegem nv* (1978), held that "(i) it states the precise time within which the notice is to be served, and (ii) it makes plain by express language that unless the notice is served within that time the party making the claim will lose its rights under the clause". Thus it was expressly makes clear in Sub Clause 20.1 in FIDIC 1999.

From a contractor's viewpoint, strict enforcement of the time limit for notice has been described as unfair (Sandberg, 1999). Wahlgren (2002) described time bar clauses as favorable to the developers/employers. An overview of the literature and court cases dealing with notice requirements in the United Kingdom, Australia, Scotland, and the United States suggest that courts have taken different positions depending on the facts of each case when asked to determine the enforceability of time bar clauses. On the subject, it appears that there is collision of legal principles (Aibinu, 2009).

A court's analysis depends heavily on the nature and wording of the notice provision in question and the surrounding circumstances. "Strict" notice provisions almost always render notice a condition precedent to the triggering of a contractual right or duty (Block, 2013).

It would allow the owner to consider cancellation of any directed changes causing the delay or consider alternative instruction so as to mitigate the consequential impact on

the project. For example, the owner may give appropriate instruction to avoid the problem. Contractor's notice also allows the owner the opportunity to plan for financial consequences of the event that is causing the delays if it is unavoidable (Bramble & Callahan, 1992). Therefore, the implication of a contractor's failure to give notice is that it takes away, from the owner, the opportunity to mitigate the damages as well as the opportunity to consider the financial consequences of the delay and perhaps take remedial action if necessary or desirable. In *Cherry Hill Construction, Inc. v. Maryland Transportation Authority* (1999) an additional purpose of a contractor's notice is that it gives the employer the opportunity to conduct a contemporaneous investigation of the basis of the contractor's claims rather than after the fact assessment.

The Australian case of *Gaymark Investments v Walter Construction Group* (1999) *NTSC 143*, however, held that where there is a delay in completion due to an act of prevention by the employer and the contractor does not comply with the notice provisions, although the result is that no extension of time can be granted, the employer could not claim liquidated damages. There is to date no English law on this point, although it is a well established principle that a party will not be permitted to take advantage of its wrongs (*Alghussein v. Eton College*, 1985).

It should be noted in passing that if the time is extended so as to compensate the contractor for delay caused by the employer, then the right of the employer to claim liquidated damages is preserved. Therefore, another critical issue that has been questioned in courts due to non compliance with contractor's notice provision is the applicability of prevention principle. That is where the contractor has failed to give claim notice to the employer; the employer cannot rely on its non-performance if it was caused by his own prevention act (Black, 2004).

The doctrine of penalty is another issue raised with enforcement of time bar notice provision. Where such a provision is a condition precedent to an extension of time, a failure by a contractor to comply with the provision may deprive the contractor of an extension of time, and allow the owner to recovery liquidated damages. This could be a penalty payment where cause of delay is due to employer's action (Smith, 2010)

What remains are conflicting views as to the effect of time bar provisions where there has been an employer caused delay. Accordingly, one lawyer's view was that a contractor should be liable for liquidated damages for not complying with notice provision (Lal, 2007) and another lawyer's view is that: "the claim notification provisions should not apply to breaches of contract" (Tweeddale, 2006).

1.2 Research Problem

Recently, many of the standard forms of contracts contain condition precedent time bar clauses for contractor's claim notifications. The most prominent objective of the notice provision is to make attentive the employer or contract administrator on events that can cause to extend project completion or incur additional cost. Therefore, many construction contracts include some strict notice provision, requiring contractor to provide written notice of a claimable event at a specified time in order to claim time extension or compensation under the agreement. A failure to satisfy such a notice requirement can, in certain circumstances, lead to the forfeiture of contractual rights.

It is questionable whether the contractor would be treated unfairly, when the contractor is unable to give notices as per the contract and end in a situation he is not entitled to time and/or cost where he should be if the time bar is not available.

1.3 Aim

Aim of this research is to examine challenges to condition precedent notice provision in contractor's claim clause and to propose relevant developments to be brought for the betterment of the contractor as per contractor's perspective.

1.4 Objectives

- To identify condition precedent notice provisions in FIDIC 1999, NEC 2 and NEC 3 standard forms of contracts.
- To identify the importance of condition precedent notice provision to notify of contractor's claim.
- To identify reasons for inability of contractors to comply with condition precedent notice provision in contractor's claim clause.

- To examine challenges to condition precedent notice provision in contractor's claim clause as per contractor's perspective.
- Examine different views to modify condition precedent notice provision in contractor's claim clause as per contractor's perspective.

1.5 Methodology

Literature Review

As the first stage, clear understanding will be acquired regarding the condition precedent notice provision clauses in FIDIC 1999, NEC 2 and NEC 3 conditions of contracts and their condition precedent requirements. Then a comprehensive literature survey will be conducted to gather knowledge in terms of related court decisions and to examine challenges to condition precedent notice provision in contractor's claim clause.

Preliminary Survey

In the preliminary survey, interviews will be conducted with highly experienced experts to obtain views about the enforcing of claim notice provision as condition precedent based on its applicability in current industry, to obtain advices to prepare questionnaire and to find suggestions to deal with challenges in enforcing condition precedent notice provision.

Questionnaire Survey

In the field survey, comprehensive questionnaire survey will be conducted with experienced contractors to obtain reasons for inability to comply with notice provisions and to seek their views on challenges and developments to be brought in to condition precedent notice provision. Then a desk study will be carried out to identify most frequent and prominent challenges and developments to be brought in to condition precedent notice provision.

Finally the data obtained will be analysed to propose developments to condition precedent notice provision in contractor's claim clause for the betterment of the contractor.

1.6 Scope and Limitation

Scope and limitation that restrict the applicability of this research is explained below.

- The research will be focused on Sri Lankan construction industry.
- The research will be focused on practitioners who have experience in contractor's claim clause established with condition precedent notice provision.
- Research will be carried out under the limitations of readers who are practitioners of the Sri Lankan construction industry where English (the language from which, selected standard form of contract are written) is a second language.

1.7 Chapter Breakdown

Flow of the chapters are briefly explained in the below figure 1-1.

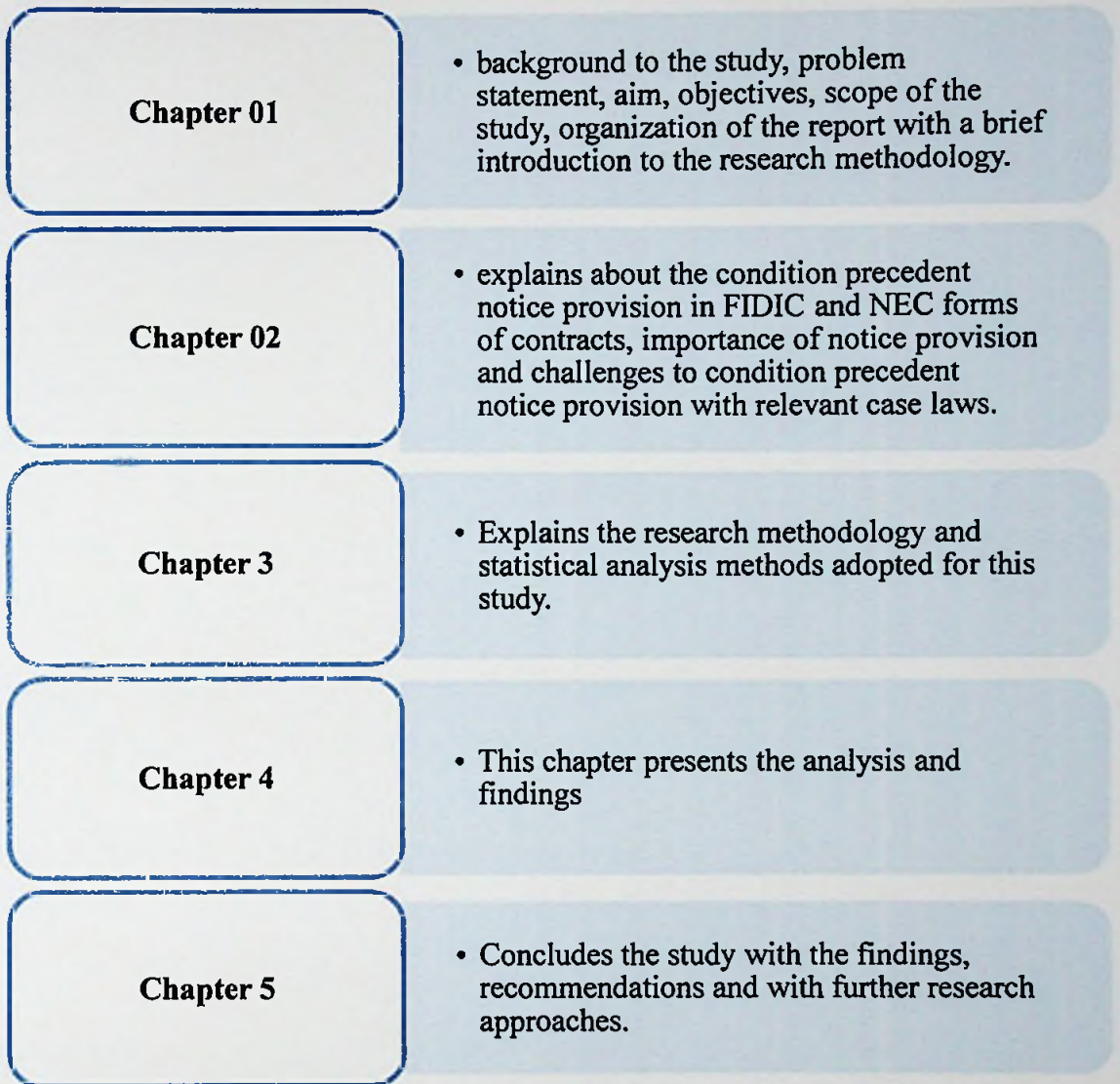


Figure 1-1: Chapter breakdown

CHAPTER TWO

2 LITERATURE REVIEW

2.1 Introduction

In modern construction industry, One of the facts that the standard form of contracts that appeal to its users is that it provides specific provisions or procedures that must be followed when executing jobs specifically with respect to the claim notification procedures. If parties thus fail to comply with such provisions and procedures, specially stipulated time limits, it could give rise to grounds on which claims may be rejected by the engineer/employer.

Time-bar provisions started gaining momentum as a result of development of contract law and began to be widely used internationally when introduced by FIDIC and by NEC3 in 1999 and 2005 respectively. When it comes to Sri Lankan context, SBD/02 mostly similar to FIDIC 1999 version has removed the condition precedent notice provision from the contractor's claim clause. However it can be seen that some clients tend to amend the relevant clause in contract data to condition precedent.

The main intension of this provision is to alert the employer in an early stage if and when the contractor considers that the progress of the works is likely to be, or has adversely been, affected by an event, thus allowing him an opportunity to consider the steps of mitigation (if any) when the financial consequences become apparent.

In practice, many experienced contractors who are fully aware of the time-bar rules inevitably fail, for various reasons, to notify their claims and many employers take advantage of the provision to defeat those claims. For that specific reason, contractors view the provision as unduly harsh and try to challenge its operation using various



legal tools available under common law, such as the prevention principle, the contract interpretation, the inequality, the waiver/estoppel, etc.

Hence, this study seeks to examine literature on this conflict. Firstly, examines the contractor's claim clause in NEC2, NEC3 standard forms of contract and FIDIC 1999 Red book and its time bar provisions. This further elaborates notice requirement and relevant importance on behalf of both parties to the contract. Next section looks at construction claims by evaluating contractor's claim for extension of time and employer's claim for LD under the standard forms of contract. Further, next section examines about the challenges to condition precedent notice provision with relevant judgments and rules in civil law countries. Moreover, English and Scottish cases in both favor and denying of notice requirement as condition precedent are discussed in subsequent sections. At the end of this chapter it attempts to review literature on better approach to condition precedent notice provision in contractor's claim clause.

2.2 Time Bar Notice Provision in FIDIC and NEC Contracts

A time bar claim notice provision, classically states that the failure to provide valid notice with regard to time or cost overrun would result in the defeat of entitlement to that claim and is one of the most attentive provision in construction contracts that had arguments beyond others (Kassem, 2015).

As per Wilsoncroft (2009), the use of establishing such notice provision in many standard forms of contracts and particular conditions, could be said to demonstrate the upward expectation of clients and funders to control their risks of ultimate, project cost overruns.

Further, Giles' and Gibsens' (2014) view is that, more collaborative approach in relation to claims for additional time and money between the main two parties in a contract could be achieved through an effective time bar clause and it can be used as a tool for view that.

2.2.1 Standard Forms of Contract

There are several “standard” forms of contracts available in the world and the extent to which any of these contracts are used is unknown.

Standard form of contract is a written agreement for contracting parties, client or employer and contractor. Standardize version of anything is based on a concept of a majority requirement of the parties using it. Further, “Standard” is something which used as a measure to make comparison with a common base. Likewise the “Standard Form of Contract” can be explained as a common basis for a contract agreement which defines the rights and obligations of the contract parties (Jayamanna, 2001).

Similarly, a standard conditions of contracts is a creation of experiences acquired in exercise of the construction contracts in all over the world, are applied consistently as general provisions, some provisions are modified essentially according to the geological location and conditions of the construction business as per Turegun (2006).

Whatever the type of project, time, cost and fit for purpose are the fundamental requirements for it to be successful and it is universally recognized (Sida, 2008). Hence a standard form of contract is generally published by one of the major professional institutions in the world.

Therefore, a standard construction contract should be an equalization of accepting between controllable and uncontrollable risks with the price deemed appropriate to undertake the work by the parties who uphold the contract. However, contractual agreements should be concluded taking into account that will burden how much risk and therefore time bar clauses in standard forms is rising as per Lal (2007).

2.2.2 Time Bar Notice Provision in Standard Forms of Contracts

Time bar provision has been defined by Croeser (2009) as: “A contractual mechanism aimed at promoting the quick response to certain events, usually risks” (p.20). If a contract clause to be a time bar, two fundamentals to be considered as follow;

- A time period within which a procedure needs to be complied with; and
- Consequence for non-compliance (Gould, 2008).

There is an increasing tendency in construction contracts to include time bar clauses which are intended to have the effect of disallowing the contractor a claim that might otherwise be legally recognizable.

Further, as per Gould (2008), it was traditionally not included time-bar provisions in standard construction contract. Many standard forms required a notice to be given within a specified period only.

Based on the case of *Andrews v. Australia and New Zealand Banking Group* (2012), that time-bars could be considered as penalty to the extent that they might offend against the penalty doctrine.

There are valid reasons for the inclusion of time limits in the claims procedures of construction and engineering contracts. However, whether the actual content of the provision is fair or whether it should be made a condition precedent separately are more difficult questions to be answered (Thomas, 2014). Therefore, it is advisable to examine time bar clauses in known standard forms of contracts.

2.2.2.1 The New Engineering Contract: ECC (NEC2 & 3) (1995, 2005)

In 2014, Thomas noted that the UK's JCT Major Project Construction Contract requires submission of supporting documentation for an extension of time claim within 42 days after practical completion where there is a similar provision for loss and expense claims. However there was no clear frame as a condition precedent. The New Engineering Contract (NEC) has a time-bar and a condition precedent mentioned as 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 date of completion or a key date. However, the condition precedent effect is diluted by the addition of the words 'unless the Project Manager should have notified the event to the contractor but did not', which are arguably very broad.

As explained by Croeser (2009), regarding the claims notification provisions under NEC, “it is interesting how these specific clauses have changed from NEC2 to NEC3 in 2005, which results in a much greater impact on the contractor's ability to successfully institute and be compensated for a claim. First, clauses 61.3 and 61.4 of NEC2 simply establish the following with respect to the claim notification” (p.25).

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

- The Contractor believes that the event is compensation event,
- It is less than two weeks since he became aware of the event and
- The Project Manager has not notified the event to the Contractor.

61.4 The Prices and the Completion Date are not changed if the Project Manager decides that an event notified by the Contractor

- Arises from fault of the Contractor,
- Has not happened and is not expected to happen,
- Has no effect upon the Actual Cost or Completion or
- is not one of the compensation events stated in this contract (p.26).

It can be seen that there is no clear wording with regard to time limit for claim notification and consequences for failure to comply with the above clause 61.3 of NEC2 as to qualify as a time bar clause as explained by Gould (2009) in the previous sub title in this report. However, in the next revision (NEC3), this provision was established more clearly with the following wordings.

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 project manager should have notified the event to the contractor but did not.

Glover and Tolson (2008) have recognized that the revised clause in NEC3 61.3 has established with the two fundamentals of time bar notice provision and serve as a condition precedent to the contractor's claim for cost and time overruns. However, it is subject to whether the Project Manager should have notified the event to the contractor but he did not.

2.2.2.2 FIDIC Conditions of Contract: 1999 (the Red Book)

The claim notification procedure in terms of the FIDIC 1999 contract is expressly stated in Sub Clause 20.1:

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment the Contractor shall give notice to the Engineer, describing the event or circumstances giving rise to the claim. The Notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.

Once again the contract provides for contractor's claims to be time barred in absence of valid notice.

However in the above clause, the 28-day period referred to does not run from the occurrence of the event or circumstance giving rise to the claim. Instead, it runs from when the Contractor "became aware, or should have become aware, of the event or circumstance" giving rise to the claim (Stewart & Moraes, 2014).

When it is related to a delay event, the entitlement to an extension clearly arises either when it is clear that there will be a delay (a prospective delay) or when the delay has at least started to be incurred (a retrospective delay). This was decided by Justice Akenhead in the case of *Obrascon Huarte Lain SA v. Her Majesty's Attorney General for Gibraltar* (2014).

It is evident that the clauses of each of the forms mentioned above are structured in a similar way, in the sense that each one establishes the need for notification within a limited period and establishes the consequence of not providing that notification so that it is exactly a time bar.

2.2.3 Notice Requirement in Contractor's Claim

The contract provides for contractor's claims to be time barred in absence of valid notice. In 2007, Champion explains although the timing of the claim notification is not negligent, the parties are conditional in every way depending on the amount of awareness. The FIDIC-1999 contract, for example requires notification by the contractor within twenty eight days of the contractor become aware or should have become aware of the event. He further states, it was seemed that contractors have quickly welcomed this provision as per the reports from early use of this contract form and have been quick to adopt two arguments to avoid this provision. These arguments were that:

- The contractors have not been informed about all changes and therefore they have only recently become aware of the events giving rise to claim and therefore the notification was not delayed.
- The contractors were aware of the event, but they had not had sufficient data to ascertain whether it was a compensation event, and therefore notified as soon as they became aware that it might be.

As explained by Croeser (2009), it is required to notify of claims when the contractor is aware or, should have become aware, of a potential claim. Thus it is wonder how exactly the employer intends to convince a tribunal that the notice should have been

issued earlier. Table 2-1 summarizes the claim procedure of previously discussed standard forms for easy review.

Table 2-1: Claim Procedure of Standard Forms (NEC2, 3 and FIDIC 1999)

Description	Standard Forms of Contract		
	NEC2	NEC3	FIDIC 1999
<i>Time period to Notify Claim</i>	3 weeks: Notify compensation event	8 weeks: Notifying compensation event	28 calendar days: Notifying claim for additional time and/or money
<i>Duty to inform</i>	Notify compensation event	Notify compensation event	Notify for entitlement to additional time and/or money
<i>Extent of awareness</i>	Notify when contractor became aware of compensation event	Notify when contractor became aware of compensation event	Notify when contractor becomes aware or should have become aware of compensation event/ circumstance
<i>Consequences of failure to comply with notice period</i>	Has no effect	Completion date or Key date not changed NO entitlement to change prices	No EOT No entitlement to additional payment Employer is discharged of all liability in connection of claim
<i>Possible remedy available</i>	Not applicable	Only if contractor can prove that Project Manager should have notified compensation event to contractor	No remedy available

Source: (Croeser, 2009, p.33)

2.3 Construction Claims and Importance of Notice Provision

A definition of the term “claim” as used and interpreted in the construction industry is given by Powell-Smith & Sims (1989) “as any application by the contractor for payment which arises other than under the ordinary contract payment provisions and such a claim includes an application for an ex gratia payment too” (p.3). Further, the

word is also used to describe a contractor's application for extension of time for completion of a project.

In 2001, Trickey and Hacket said the cost plan might be based on previously collected data and that contract bills are measured on a specific set of rules, but that claim is often resolved by going to war. Within the context of a construction contract, the term "variation" is used to describe any changes happened due to external forces or changes authorized by the engineer or the employer. It means an alteration, whether by extra or omission, to the physical work content specified in the contract but which the contractor is required to perform. Apart from variations, circumstances may arise to a project during the contract period due to inclement weather condition as well as the default to pay by the employer which will cause to make claims by the contractor for extension of time for contract period and/or additional cost to the contract price. This type of concurrent variations and claims can be cause to disputes in construction contracts among relevant parties (Croeser, 2009).

March (2009) explains that the huge load of claims apply by the contractors on developers by asserting everything possible and make opportunity of every possible loophole in the contract and that much of the disquiet between developers and contractors has resulted from extreme use of these procedures like time bar notice provisions.

The Royal Institution of Chartered Surveyors (RICS, 2001) comment that it is the quantity surveyor's responsibility to determine a proper ascertainment in accordance with the conditions of contract and the circumstances that have prevailed. They note that while contractors press hard and sometimes overstate their cases, the quantity surveyor must not be seen as "being at the other end of a tug-of-war rope to the contractor" in an attempt to minimise the reimbursement of such claims.

2.3.1 Types of Claims

As per Powell-Smith & Sims (1989), there are about four types of claims that can be made by contractors against employers. These four types include:

- Contractual claims: claims that arise out as per the express provisions of the relevant contract between the contractor and the employer.
- Common law claims: claims with respect to demanding damages for breach of common law aspects, e.g. breach of copy right. For such claims may no need to provide notices and so on which established in particular contract.
- Quantum meruit claims: ('the amount he deserves') it is a type of claim to recover payment for a work executed where no price has been agreed or quantified. An entitlement to quantum meruit claim is not applicable if there is an agreement between the parties to pay for the particular work done. The contractor may try to recover a "reasonable sum" for the work performed by him.
- Ex gratia claims: ('out of kindness') there is no legal base to employer to pay for this type of claims and also called a 'sympathetic' claim. However, there is a moral duty to meet by the employer. The Employer has no obligation to meet such a claim, but may be prepared to do so on grounds of natural justice or to help the contractor where otherwise he might be forced into liquidation.

Ramus, Birchall and Griffiths (2006) categorise claims as being one of three kinds: common law claims; ex gratia claims, and contractual claims. Accordingly, quantum meruit claim may include under common law claims.

2.3.2 Contractual Claims Relates to Contractor

Most standard form of construction contracts contain provisions under which the contractor can recover compensation from the employer for various losses suffered where the project is prolonged or disrupted by certain specified causes (Croeser, 2009, p. 12).

Ramus et al. (2006) explain that these are by far the most common form of claim and typically relate to "fluctuations, variations, extensions of time and loss and/or expense due to matters affecting regular progress of the works" (p.224).

Accordingly, there are situations where some causes may entitle for extension of time only and some for both extension and cost as laid down in the Principal Building Agreement (PBA), (2005) which forms part of the JBCC contract document.

Table 2-2: Contractor's entitlement for EOT & Contract Value as per PBA (2005)

Contractor entitle only for EOT	Contractor entitle for EOT and adjustment to the contract value
The adverse effect of weather conditions	Failure to give possession of the site to the contractor
The inability to obtain materials and goods where the contractor was not liable	Contractor repairing physical damage to the works where he is not at risk
Contractor repairing physical damage to the works at his risk	Contract instructions not occasioned by default by the contractor
An event that neither party could prevent, civil commotion, riot, strike or lockout	Failure to issue construction information on time
Late supply of a prime cost materials where the contractor is not liable	Late acceptance by designer undertaken by a selected subcontractor where the contractor's obligations have been met
Default by a nominated subcontractor where the contractor is not liable	Suspension or termination invoked by a subcontractor due to default by the employer
	Insolvency of a nominated subcontractor
	Opening up and testing of work and materials and goods where such work is in accordance with the contract documents
	The execution of additional work for which the quantity included in the bills of quantities is not sufficiently accurate
	Late or failure to supply materials and goods for which the employer is responsible
	Suspension of the works

2.3.3 Importance of Notices for Contractor's Claims

Wallace (1994) suggests that the point of notice provisions is to enable the employer to think about the position and its financial consequences and there is no doubt than in many if not most cases the courts will be ready to interpret these notice requirement as conditions precedent to a claim, so that failure to give notice within the required period may deprive the contractor of all remedy.

It is probable that if a notice provision is to rank as a condition precedent it must state the specific time within which the notice shall be served and must make plain by express language that if not the notice is served within the specified period, the party claimed EOT and/or the additional cost will deprive his entitlement for the claim (*Bremer Handelgesellschaft Schaft MBH v. Vanden Avenne Izegem PVBA*, 1978)

The notification should be regarded as a signal to stop the project team and to look into the issues submitted by the plaintiff; usually it will be the contractor. Further, during this period, the parties need to collect and review information about the claim submitted (Champion, 2007).

As explained by Giles and Gibson (2014), the principle purpose of using strict time bar clauses can be list out as follows;

- To improve the administration of the contract.
- To make aware the employer regarding the contractor's claim at an early stage.
- This allows the employer to evaluate the claim, and also take any steps to work with the contractor to mitigate the delay.
- To avoid a buildup of contractor's claims during a project, this historically has often led to a final account dispute between the employer and the contractor.

Jackson J in *Multiplex Construction (UK) Limited v. Honeywell Control Systems Limited* (2007) supported the condition precedent notice provision as follows;

Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notices enables matters to be investigated while they



are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent.

This process imposes a more proactive contemporaneous approach to dealing with unexpected events when they arrive, and providing cost and programme certainty and transparency. An effective time bar clause can be used as a tool for achieving a more collaborative approach between the contractor and the employer in relation to claims for additional time and money.

Likewise, the notice requirement to rank as a time bar was provided in *Bremer Handelsgesellschaft mbH v. Vanden Avenne-Izegem PVBA* (1978) case and it made it clear that inability to provide a valid notice will mean loss of rights.

Notice, by the plaintiff to the defendant, as a condition precedent to an action against the defendant is, in some cases, expressly required by statute. In the absence of statute express provision, and at common law, the necessity of notice depends upon the particular case (Weinstein, 1923).

However in contract law, a condition precedent can be expressly stated or impliedly meant in the relevant clause. In the absence of express wording which can qualify the condition precedent requirement a party may seek to imply it as condition precedent. The test for which is laid out in *(BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council, 1977)*, in order to imply as condition precedent, it must be:

- reasonable and fair;
- necessary for business efficiency;
- so obvious as to imply without stating as condition precedent;
- capable of clear expression;
- Steady with any express terms.

As explained by Lal (2007), it is crystal clear that the main purpose of the drafting panels of the FIDC and NEC standard forms of contract is to make attentive the

employer or administrator regarding the contractor's claim which enable quick evaluation and to avoid the stockpiling of claims.

However, as identified in court cases, there is a much more fundamental reason why time-bar clauses are so important. If such a clause is held to be ineffective, then in the absence of any extension of time award, the time for completion is becoming 'at large', such that the employer will lose its 'automatic' right to claim LD against the contractor. This was summarized briefly by Lord Fraser in *Bilton v. Greater London Council* (1982).

- The general rule is that the contractor is bound to complete the work on time for completion stated in the contract. If he fails to do so, he will be liable for LD charges.
- The employer is not entitled to LD charges if by his acts or omissions he has prevented the contractor from completing his work by the stated date of completion.

2.3.4 Reasons for Not Complying with Notice Provision

As per Currie (2013), there are a number of circumstances in which strict compliance with a notice or change order provision has been excused or found to be unnecessary. These include one or more of the following:

- the delay or additional expense is not the contractor's fault
- there was no prejudice to either the owner or general contractor
- the other party had actual knowledge of the delay or expense associated with the claimed extra work
- compliance with the notice provision was frustrated or rendered impossible by the other party
- the other party actually reviewed and denied the claim on its merits thereby waiving its right to assert compliance with the notice provision as a defense to the claim.

Depending on the particular facts, courts vary in how strictly they interpret and apply notice and change order provisions. A survey, carried out by the Chartered Institute of Building (CIOB) in 2008 had identified different reasons for failing promptly to notify delay events and as per their survey findings, following reasons had caused highly in descending order.

- We might get over it
- We don't want to upset the client
- It is not a contract obligation
- We might be able to blame someone else for it
- We don't want to upset the contract administrator

Further it describes, by serving a notice of an impact event a contractor is unlikely to exacerbate an existing awkward or conflicted situation, as the owner is far more likely to be less upset about being notified of a potential claim and having the opportunity to discuss and perhaps mitigate the situation as opposed to having a unexpected claim and /or negative project impact appear out of nowhere.

As per Harris (2017), in some instances where a contractor is fully aware of the notice provisions and the applicable law, a claim event has clearly occurred, and potential time and cost issues are at stake, the contractor decides not to issue a compliant notice or, in fact any form of notice at all. He further states, contractors often arguing that:

- we were anxious to avoid the situation where things got contractual,
- We did not wish to make an already adversarial situation into worse
- The owner is one of our best clients and we do not want to upset them. We hope to get many more projects from them in the future. We can make up the losses on the next project.

There are many other circumstances where, for some practical reasons, delay claims cannot be notified within the specified time limit. No provision can be able to take account of each and every possible claim eventuality, thus it can be argued that the time bar clause in whole is not workable to all situations and therefore unenforceable

since it did not consider or allow for additional cost and time to all scenarios. In any event, the burden to prove the reasons for noncompliance will lie on the contractor, and the court will require a factual robust analysis to get convinced. This may not be an easy task on the contractor (Kassem, 2015).

2.4 Traditional Challenges to Condition Precedent Notice Provision

Time bar clauses usually included in amended local and or international contracts as in particular conditions. However, the introduction of condition precedent notice provision in NEC and FIDIC forms of contract presents a great challenge to arbitrators as it is increasingly used in all over the world (Lal, 2007).

Further, there are number of case law exist where courts are recommended to adopt common sense and practical approaches. There are continuous debates between practitioners and legal commentators in relation to the effectiveness of time bar claim notice provision in forfeiting the contractor's claim when the notice is not being served within the time limits specified in the provision (Kassem, 2015). Therefore, it is important to critically analyse various tools which has been used so far to challenge the existence and operation of time bar provisions.

2.4.1 Matter of Interpretation

The first issue of time bar notice provisions in standard forms is to decide, whether it is validly written as condition precedent regardless of what the respective drafting panels intended (Lal, 2007).

The House of Lords decision in *Bremer Handelgesellschaft Schaft MBH v. Vanden Avenne Izegem PVBA* (1978) was to rank notice provision as condition precedent, the clause must clearly establish the specific time during when the notice shall be served and expressly stated that unless the notice is served the entitlement to claim under the clause will forfeit.

On this basis, Clause 61.3 of NEC3 and Clause 20.1 of FIDIC forms appears probably to be viewed as condition precedent. Because it clearly states the time limit to serve a notice as from the contractor become aware of the event and expressly states the

consequence of not complying with notice provision as loss of the entitlement to claim (Gould, 2008).

However, even where a time bar clause appears to be a condition precedent, a court or arbitral panel may refuse to interpret it this way. A notable example is given by Lal (2007), in case law of *Koch Hightex GmbH v. Millenium Central Ltd* (1999). Where the English court of appeal held the following clause not to be a condition precedent: “The provision of a guarantee and performance bond is a condition precedent to any liability or obligation of the new millennium company (as employers for the supply of the roof for the millennium dome) under the contract.” As per the decision of the court of appeal, the judge has not meant it as that the employer and the contractor has intended that the contractor should carry on working without any entitlement to be paid, until it chose to provide the guarantee and performance bond, which became unrealistic after termination of the same.

As said by Kassem (2015), drafting a time-bar clause with ‘very clear’ language should not be a difficult task. For example, the provision can state that unless otherwise indicated, the contractor must comply with the time even though it has been delayed due to acts of employer prevention. Equally important, if the parties can agree on clauses which may eventually lead to harsh results on one party, and they draft the clause with clear wordings stating so, then the court cannot interfere otherwise. Reviewing time-bar clauses in most well-known standard forms of contract had revealed no such clear wordings within the clause itself that transfer the risk of employer’s prevention to the contractor if notice is not provided as required.

2.4.2 Prevention Principle

If there is no longer an enforceable completion date, the contractor must complete the project within a reasonable time and the principal can only apply for general damages under common law (Pickavance & MacLaughlin, 2005). This is the basis of the prevention principle, originating from the case of *Holmes v. Guppy* (1938). Accordingly, it was determined that when acts of the principal prevent the contractor from achieving the specified completion date, and there is no contractual mechanism

to extend the date, the contractor may be excused from completing the work by the date of completion.

Therefore, it is the idea of Finnie (2012) that the principal is in a much more vulnerable position with time at large than if there were new extended completion dates where EOT contract provisions provide protection to the principal as well as the contractor.

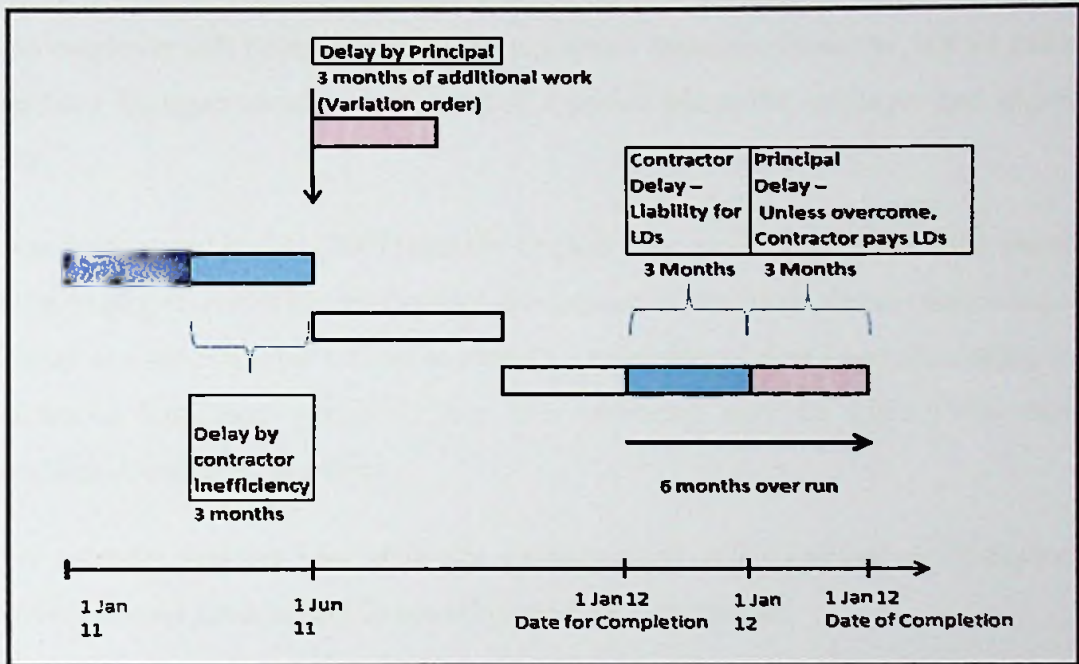


Figure 2-1: Illustration of prevention principle concept

Source: (Stulic, 2010, p.2)

The so-called 'prevention principle' as illustrated in figure 2-1 shows that where one party to a contract has failed to act as per the condition of that contract, the other party cannot benefit from other party's non-performance if it was caused by his own wrongful act (Black, 2004).

The prevention doctrine is a recognized principle law of contract. In case law *Moore Bros. Co. v. Brown & Root, Inc.* (2000) it is said that, if an employer prevents or hinders execution of a stipulation in a contract, that condition may be deemed as waived or excused. However, as per the prevention doctrine it does not need to prove

that the condition would have executed except the wrongful conduct of the employer. Instead, it only requires that the conduct have “contributed materially” to the non-occurrence of the condition. It is as effective an excuse of performance of a condition that the promisor has hindered performance as that he has actually prevented it

As per Gould (2008), the prevention principle can also apply in respect of any employer’s claim for liquidated damages. If the contractor does not request for a time extension, then the engineer cannot extend the time for completion under FIDIC, and so an employer will be entitled to claim liquidated damages. However, the so called liquidated damages could be in respect of a period where the employer had caused delay.

It was emphasized by Lal (2007) that the English legal principle of prevention means that an employer cannot benefit from his own breach. If, therefore, there is concurrency of delay and the employer refuses to award an extension of time (thus alleviating the contractual liquidated damages), then the contractor may be freed from those liquidated damages in any event.

More recently, Jackson J in *Multiplex Constructions (UK) Limited v. Honeywell Control Systems Limited* (2007) has reinforced the same point:

In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time. The same principle applies as between main contractor and sub-contractor (para. 48).

Hence, the employer’s right to liquidated damages for delaying is therefore replaced by a right to un liquidated damages, based on a new ‘reasonable time’ completion date. The Court of Appeal decision in *Shawton Engineering Ltd v. DGP International Ltd*

(2005) holds that what is a reasonable time has to be judged as at the time when the question arose, in the light of all relevant circumstances.

2.4.3 Doctrine of Penalty

As regards an employer's claim, Sub-Clause 2.5 in FIDIC-Red Book (1999 Edition) merely requires that notice of the claim be given to the contractor "as soon as practicable after the employer became aware of the event or circumstance giving rise to the claim".

As per Smith (2010), Construction contracts often provide for the payment of 'liquidated damages', which is a fixed amount previously agreed with respect to certain types of non-compliance. Construction contracts commonly stipulate that if the contractor does not complete the works before the date, or within the period of time stipulated in the contract, adjusted for any extension of time duly granted under the contract, then the contractor must pay the employer the liquidated damages at an agreed daily or weekly rate, from the contractual date until its completion until the date on which the works have been completed.

Liquidated damages clause in conditions of contract is advantages for both parties. From the contractor's point of view, such clauses are normally considered to be a limitation of the contractor's liability for delay which allows the contractor to understand the extent of their late-completion risk and to take that risk into account in the bid of the contractor. From the employer's point of view, liquidated damages clauses give the employer a contractual right to compensation at an agreed rate. It is not necessary for the employer to file a claim against the contractor for general damages for breach of contract that would require the employer to provide evidence to prove the actual loss suffered (Kheng, 2003).

As described by Sweet in 1963, the enforceability of any liquidated damages clause under English law is subject to a number of principles, including the rule in relation to "penalty clauses". In accordance with this rule, for the clause to be enforceable, the liquidated damages must be established at a level that reflects a genuine presumption of the probable employer losses arising from any delay (Lal, 2002; Marrin, 2002).

As noted by the Supreme Court of Canada in *Elsely v. J G Collins Insurance Agencies Limited* (1978), in most cases the stipulated sum is a penalty because the sum is extravagant and unconscionable in amount in comparison with the greatest loss that could be proved to have flowed from the breach.

In the same case law, it was mentioned if the actual loss turns out to exceed the penalty; the normal rules of enforcement of contract should apply to allow recovery of only the agreed sum. The party imposing the penalty should not be able to obtain the benefit of whatever threatening force the penalty clause may have in reminding performance, and then ignore the clause when it turns out to be to his advantage to do so.

As such, there is rarely a practical issue as to whether the unenforceable penalty clause would nonetheless operate as a limit on the amount of general damages. However, it is theoretically possible for general damages to be greater than the stipulated unenforceable penalty (Smith, 2010).

However, As per Aibinu (2009) the question of penalty in time bar clauses is raised when the contractor's entitlement to an extension of time for completion is subject to the contractor serving upon the owner a notice of an event causing delay within a stipulated time period. Where such a provision is a condition precedent to an extension of time, a failure by a contractor to comply with the provision may deprive the contractor of an extension of time, and allow the owner to recovery liquidated damages.

There are no conceptual difficulties with the application of a condition precedent for notice of neutral delay events not caused by the owner. However, conceptual difficulties arise where the delay has been caused by the owner, and the contractor fails to comply with a condition precedent for an extension of time, because such provisions give rise to a tension between the owner's freedom to stipulate contractual notices and the prevention principle. This tension has given rise to a number of decisions, and conflicting academic debate on where the balance may lie (Smith, 2010).

2.4.4 Duty to Act in Good Faith

Kassem (2015), questioned that in many instances, the employer may not necessarily have suffered any loss from the contractor's non compliance to the notice requirement, decides to activate provision to avoid contractor's entitlement to claim which would appear to employer as absolutely legitimate. In such instances, can the employer's reliance on the provision be considered as a normal exercise of his right to pursue his individual self interest or will he be accused of not acting honestly and openly while carrying out his obligations by not having appropriate regard to the contracting interest of the contractor?

At the same time Lal (2007), has answered that it will probably depend on the type of the jurisdiction, culture and the commercial norms in the country in which the contract is being performed.

Bingham LJ in *Interfoto Picture Library v. Stiletto Visual Programmes* (1987) clarified the different position of civil law and common law jurisdiction in this matter:

In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table". It is in essence a principle of fair and open dealing.

There is an overarching principle of good faith in the UAE Civil Code. Article 246(1) of the UAE Civil Code states that; "the contract must be performed in accordance with its contents and in a manner consistent with the requirements of good faith". By way of example, this provision could be relied upon by a contractor in a situation where an employer was made aware of the contractor's intention to make a claim but this was not notified in accordance with the contract and the employer later seeks to use a time bar argument to defeat that claim. Alternatively, a contractor could argue that a time

bar provision may not be relied upon by an employer in circumstances where the employer is in breach or otherwise caused the delay and was fully aware that its actions would cause delay to the project (Kassem, 2005).

However, this principle is differently arguing in common law courts; Canadian courts have made it clear that a duty of good faith performance will not be implied as a matter of course into every contract (Peters, 2013).

Jackson LJ held in *Mid Essex Hospital Services NHS Trust v. Compass Group UK & Ireland Ltd (t/a Medirest)* (2013)

In addressing this question, I start by reminding myself that there is no general doctrine of “good faith” in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract...If the parties wish to impose such a duty they must do so expressly.

The point that has to be made is that the requirements for having notices are used as defenses against claims, and not for the intended purpose (Kheng, 2003).

2.4.5 Other Challenges to Condition Precedent Notice Provision

Further, as mentioned by Kassem (2015), there is a creeping pressure on English law for the implementation of European Directives. The European Law, which is mainly derived from civil law jurisdictions of major economic powers such as France, Germany and Italy, incorporates the doctrine of good faith by statute. On the whole, incorporating good faith has become a real issue under the English law and there are strong indications that it could soon be fully recognized as an independent doctrine. However when it does it would probably expose the time-bar provision to a serious challenge of being void when misused.

Other than that, UAE civil code provides significant challenges to the condition precedent notice provision namely;

- **Unlawful exercise of right** – pursuant to Article 106, the exercise of a right shall be unlawful if the benefits allowed are disproportionate to the harm that

will be suffered by others. When this is applied to condition precedent notice provision; Glover (2008) has said that it may be unlawful if a valid claim is rejected purely due to breach of technical matter in a contract.

- **Unjust Enrichment** – pursuant to Article 318 and 319 (1), no person may take the property of other person without a lawful cause and any person who acquires the property of another person shall return it if that property is still exists or the value of it if it no longer exist. Accordingly, there is a plus point against time bar notice provision where it can be argued that the employer has benefitted by nonpaying to contractor if the only reason for nonpayment is late notification.
- **Defense for Claim** - Glover (2008), has said that time bar notice provision provides the employer a complete defense to any claim for time or money by the contractor if it is not notified as per the conditions of contract.

2.5 Conflicts in Time Bar Clauses

Both parties, which are the Contractor and the Employer, as well as the supervising agent, are affected by the requirement of notices for the claims to proceed or for the other party to hear them. Contractors are affected by having to be aware all the time of possible problems that may or may not become a claim in the future (Champion, 2008).

The same author has explained that the impact on the employer can arise from uncertainties about whether the time bars can be applied, or not; several jurisdictions have shown that the notification requirements may not be applicable at all; for example, in the United Kingdom the Law of Unfair Contractual Terms is considered, and in the United States, a non-claimant party may not have suffered any prejudice for not receiving claims notifications.

The important point on this regard is that the notice requirements in contracts are used as defenses against claims for time and cost overrun of the contractor, and not for the intended purpose. The intention of the notices is to treat situations from the beginning so that preventive and corrective actions remain possible. Glover and Hughes (2011) suppose that this situation is for the contractor and the engineer to work together.

2.5.1 Conflicting Judgments relate to Time Bar Notice Provision

- *City Inn Ltd v. Shepherd Construction Ltd* (2002);

As per the Architect's and Adjudicator's determination the contractor was granted nine weeks of extension of time to the contract period. However, the employer did not agree with this decision and argued that LD should be payable; as the contractor had failed to comply with the express time-bar clause. In the Inner House, the Lord Justice 'Clerk agreed:

if the contractor wishes an extension of time, he must comply with the condition precedent that clause 13.8 provides for these specific circumstances ... But if the contractor fails to take the specified steps in clause 13.8.1, then, unless the architect waives the requirements of the clause under 13.8.4, the contractor will not be entitled to an extension of time on account of that particular instruction. (p.3)

The Inner House interpreted the time-bar clause as giving an option, so not imposing any obligation on the contractor.

- *Turner Corporation Ltd v. Austotel Pty Ltd* (1992);

New South Wales Supreme Court denied that there was a conflict between the prevention principle and the condition precedent time-bar clause mentioning that, if the contractor having right to claim an extension of time to the contract as per the terms of the contract and fails to do so. Then he cannot claim that the act of prevention by the employer resulted in his inability to complete by time for completion which would have entitled to extension of time. The contractor cannot rely upon preventing conduct of the employer where if the contractor failed to claim extension of time established as a contractual right which would have canceled the effect of that preventing conduct.

Likewise, in this case, the judge has denied the effect of prevention principle in favor of contractor as the contractor has failed to comply with claim provision established in the contract. The prevention principle has been overruled here by a general principle called that a party cannot benefit from his own wrong.

- *Gaymark Investments Pty Ltd v. Walter Construction Group Ltd* (1999)

The form of contract in this project was an amended version of the Australian public works standard form NPWC3-1981 and the following is captioned under sub-clause 19.2:

The Contractor shall only be entitled to an extension of time ... where the Contractor ... (b) (i) has complied strictly with the provisions of sub-clause SC19.1 and in particular, has given the notices required by sub-clause SC19.1 strictly in the manner and within the times stipulated by that sub-clause; ...

It was agreed that the contractor had failed to give notice in accordance with SC19.1. However, Bailey J refused to treat it as a condition precedent. His view, refusing to turn over the arbitrator's award on this point, was that the prevention principle presented a 'formidable barrier' to the employer's claim for liquidated damages, the amended contract making no provision for an extension of time except via an application by the contractor complying with the time-bar clause. Hence, this decision opened an arena to the prevention principle arguments.

- *Peninsula Balmain Pty Ltd v. Abigroup Contractors Corp Pty Ltd* (2002)

The New South Wales Court of Appeal considered the following time-bar clause:

The Principal shall not be liable upon any claim by the Contractor in respect of or arising out of a breach of the Contract unless within 28

days after the first day upon which the Contractor could reasonably have been aware of the breach, the Contractor has given to the Superintendent the prescribed notice. (p.5)

As explained by Lal (2007), although the contractor failed to comply with the notice requirements set out in the contract, the Court of Appeal held that such failure did not deprive the contractor of his right to an extension of time; it merely delayed it. The court held that ‘the prevention principle’ defeated the time-bar clause and that the Superintendent should have exercised his unilateral power to grant an extension of time to cover the employer delay.

2.5.2 Better Approach to Time Bar Notice Provision

The forfeiture of claims due to short and strict time limits must be reviewed as it places the concept of cooperation and trust, so badly needed in the construction industry, in jeopardy. This argument made clear by Glover & Hughes (2011, p.380), and quote: “The general point being that it is somehow wrong that a party who genuinely suffered a loss might be prevented from bringing a claim in respect of that loss for a technical procedural breach”.

As per Kassem (2015), time-bar provisions in FIDIC-1999 and NEC3 however have no mechanism for reconsideration of the reasons for not notifying, although FIDIC-2008 has provided a provision for DAB consideration to overrule time bar notice provision. There are many circumstances where, for practical reasons, claims cannot be notified within the specified time limit. The concept of collaboration and industry practice may be disputed with the inclusion of time bar notice provision. Since it did not consider or allow for additional cost and time to all scenarios the contractors could reasonably challenge its enforceability.

The new draft form of condition introduced by FIDIC in autumn 2007 seems changing their approach on condition precedent notice provision. This has introduced for Design, Build and Operation form of contracts. Accordingly following concession has been included in clause 20 (Tolson and Glover, 2008):

20.1. (a) However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. If the DAB considers the circumstances are such that the late submission was acceptable, the DAB shall have the authority under this sub-clause to override the given 28-day limit and advise both the parties accordingly.

However, FIDIC Multilateral Development Bank Harmonized Edition June 2010 form of contract introduced for building and engineering works designed by the employer was issued after the Gold Book and it did not include the amended provision of DAB ruling in Gold Book. Therefore, Kassem (2005) has said it is puzzling why FIDIC has not continued that mostly welcomed reform all over the world in their subsequent publications.

Ahler, (2012) has said that, if change orders arise in public projects, it is only appropriate that contractors be compensated fairly and equitably for additional work. For projects with severe warning provisions in force, if a contractor loses the notification deadline, the instinctive reaction of the owner's representatives is to lose the claim. When the margins are already tight, the foreseeable reaction of the contractor will be to participate in a battle of paperwork in the project to the detriment of the quality of the work done.

Further, Seppala (1999) opined that although it is sensible to regulate claims, the failure of a contractor to comply with the notification requirement should not be fatal to the claims of the contractor; rather the contractor's claims should be reduced by the damage suffered by the employer. These recommendations mean to relax the strict interpretation and enforcement of the time limit for notice while at the same time preserve the right of the employer to recover damages suffered due to a notice of delay of the contractor. When owner's representative fights very confidently in the strength of their contract clauses, the issue will be ended up eventually in a court thus wasting time and money of both parties.

For example, in the majority of construction contracts, the design is either prepared by or directed to be prepared by the owner. When changes occur, the owner is therefore

in the best position to analyze the change in relation to the design and is the only party that can decide whether or not to make a design change in the first place. On the other hand, the contractor, who has not participated in the design, faces a change in the midst of the coordination of subcontractors, workers and suppliers of materials and must understand in some way the total impact of the claim shortly to comply with the burdensome claim notice provisions (Ahlers and Taft, 2012).

Another common law lawyer's view is that the claims notification provisions should not apply to act as breaches of contract. In any event what is clear is that:

- courts have not yet adopted a consistent approach to this problem
- it is an issue that is likely to have significant financial consequences to a party; and
- it is an issue that is now being raised in numerous FIDIC adjudication and arbitrations

In light of the above, clause 20.1 is a clause that sooner or later FIDIC might wish to consider amending (Tweeddale, 2006).

2.6 Chapter Summary

As stipulated in literature, the time-bar provisions in sub clause 20.1 of FIDIC 1999 are valid under English law, as are time barring mechanics of clause 61 of NEC3. However, the success of their process so as to refer condition precedent will vary depending on the circumstance of the case.

It is evident that the clauses of each of the forms mentioned above are structured in a similar way, in the sense that each one establishes the need for notification within a limited time period and establishes the consequence of the lack of notification. This will affect as a bar to contractor's claim on any alteration for cost and time for completion.

There are number of challenges to address when establishing time bar notice provision in conditions of contract such as interpretation challenge, prevention principle,

doctrine of penalty, duty to act in good faith and other challenges raised in civil law countries. It is submitted that a significant literature on international case law supports the suggestion that those challenges are merely a rule of contracts drafted for construction purpose and not a rule of law and therefore the clear express terms (such as NEC 3 Clause 61.3 and FIDIC Clause 20.1) can simply eliminate its process. However, a careful examination of the jurisprudence reveals the judicial reasoning supported by this point of view.

“It follows that the real issue for construction arbitrators is not the tension between the time-bar clause and these principles, but a possible one between the time-bar clause and the doctrine of freedom of contract” (Lal, 2007, p.18).

CHAPTER 03

RESEARCH DESIGN AND METHODOLOGY

CHAPTER THREE

3 RESEARCH DESIGN AND METHODOLOGY

3.1 Introduction

Chapter two contained of the literature synthesis and the identification of the research problems, while, the purpose of this chapter is to clarify the methodological framework used to conduct this research.

This chapter is prepared in three main headings. First, the design of this study is described including research philosophy and the research approach. Afterwards, the research process of this study and the measures taken to certify research validity are described in detailed manner.

3.2 Research Background

Literature reveals that, there remains conflicting views as to the effect of condition precedent notice provisions where there has been an employer caused delays. Legal writers have opined that where the parties to a construction contract have decided by agreement in their contract to allocate the risk of the cost of delays and cost of additional works to the contractor by making the time limit for the contractor's notice a condition precedent to the contractor's claims, so that if notice requirements are not fulfilled by the contractor, then the contractor's entitlement to a claim is defeated (Lal 2002). Legal authority in support of this principle includes *Madigan v. Hobin Lumber Co.* (1993). In that case, the general rule that "agreed-upon contract terms must be enforced" was invoked by the court.

Accordingly, there is a risk to the contractor in case if he unable to comply with condition precedent notice provision with regards to valid claims. On the other hand, it seems unfair to the contractor, if a real claim is rejected due to non compliance with

notice provision where otherwise it could be approved. From the knowledge gained through literature and other findings, a gap on lack of construction researches on challenges to condition precedent notice provision and possible developments to contractor's claim clause to overcome those challenges is identified. Consequently, following research questions set the stage for the research design and analysis;

- What is the importance of introducing condition precedent notice provision to contractor's claim clause?
- What are the reasons for inability of contractors to comply with condition precedent notice provision?
- What are the challenges to condition precedent notice provision in contractor's claim clause?
- What are the amendments to be brought into condition precedent notice provision in contractor's claim clause?

3.3 Research Design

Research design is consisting of three main steps, which are identifying research philosophy, identifying research approach and identifying research technique. These three steps follow in sequent where the research technique is identified based on research approach and the research approach is identified based on the research philosophy (Kagioglou *et al*, 2000 cited Senarathna, 2005). Further, this is broadly illustrated by Saunders, Lewis & Thornhill (2003) as shown in the following figure 3-1.

First, the research philosophy requires definition. This creates the starting point for the appropriate research approach, which is adopted in the second step. In the third step, the research strategy is adopted, and the fourth layer identifies the time horizon. The fifth step represents the stage at which the data collection methodology is identified. The benefits of the research onion are thus that it creates a series of stages under which the different methods of data collection can be understood, and illustrates the steps by which a methodological study can be described.

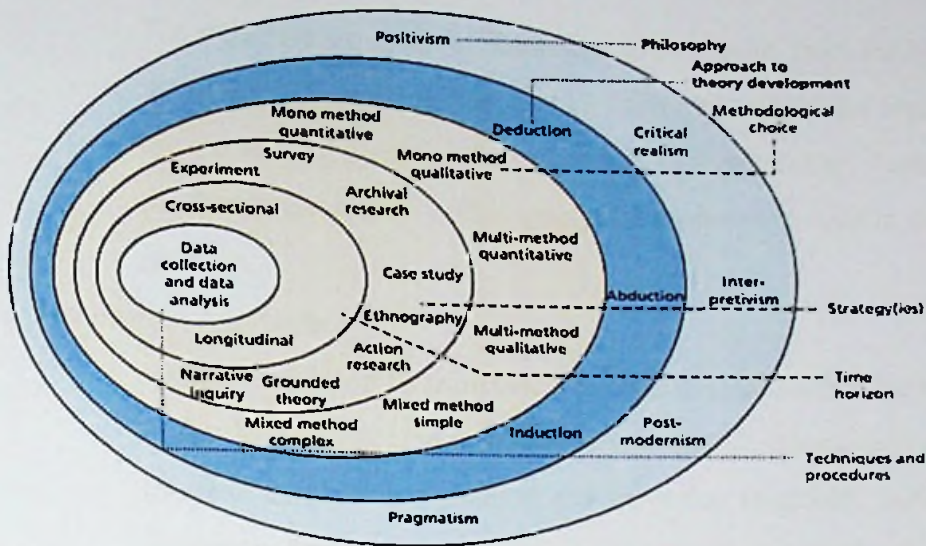


Figure 3-1: Research onion

Source – (Saunders *et al*, 2003)

3.3.1 Research Approach

Research approach is basically deal with research problem and are about to organize research activities including data collection from the population in a way that meet the research problem, aim and objectives. Saunders *et al*. (2015) has divided this in to three as Deductive, Inductive and Abduction.

- Deductive Approach:

The deductive approach develops the hypothesis or hypotheses upon a pre-existing theory and then formulates the research approach to test it (Silverman, 2013). This approach is best suited to contexts where the research project is concerned with examining whether the observed phenomena fit with expectation based upon previous research. Hence, this is characterized as the development from general to particular. The general theory and knowledge base is first established and the specific knowledge gained from the research process is then tested against it (Kothari, 2004).

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

- **Inductive Approach:**

The inductive approach is characterized as a move from the specific to the general (Bryman & Bell, 2011). In this approach, the observations are the starting point for the researcher, and patterns are looked for in the data (Beiske, 2007). This approach is commonly used in qualitative research.

- **Abductive Approach:**

Instead of developing from theory to data as in deductive approach and or data to theory as in inductive approach, an abductive approach moves in effect combining deduction and induction (Suddaby, 2006). With abduction, data are used to explore a phenomenon, identify themes and explain patterns, to generate a new or modify an existing theory which is subsequently tested, often through additional data collection.

A topic on which there is a wealth of literature from which it can define a theoretical framework and a hypothesis lends itself more appropriate to deduction. With research into a topic that is new, is exciting much debate and on which there is little existing literature, it may be more appropriate to work inductively by generating data and analysing and reflecting upon what theoretical themes the data are suggesting. Alternatively, a topic about which there is a wealth of information in one framework but far less in the area in which is researching may lend itself to an abductive approach enabling to modify an existing theory.

In this particular research, the well established notice provision in contractor's claim clause is questioned on its importance, legal challenges and regarding developments that can be brought into amend the provision. Since there is more literature on importance and challenges to condition precedent notice provision and less literature on developments that can be bring into reform the contractor's claim clause, the research problem is more achievable through a mix approach like abductive approach. The design format is shown in figure 3-1.

3.3.2 Research Methodology

There are mainly three methodologies as Quantitative, Qualitative and Mixed methods. Quantitative approach tend to relate to deductive approach and seek to gather factual data and to study relationships between facts and how such facts and relationships accord with theories and the findings of any research executed previously (Fellows and Lui, 2003). Survey researches and experimental researches are basically coming under quantitative approaches. By using a qualitative approach the researcher will study whole population as individuals or groups and could be able to identify beliefs, understandings, opinions and views of people (Fellows and Lui, 2003). Case study research, ethnography, action research and grounded theory approach can be taken under qualitative approaches. Mixed method comprises of both quantitative and qualitative methods and it can be applicable for deductive, inductive or abductive approaches.

Quantitative methodology most frequently used to answer questions as, “who”, “what”, “where”, “how many” and “how much”, and strive to support the facts submissively. The qualitative methodology also has considerable ability to generate answers to the question ‘why?’ as well as the ‘what?’ and ‘how?’ questions, although ‘what?’ and ‘how?’ questions tend to be more the concern of the quantitative methodology. For this reason the qualitative methods is most often used in explanatory and exploratory research whereas quantitative methods used in exploratory and descriptive research.

However, as explained by Saunders *et al.* (2016), the most important thing is not the label that is attached to a particular methodology, but whether it will allow you to answer your particular research questions and meet your objectives. In this research, it is basically questioned on “what” questions as mentioned in the research background above. As to achieve research aim and objectives of this research, an exploratory study should be carried out among industry practitioners who are experts in this research area. An exploratory study is a valuable means of finding out ‘what is happening; to seek new insights; to ask questions and to assess phenomena in a new light (Robson, 2002).

There are three principal ways of conducting exploratory research:

- A search of the literature;
- Interviewing experts in the subject;
- Conducting focus group interviews.

Likewise, based on the findings of the literature review of this research; the importance, challenges and developments that can be brought in to condition precedent notice provision in contractor's claim clause should be explored from the current industry experts and reveal a most suitable solution for a better contractor's claim clause.

3.3.3 Research Strategy

It must be emphasized that, no strategy is inherently superior or inferior to any other. Each strategy can be used for explanatory, descriptive and exploratory research (Yin, 2003). Following strategies are the most commonly used research strategies in the world

- experiment;
- survey;
- case study;
- action research;
- grounded theory;
- ethnography;
- Archival research.

For this research, **survey strategy** was selected to gather opinions from industry practitioners. The survey strategy allows collecting quantitative data which can be analysed quantitatively using descriptive and inferential statistics.

3.3.3.1 Survey Research Strategy

Survey research is a specific type of field study that involves the collection of data from a sample of elements drawn from a well-defined population through the use of a questionnaire.

Kraemer (1991) identified three distinctive features of survey research. First, survey research is used to quantitatively describe specific aspects of a given population. These aspects often involve examining the relationships between the variables. Second, the data needed for survey research is collected from people and, therefore, is subjective. Finally, the survey research uses a selected portion of the population from which the findings can later be generalized to the population. However, it is important to note that the surveys only provide estimates for the real population, not exact measurements (Salant and Dillman, 1994).n

Pinsonneault and Kraemer (1993) noted that surveys are generally unsuitable where an understanding of the historical context of phenomena is required. Bell (1996) observed that biases may occur, either in the lack of response from intended participants or in the nature and accuracy of the responses that are received. Other sources of error include intentional misreporting of behaviors by respondents to confound the survey results or to hide inappropriate behavior. Finally, respondents may have difficulty assessing their own behavior or have poor recall of the circumstances surrounding their behavior.

3.3.3.2 Justification of using Survey Strategy

The survey strategy produces data based on real-world observations. Accordance with the research problem in this study, it is important to quantitatively investigate and identify importance of condition precedent notice provision and its challenges. The breadth of coverage of many people or events means that it is more likely than some other approaches to obtain data based on a representative sample, and can therefore be generalized to a population. Further, this strategy is useful to figure out developments that can be brought into condition precedent notice provision for the betterment of the contractor through interviewing a selected sample. Further, survey can produce a large

amount of data in a short time for a fairly low cost. Researchers can therefore set a finite time-span for a project, which can assist in planning and delivering end results. Importantly this research question is to investigate of importance, drawbacks and to improve the time bar notice provision which cannot be explored non other than survey strategy.

Further advantages can be obtained by using survey approach. Many questions can be asked about a given topic giving considerable flexibility to the analysis. There is flexibility at the design phase in deciding how the questions will be administered: as face to face interviews, by telephone or by electronic means. Standardized questions make measurement more precise by enforcing uniform definitions upon the participants. Thus, it is evident that in this research can be implemented through a questionnaire survey in obtaining relevant data under this research topic.

3.3.4 Research Technique

Considering the various aspects of this research, especially necessity to identification of opinion of experts in the construction industry regarding inclusion of time bar notice provision to the contractor's claim clause, survey strategy was selected. Under survey strategy, questionnaire survey is selected as primary data collection technique. Additionally, unstructured interviews can be used to prepare better questionnaire and to fill the gap creating by the questionnaire survey and to validate results of the questionnaire survey.

3.3.4.1 Data Collection Technique

Literature Survey

Literature survey was carried out to find out different types of condition precedent notice provisions in different standard forms of contracts, to identify the importance of using condition precedent notice provision in contractor's claim clause and to identify challenges to condition precedent notice provision with current case law.

Through the literature review, it was identified the findings of the former researches and conflicting judgments of case laws in this research area and it was a guide to

develop research question of this particular research. The literature review carried out in this research helps to refresh the knowledge gap in identification of condition precedent notice provisions in different contractor's claim clauses in various standard forms of contracts and to take a broad view of importance of condition precedent notice provision. Furthermore, judgments relate to challenging the inclusion of condition precedent notice provision to the contractor's claim clause was identified through the literature survey. Mostly, online researches, articles, websites, books and case laws were reviewed in this literature survey.

Preliminary Survey

Preliminary interview was carried out among 5 industry experts to obtain their assistance to draft the questionnaire. This unstructured interview was supported to get a clear idea about the sample and the data collection using questionnaire survey. Findings from the literature review were also examined by the expert to draft the questionnaire.

Sample

In a survey research the most important aspect in data collection is the selection of the sample. That is the method of selecting from a population and therefore it is quite difficult.

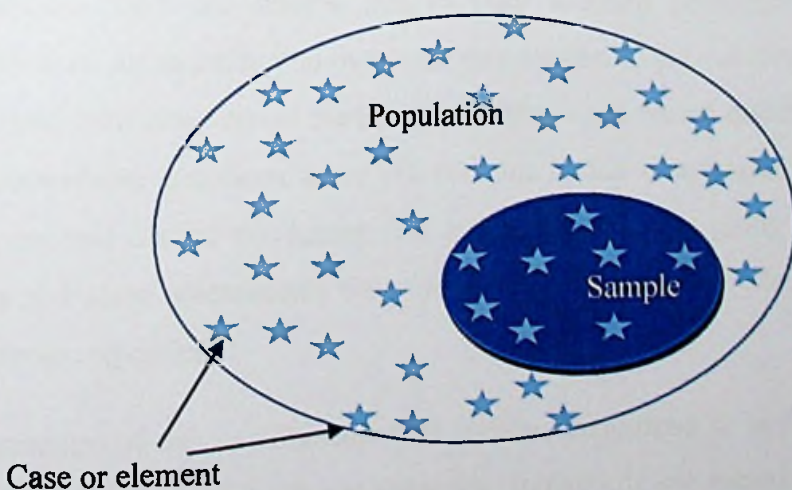


Figure 3-3: Population, sample and individual cases

As Saunders *et al.* (2016) shown in the above figure 3-3, the sampling technique allows to collect data from a sub group rather than collecting data from all relevant cases or elements. Thus, sample should be selected in a way can generalize about all the cases or elements from the population.

For this research, 60 professionals from contractor organizations were selected to questionnaire survey. All the respondents in the sample were from contractor background since, the aim of this study was to develop contractors' claim clause for the betterment of the contractor. Therefore, this study is limited only for contractors as the challenges identified due to inclusion of condition precedent notice provision are faced only by the contractors. Out of 60 professionals, 44 were effectively answered the questionnaire.

Questionnaire Survey

Questionnaire was prepared based on outcomes of preliminary survey in order to achieve research objectives. For easiness of data collecting in a short period, online questionnaire survey was carried out using "Google Forms" web tool. The copied link of the questionnaire was emailed among construction professionals associated with Sri Lankan Construction industry. The drawback of the questionnaire survey was low rate of response from the sample due to busy working schedules of the industry practitioners. As an attempt to overcome this drawback, the questionnaire was mostly developed with close ended questions and other open ended questions were kept as non compulsory questions as to fill forward in the questionnaire. A preliminary interview was carried out among few professionals before going through the main survey and some amendments were identified to include for better understanding of the remote respondents.

The structure of the questionnaire was mainly categorized in to four main sections accompanied with introduction to the study. Initially, it was explained about purpose of the study which stated aim and objectives and additionally brief explanation about the condition precedent notice provision was given as to refresh the knowledge of

respondents on the study area. To encourage high response from the respondents, the security of their responses was assured.

In the first section, it was intended to get respondents background in the construction industry related professional and academic areas. The second section was developed to gather perception of respondents regarding importance of the condition precedent notice provision and reasons for not to comply with notice provision in contractor's claim clause. Thirdly, it was asked to rank how frequent the given negative effects could challenge the condition precedent notice provision in contractor's claim clause. Those negative effects were identified through case laws observed under literature review. Finally, the respondents were inquired to propose suitable developments to be brought into condition precedent notice provision in order to overcome the negative effects of the particular provision for the betterment of the contractor.

Structured Interviews

The responses obtained through the questionnaire survey were validated by means of structured interviews carried out among industry experts those who were participated for the preliminary interview. The same questionnaire was answered by the experts in a face to face interview and opinions of the experts on subject areas could gathered through the interview non like the online questionnaire survey. The interviewer explaining questionnaires have higher response rate compared with the self reading questionnaires.

3.3.4.2 Data Analysis Technique

Data obtained through the above mentioned survey methods were analysed thoroughly as to address the research problem. Hence, data analysis plays a key role in a research. Most suitable data analysis technique was selected based on type of questions and relevant answers.

Bar Charts and Pie Charts

Pie charts and Bar charts were used to show responses of each category and to see distribution of responses relating to closed-ended questions. Mostly, pie charts indicate

percentage of responses of the total sample to close ended questions and bar charts denote number of responses for each category in a question.

Relative Important Index (RII)

The relative important index is used to rank each identified factors with regard to contractor's inability to comply with notice provision, challenges identified against the condition precedent notice provision and proposed developments to contractor's claim clause. Method of calculation of RII is; sum of weightings divided by the multiplication of highest weight and total number of respondents. Further, this method has been used by many other researches previously as data analysis method in ranking this kind of factors as to identify most appropriate factors.

RII facilitate to evaluate of nonparametric sample by giving a RII value for each factor.

$$RII = \frac{\sum W}{A \times N}$$

Where;

RII = Relative Important Index

W = weighting given to each factor by the respondent

A = Highest weight

N = Total number of respondents

3.4 Chapter Summary

The main purpose of this chapter was to identify the most suitable methodology that can express the way to achieve the aim of the research. This research area is wealth in literature on the importance of condition precedent notice provision and challenges of it however there is less literature on proposed improvements to condition precedent notice provision. Therefore mix approach was selected combining both qualitative and quantitative methods. Preliminary survey was to interview industry experts in order to obtain their view on the study area and to prepare a comprehensive questionnaire based on their views and findings of the literature review. Simple quantitative technique was selected to analyse data obtaining through the questionnaire survey. Next chapter will describe about the analysis and findings of the survey approach.

CHAPTER 04

DATA ANALYSIS AND FINDINGS

CHAPTER FOUR

4 DATA ANALYSIS AND FINDINGS

4.1 Introduction

Data obtained through the interview and questionnaire survey is analysed in this chapter based on the methodology described in the previous chapter. Accordingly, this chapter describes about the profiles of survey samples and their responses to respective questionnaire towards condition precedent notice provision.

As per the research design, firstly preliminary survey findings are discussed. The comprehensive questionnaire was then designed based on findings of the literature review and experts' opinions obtained through the preliminary survey. This chapter completely based on information collected from literature survey, industry practitioners through questionnaire survey and interviews.

Prime intension of this chapter is to analyse the data in a way to achieve research objectives. Moreover, ultimately, discussion carried out with the intention of approaching the conclusion of this study.

4.2 Preliminary survey

Preliminary survey basically carried out through the literature review and was able to find out importance of notice provision in contractor's claim clause. Further study reveals challenges to condition precedent notice provision as per case laws and code of civil law. These findings derived through the literature survey were primarily validated by carrying out preliminary interviews. Five claim experts were selected to this and these experts were selected basically considering their extensive experience and knowledge on contractor's claims in contractor background. The experts' profile is given in the below table 4-1.

The purpose of the preliminary interview was to obtain the view of the experts on condition precedent notice provision and to obtain their guidance to prepare the questionnaire. Further, suitable flow in the questionnaire and readability of each question that most precisely explain its' purpose were extensively discussed with them. Possible answers for those questions were also discussed.

Experts' Profile

Table 4-1: Experts' profile

Expert	Designation	Experience
Expert 01	Chief Quantity Surveyor	26 years
Expert 02	General Manager	31 years
Expert 03	Deputy General Manager	22 years
Expert 04	Chief Quantity Surveyor	24 years
Expert 05	Contract Manager	27 years

The expert's views were basically questioned on following areas

- The view on condition precedent notice provision in contractor's claim clause
- The view on contractor's inability to comply with condition precedent notice provision
- Identify ways of improving the contractor's claim clause

4.2.1 Findings from Preliminary Survey

All the experts agreed with the inclusion of notice provision in contractor's claim procedure. Their reasoning for that was basically it is an important contractual obligation of a contractor to notify the employer or the engineer regarding additional costs and time events that will affect to their projects in future. So, that the employer or the engineer can perceive a clear image of future consequences can occur due to those events.

However, in most of the times they have had experienced delay in giving notices for claims by contractors in the industry. One expert said the reason for lack of notices

was due to lack of knowledgeable professionals in construction sites. Most of the times, site engineers or the project managers do not identify the claim events at the initial stage or during the time period given in conditions of contract. Those events are normally identified when projects become loss or when projects could not complete on time. As per his view, though there are compensable events to the contractor, he would unluckily lose his right to get paid due to delay in claim notification as stipulated in the conditions of contract.

Another expert said complex nature of the conditions of contract is also causing to not to comply with notice provision. Generally, contractual basis for the claim and relevant clauses to be established with the notices and lack of understandability of contract clauses and its complex nature matters a lot in site level. One expert said the communication gap between site officers and claims administrators was a reason for delay in claim notices. However, majority of their idea was lack of contractual knowledge and lack of project monitoring as the reasons for shortfall of claim notices.

Further, some experts pointed out that the FIDIC conditions of contract was drafted for international contractors in developed countries and those construction organisations tend to be fairly large organizations not like in Sri Lanka. In developed countries, they employ experienced staffs who are fully capable of recognizing claim situation when it arises. Therefore, there would seem to be no good reason for why contractors forfeit claims due to inability of giving claim notice on time in those developed countries.

An argument was raised by one expert saying that, one of the reasons for requiring notice is to forewarn the employer or the engineer regarding events which are likely to cause delay or additional cost to the contract and to let them review whether to proceed or amend or withdraw those events. If the event was raised by the engineer as an instruction to variation then, after receipt of notice from the contractor, the engineer or the employer may consider the consequences of it and decide if it should either be amended or withdrawn. However, the engineer should know whether or not a variation instruction would cause delay or additional cost before the instruction is given. Some contractors do not give notices for delay or additional cost claims arising out of

variations instructed by the engineer and end in a situation where forfeiting their valuable claims due to shortfall of notice as per the contract terms. This kind of matters should be eliminated for the betterment of the contractor.

In Sri Lankan construction industry, the engineer or the consultant has been given the full authority to determine on claim situations, whether the contractor should be compensated or not. Therefore, the contract is not only the law of the parties, but also the law of the engineer as agreed by both parties in signing the contract. As explained by the experts, consultant or the engineer is mostly concern on quality of the construction and most of the time additional cost or time claims are compromised with the construction quality matters at the end. Therefore, Sri Lankan contractors are mostly reluctant to give claim notices to the engineer with the feeling that it as an unpleasant action against the consultant which could harm the good relationship between them. Therefore, one expert proposed that this notice provision is more suitably applicable for grade C1 or above contractors as registered in CIDA. Only major construction companies tend to employ experienced professional staff by paying competitive salaries and therefore, contractual aspects are somehow practiced in those organizations. Another point raised by the experts was there is a huge lag in providing notices of claims by the sub contractors in the industry. That communication gap is ultimately affected to the main contractor who is legally binding with the employer to give timely notices.

When discussed about the suitable improvements to be brought in to contractor's claim clause, majority of the experts appreciated the amendment in FIDIC 2008 Gold Book, where the contractor may be able to submit the dispute relates to notice of claims to DAB. Accordingly, if DAB considers that in all the circumstances, it is fair and reasonable that the late submission be accepted, the DAB shall have the authority to overrule the 28 days conditions precedent notice provision.

In addition to that, the majority of experts proposed that there is no reason to deny claims for lack of written notice if the contractor can prove that the engineer is well aware of the event. There can be ample of evidence in the records, meeting minutes and etc to support an inference that the engineer received the notice required under

conditions of contract or that timely constructive notice existed throughout the job. Hence, it was their perception that the time bar notice provision should not act as a defense to construction claims notwithstanding its traditional merit. Accordingly, the notice provision should be amended based on cultural and geographical aspects.

4.3 Questionnaire Survey

Main objective of the questionnaire survey was to identify contractor's opinion regarding condition precedent notice provision and the questionnaire was distributed among 60 professionals and 44 out of 60 were answered effectively. Therefore, response rate of the survey is 73.3%.

4.3.1 Respondents' Profile

General details of the respondents were given in the Table 4-2 in this section. Accordingly, designations, experience of the respondents in contractor side, academic background and standard forms of contract used in their projects are analysed.

4.3.1.1 Respondent's Designations

Table 4-2: Designations of the respondents

No.	Designation	Number of Respondents	%
1	Contract Manager	5	11%
2	Senior Quantity Surveyor	17	39%
3	Quantity Surveyor	18	40%
4	Director	2	5%
5	Managing Director	2	5%

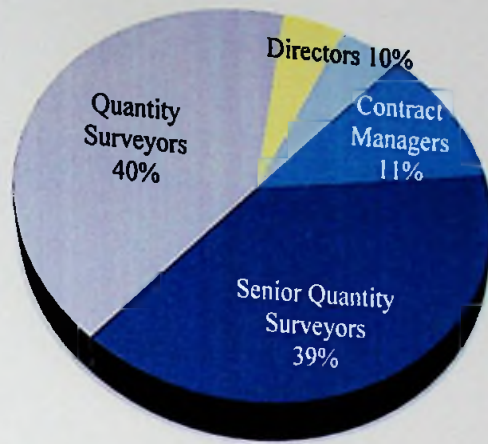


Figure 4-1: Respondent's designations

Accordingly, it can be said that 79% of the respondents are from quantity surveying background where the others are most probably from engineering background. The reason to consider large number of respondents from quantity surveying background was due to contractual issues and handling of claims are mainly carried out by the quantity surveyors of the organization. Therefore, they could have better experience in research problem of this study than the others.

4.3.1.2 Respondent's Experience

Table 4-3: Experience of the respondents

No.	Years of Experience	Number of Respondents	%
1	5-10	7	16%
2	10-15	15	34%
3	15-20	10	23%
4	20-25	8	18%
5	More than 25	4	9%

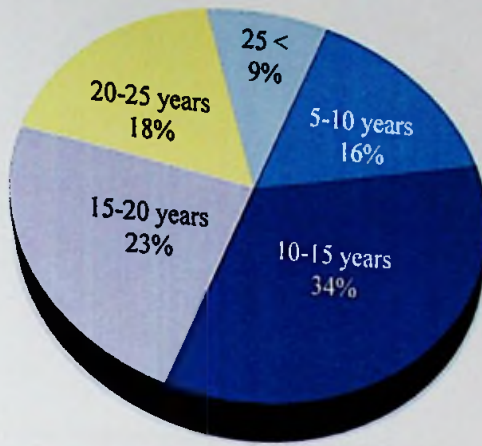


Figure 4-2: Respondent's experience

As illustrated in the Figure 4-2, all the respondents had more than 5 years of experience in the construction industry. The main reason to select respondents who have more than 5 years of experience was to obtain more reliable findings from the questionnaire survey. In many organizations, contract administration part is carried out by experienced persons and therefore, good impact for the questionnaire can be obtained by them. Further, it can be seen that all the experience categories are approximately equal and perfectly blend as 5-10 years 16%, 10-15 years 34%, 15-20 years 23% and more than 20 years 27%. Majority of the respondents had 10 to 20 years of experience.

As this research is focused only on the contractors' perspective, the respondents' experience in contractor's background is also further analyzed in the Table 4-4.

Table 4-4: Respondents experience as a contractor

No.	Years of Experience	Number of Respondents	%
1	Less than 5	7	9%
2	5-10	15	41%
3	10-15	10	37%
4	More than 15	8	13%

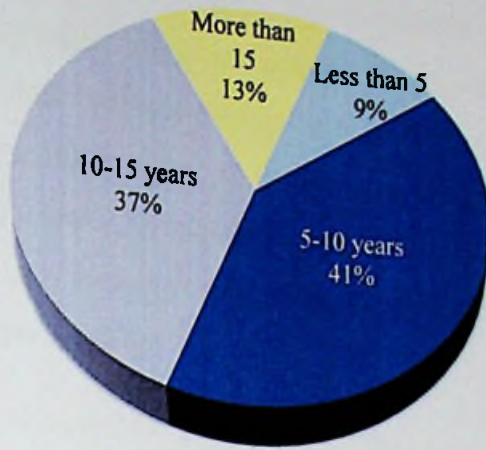


Figure 4-3: Respondents' experience in contractor background

As per the figure 4-3, majority of the respondents (90%) has more than 5 years of experience as contractors in the industry. In category wise, majority of the respondents are having 5 to 10 years of experience as the contractors. As contractor's claims are initiated by the contractors, disputes relate to the contractor's claim clause could have well identified by the contractors other than the engineers and the employers. Moreover, it can be assumed that, more experience as a contractor is directly proportional to experience in contractor's dispute and claim situations. Therefore, all the respondents having contractor side experience was a pre requisite to answer this questionnaire. Among all the respondents, 50% have more than 10 years of experience as contractors.

4.3.1.3 Respondent's Educational Background

Table 4-5: Respondent's educational background

No.	Educational Background	Number of Respondents	%
1	Graduate	44	100%
2	Post Graduate	18	40%
3	Chartered	19	40%

It can be said by referring table 4-5, that all the respondents are graduates or above category in their field of study. Since the research problem is to introduce suitable developments to the condition precedent notice provision in contractor's claim clause, both prior knowledge and experience of the respondents are important. Thus, it can be satisfied with the respondent's prior knowledge by considering the educational background. Further, it was analyzed standard contract documents they are familiar with as summarized in the table 4-6.

Table 4-6: Standard contract documents familiar with

No.	Standard Contract Document	Number of Respondents	%
1	FIDIC 1999 Red Book	44	100%
2	FIDIC 1987	9	20%
4	CIDA SBD/ 01/02/04	44	100%
3	FIDIC 2006 Pink Book	3	6%
5	NEC	6	13%
6	JCT	3	6%

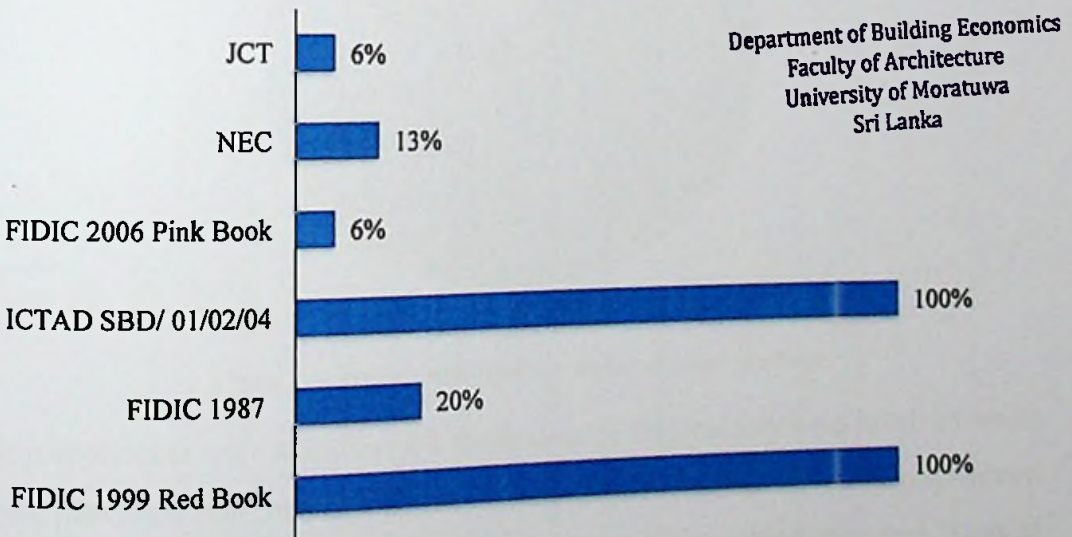


Figure 4-4: Familiar Standard Forms of Contracts of respondents'

As per the figure 4-4, all the respondents are familiar with FIDIC 1999 Red Book and CIDA SBD document series. However, notice provision is not condition precedent in Sri Lankan standard forms of contracts and therefore, as per the expert's opinion with regard to their past experience, the employers or engineers tends to include that provision in contract data or particular conditions. Since, all the respondents have experience in both documents where notice provision is stipulated as condition precedent (FIDIC 1999) and not (CIDA SBD), they may have a better knowledge regarding consequences of condition precedent notice provision.

4.3.2 Respondents' Experience with Time Bar Notice Provision

First part of the questionnaire was based on the background of the respondents and secondly it was questioned about their experience with relate to condition precedent notice provision.

4.3.2.1 Projects with Condition Precedent Notice Provision

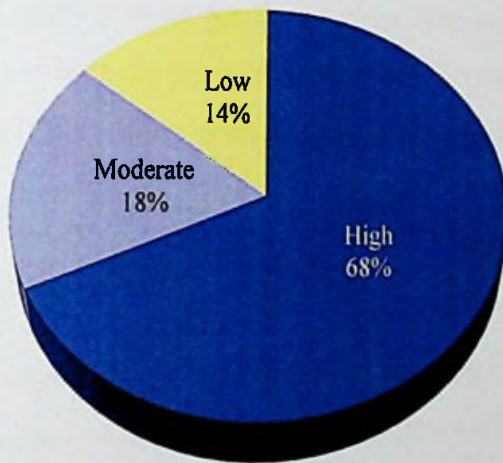


Figure 4-5: Projects with condition precedent notice provision

The respondents were asked to rank the number of projects they have involved where notice provision was condition precedent. As per their ranking, 68% of the respondents had high number of projects where notice provision was condition precedent. It can be said that, reasonably high number of projects was included with condition precedent notice provision.

4.3.2.2 Regularity of Providing Notices

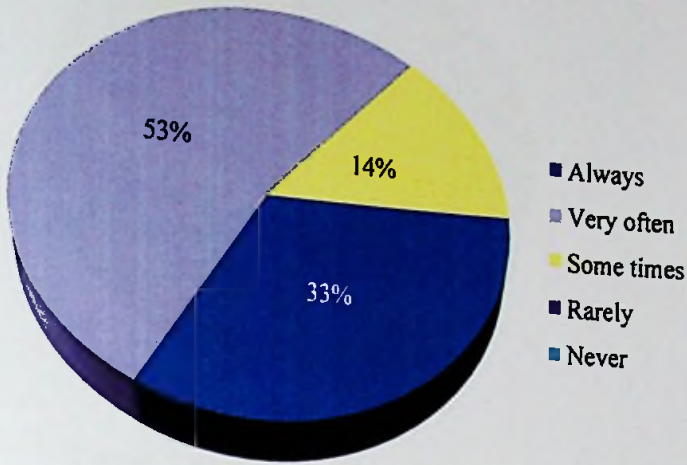


Figure 4-6: Frequency of providing notices

Further, respondents were asked to rank that how many times they have provided claim notices within stipulated time frame established in relevant contracts. Surprisingly, as illustrated in figure 4-6, only 33% of the respondents had always provided timely notices and other majority had provided notices very often. However, there were no respondents who had rarely or never provided notices. Although it is a plus point when considering the status of industry practitioners on claim administration, there is a high risk of losing claims if only lesser percentage of practitioners provide notices at all times.

4.3.2.3 Claim Rejection due to Lack of Notices

Moreover, it was reasonable to question from the respondents regarding their experience on claims been rejected due to not complying with notice provision.

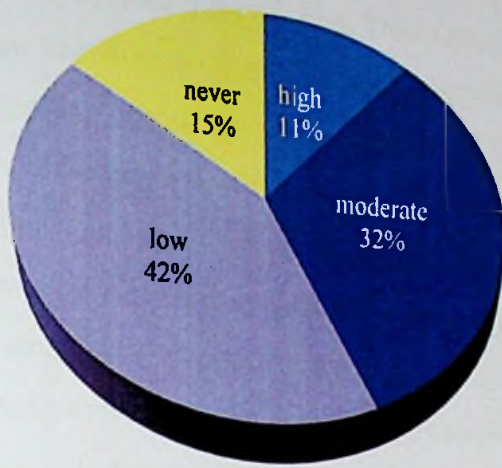


Figure 4-7: Claim rejection due to lack of notices

The figure 4-7 shows that the experience of 42% of respondents was low level on claims been rejected due to non compliance with notice provision, while over 30% had moderate experience and over 10% had high level of experience on claims been rejected due to non compliance with notice provision. Only 15% of respondents replied that they had never experienced it.

4.3.2.4 Determination from the Engineer within a Reasonable Time

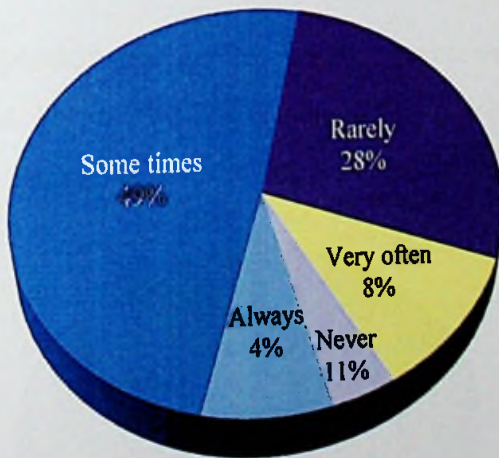


Figure 4-8: Did engineer determine within a reasonable time?

Although, the contractor is mandatory to give claim notices within a specified time period, the Engineer is required to give his determination only within a reasonable time. This has caused to initiate lot of arguments among industry practitioners and it

had been criticized in some of the literature also. Therefore, finally under this section, the respondents were asked to indicate that how many times they had received determination from the engineer within a reasonable time. Their responses are given in the figure 4-8. As per the perception of the contractors, only few (less than 5%) had received determination always within a reasonable time. Nearly 50% of the respondents' view was only sometimes they had received engineer's determination within a reasonable time. Thus, there can be a reasonable doubt whether the intended purpose of time bar notice provision can be achieved by stressing only one party to the contract with so called time bar provision and let the other party to response the same event in more relaxingly without time bars.

4.3.3 Importance of Condition Precedent Notice Provision

One of the research objectives in this study was to identify importance of condition precedent notice provision. Therefore, in the questionnaire survey, the respondents were firstly questioned whether they think that it is important to establish notice provision as condition precedent.

4.3.3.1 Is it important; notice provision as condition precedent?

More than 70% of respondents thought that it is important to establish notice provision as condition precedent. This reveals that the contractors also see the better side of the notice provision from their point of view than the negative impacts.



Figure 4-9: Is it important; notice provision as condition precedent?

Accordingly, less than 30% of the respondents had thought that it is not important. However, it can be said that majority of the contractors think that notices are important.

4.3.3.2 Importance of Condition Precedent Notice Provision

Different reasons identified other than in the literature review were listed out in the below table 4-7 as per the opinion of the respondents comparatively with the reasons identified in the literature survey.

Table 4-7: Importance of condition precedent notice provision

Importance of Condition Precedent Notice Provision (Literature Vs. Questionnaire Survey)		
No.	From Literature Review	From Questionnaire Survey
1	To improve the administration of the contract.	Otherwise contractors will not notify any delays or additional cost events.
2	To alert the employer to the contractor's claim at an early stage.	To protect the right to know.
3	This allows the employer to evaluate the claim, and also take any steps to work with the contractor to mitigate the delay.	To minimize misunderstanding when interpreted the claim.
4	To avoid a buildup of contractor's claims during a project, this historically has often led to a final account dispute between the employer and the contractor.	

Majority of others who agreed to establish condition precedent notice provision had same reasons as identified in the literature review. Additional reasons identified in this questionnaire survey show the opinion of contractors together with their cultural attitude as Sri Lankans. Contrary to the intended purpose of the notice, they have thought condition precedent notice provision as a penalty provision where otherwise contractors would not provide claim notices to alert the employer. On the other hand, it can be most probably the reason for including time bar provision without just including a notice provision. Another interesting reason given by the respondents was

“to minimize misunderstanding when interpreted the claim”. They have thought that the engineer would misunderstand the claim situation where if the claim was given without a proper notice.

4.3.3.3 Objections for Condition Precedent Notice Provision

Further, respondents who did not agree to condition precedent notice provision had given their reasons for the objection as follows;

Table 4-8: Objections for condition precedent notice provision

No.	Reasons for objecting the Condition Precedent Notice Provision
1	To maintain a good relationship with Contract Administrator /Engineer to minimize the negative effects to the project while progressing it.
2	If any additional work is performed by the contractor at site as per the instruction given by Engineer, he must be paid for it.
3	Because the contractor's failure to give notices of claim for cost and/or time will be a complete defense for the employer, no matter how genuine the claim may otherwise be.
4	It's unfair to lose contractor's entitlement due to failure to serve notices
5	It should be amended to with the notice clause for employer too.

As per the experts' explanation, Sri Lankans are egoistic. Similarly, the contractors' view was coinciding with the expert's view and hence they feel offensive when another show a fault while considering it would negatively affect to the good relationship with the other party. Summing up other reasons, it can be said that the respondents had thought that the condition precedent notice provision as unfair to the contractor, where if the contractor has genuinely done some additional work or incurred additional time, he should be compensated for it. In other words, the contractors' reasonable entitlement to a claim should not be defeated due to notwithstanding notice provision. There should be a fair and reasonable manner for both parties, where some respondent had said that it should be amended with the notice clause for employer too.

4.3.3.4 Contractors' Inability to Comply with Notice Provision

As discussed in the section 4.3.2.2 only 30% had always provided notices and therefore, it was most suitable to identify reasons that why others cannot comply with notice provision at all the times. Further, it was one of the main objectives of this study. Various reasons identified in the literature review were asked to rank by the respondents with respect to level of frequency as "very frequently", "frequently", "occasionally", "rarely" and "never". Highest weight of 5 was given for "very frequently" in RII analysis and in descending order up to 1 was given to other frequency levels as mentioned above. The relevant RII values with respect to each cause are given in the figure 4-10.

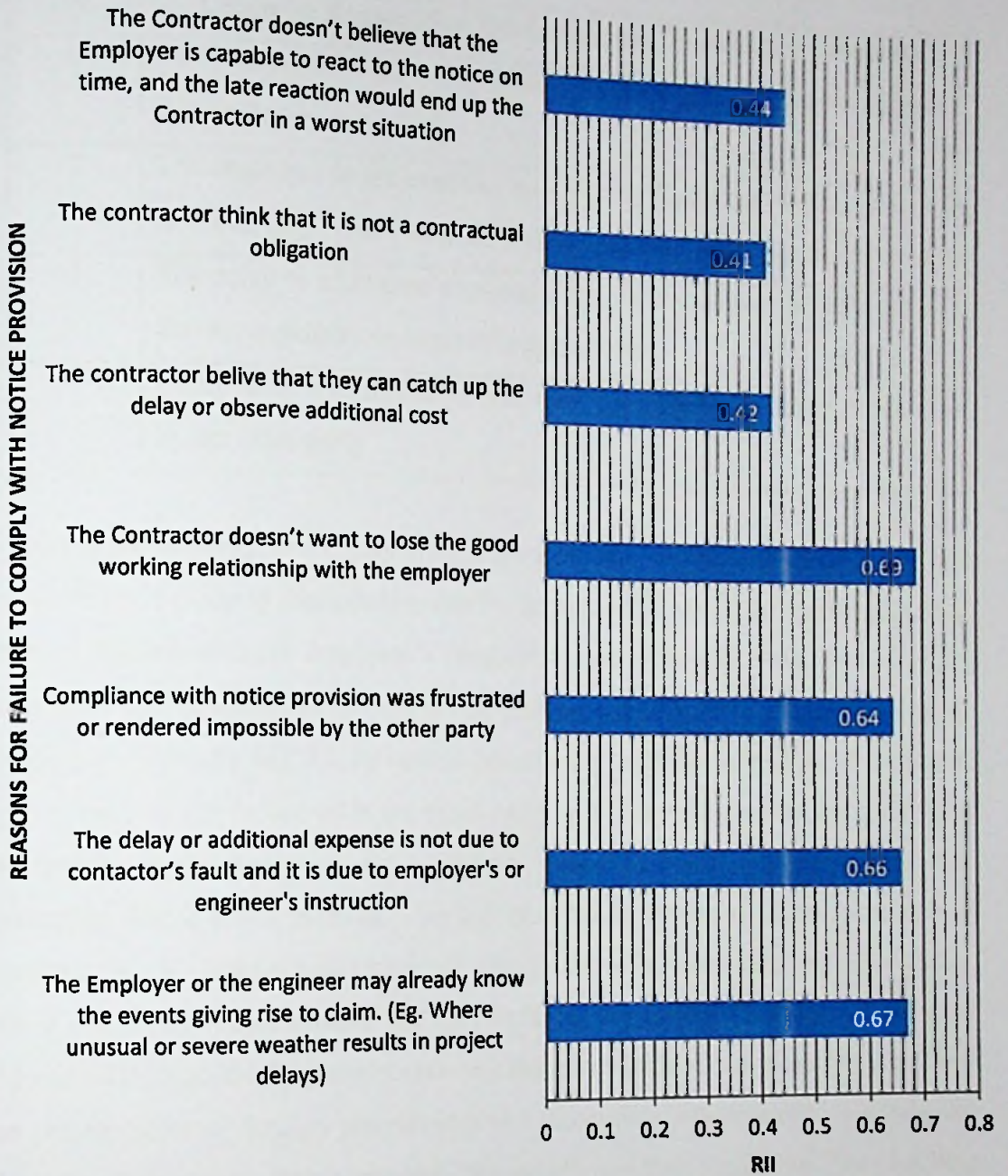


Figure 4-10: RII analysis for reasons of failure to comply with notice provision

By looking at the RII values, it can be seen that only four reasons have got above 0.6 where other three reasons have around 0.4 values. Among them considering RII values, mostly caused matters for not complying with notice provision are as follows in the table 4-9.

Table 4-9: Common Reasons for not complying with notice provision

No.	Common Reasons for Not Complying With Notice Provision
1	The Contractor doesn't want to lose the good working relationship with the employer
2	The employer or the engineer may already know the events giving rise to claim. (Eg. Where unusual or severe weather results in project delays)
3	The delay or additional expense is not due to contractor's fault and it is due to employer's or engineer's instruction
4	Compliance with notice provision was frustrated or rendered impossible by the other party

It seems the majority of the respondents have thought that the notice provision as a threat to good working relationship with the employer. However, this matter should be further studied with the employer's perspective and otherwise there is no point of establishing a condition precedent notice provision mostly for the betterment of the employer. Secondly and thirdly ranked causes are in simply saying that, if the matter gives rise to claim is known to the other party or if it is instructed by the other party (employer or the engineer), the contractor would have fail to give claim notice assuming that it is not required. This can be a misinterpretation of the condition of contract. Since all the reasons have got only average RII value from the respondents, there can be any other reasons that may cause to contractors. The above facts were identified through the literature review and therefore, those reasons can be established as per the view of foreign practitioners. As this survey was carried out among Sri Lankan practitioners, their perception can be different than the others. That can be a reason for getting average RII for all the causes in the above analysis.

As the next question in the questionnaire survey, the respondents were asked to reply that if they did not always comply with notice provision what were the reasons. Accordingly, they were encouraged to provide their own reasons as it seems less input in the literature on this area. Accordingly, 70% of the respondents other than the 30% who always provide notices had given their reasons. As a summary, all the reasons can be list out as in the table 4-10:

Table 4-10: Additional reasons for not complying with notice provision

No.	Additional Reasons for Not Complying with Notice Provision
1	Lack of knowledge of the site staff
2	Negligence
3	Lack of communication
4	Due to contractors are overloaded with work and the time targets
5	Lack of awareness
6	Some of the impacts unknown until execution or indirect impact.
7	Poor management
8	It is not benefit to contractor
9	Attitudes (fear of making anger the client)
10	Higher management decision to refrain from it
11	Concurrent responsibility for default
12	To maintain good relationship with Employer

All the reasons identified by the respondents' show a significant similarity because all can be said as deficiencies in the contractor's side. On the other hand if contractors can overcome these deficiencies, most probably they can comply with notice provision too. Surprisingly, the only reason that has been similar with the findings from literature review was "to maintain good working relationship with the employer" and at the same time that is the reason which scored highest RII value in the survey. It is important to notice the following reasons given by the respondents.

- Lack of Knowledge
- Negligence
- Lack of communication
- High work load of site staff
- Lack of awareness
- Poor management

Those are critical deficiencies of contractor's staff. If contractors are unable to comply with notice provision due to those reasons, is it reasonable to defeat their valuable claims due to lack of notices. On the other hand, does "time bar" the best fitted contractual provision which can be applied to overcome such kind of deficiencies of the contractor's staff is one of the questions to be clarified. Since, FIDIC is developed for international contracts where contract administration is properly practiced by qualified professionals and therefore they may not have come across with the above mentioned shortfalls. However, it can be seen that mostly the practitioners in Sri Lankan construction industry are facing contract administration issues.

4.3.4 Challenges to Condition Precedent Notice Provision

As discussed in the literature review, the condition precedent notice provision has been critically argued in litigation forum. There are number of judgments which criticized the condition precedent notice provision and at the same time there are number of judgments strictly applied the merit of wordings in relevant clauses. Moreover, Middle East countries have permitted different civil law concepts to overrule the condition precedent notice provision. Therefore, firstly respondents were asked to indicate whether they think that the contractor is prejudiced by enforcing condition precedent notice provision.

4.3.4.1 Does the Contractor Harmed by Condition Precedent Notice?

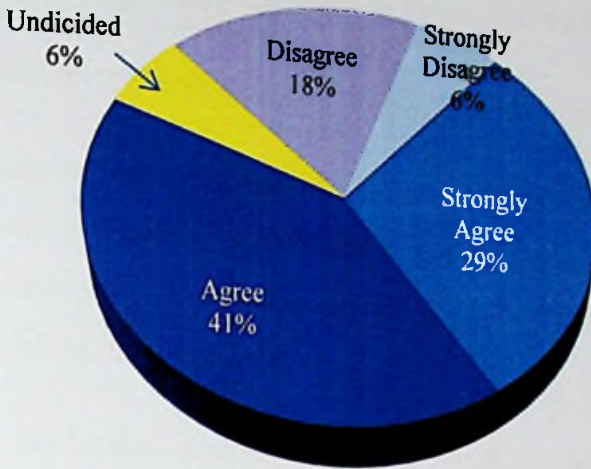


Figure 4-11: Does the contractor harmed by time bars?

Exactly 70% of the respondents have thought that the contractor is prejudiced by enforcing condition precedent notice provision in contractor's claim clause. Nearly 25% has been disagreed to the above question where other 5% has been undecided the answer. Accordingly it can be said that more than two third of the respondents' view on condition precedent notice provision is that it is destructive or unfair to the contractor.

4.3.4.2 Factors Caused to Prejudice the Contractor

Before, asking to rank the challenges identified in the literature review, the respondents were asked to explain their view as why they think that the condition precedent notice provision is considered as harmful to the contractor. Summary of all the responses from the respondents' is given in the table 4-11.

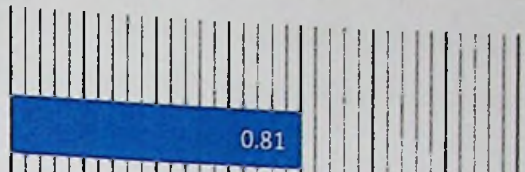
Table 4-11: Factors caused to prejudice the contractor

No.	Factors Caused to Prejudice the Contractor
1	Contractor loses his entitlement for time and cost
2	Even the claim is a reasonable one and the effect to the contract is clearly obvious, Engineer will throw it away merely because of his failure to submit prior notice, which is right as per the contract, but practically very unfair to the Contractor.
3	In Sri Lankan contexts most consultants use condition precedent notice provisions to reject contractor's claims, So, consultants use this to penalize contractors.
4	Including biased conditions. That is transferring all claimable events as contractor's risk
5	Will face financial consequences and losing the contract and securing future contracts will be an issue including sustaining the business

Notwithstanding the contractor's deficiencies given under sub heading "Additional Reasons for Lack of Notices", the contractors have thought that the forfeiting his entitlement for additional cost and/or time as unfair contract term. Further, it was considered as a penalty clause. However, the basic idea from all the respondents' was depriving contractor's actual entitlement for additional cost and time due to failure to provide notice is not reasonable. The challenges identified in the literature review were asked to rank by the respondents to evaluate perception of the industry practitioners on common challenges.

4.3.4.3 Significant Challenges to Condition Precedent Notice Provision

["Doctrine of Penalty"] when the contractor's entitlement to an EOT is subject to complying with notice provision and failure to do so will deprive the contractor of an EOT and allow the employer to claim LD. This LD could be a penalty



["Conflicts with Prevention Principle"] when acts of employer prevent the contractor from achieving the completion date and deduction of LD due to not complying with notice for EOT is not reasonable under common law prevention principle



["Defense for claims"] The requirement for having notices is used as defense against claims and not for the intended purpose



["Unjust enrichment"] An employer may be relying on a time bar provision to avoid payment to the contractor for works performed and for works from which the employer has benefitted particularly if the only reason for withholding payment is the lateness of the contractor's claim.



["Unlawful exercise of rights"] the exercise of a right shall be unlawful if it is disproportionate to the harm suffered by the employer



["Loosing good faith obligation"] If an employer was made aware of the contractor's intention to claim in such manner, the employer could be seen as acting in bad faith; if he later argues that the contractor did not meet the condition precedent notice provision.



0.77 0.78 0.79 0.80 0.81 0.82 0.83 0.84
RII Value

Figure 4-12: Challenges to condition precedent notice provision

RJI value for each challenge was calculated based on the respondents' ranking as "Strongly agree", "Agree", "Undecided", "Disagree" and "Strongly Disagree". The highest weight of 5 was given for "Strongly agree" and other responses were weighted as 4, 3, 2 and 1 respectively. The relevant RJI values with respect to each challenge are shown in the above figure.

Accordingly, as shown on figure 4-12, all the challenges have scored around 0.8 RJI value. Therefore, majority of respondents had agreed to all the challenges identified in the literature review as true challenge to the condition precedent notice provision. Accordingly, most significant challenges affected to condition precedent notice provision can be list out in the following order.

1. Conflicts with prevention principle
2. Unjust enrichment
3. Defense for claims
4. Doctrine of Penalty
5. Unlawful exercise of rights
6. Loosing good faith obligation

However, in a recent case *North Midland Ltd v. Cyden Homes Ltd* (2017), the English High Court had rejected prevention principle argument related to concurrent delay event of a contract formed under an amended JCT Design and Build 2005 form, where it expressly provided that "any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account". Accordingly, the judge had clearly stated that the clause was "crystal clear" as to intention of parties where concurrent delay occurs and the prevention principle could not taken in to account as per the express provision in the contract.

Therefore, parties' intension in a contract is paramount and in that sense express provisions in a contract agreement can avoid conflicts and challenges to condition precedent notice provision.

4.3.5 Developments for Contractor's Claim Clause

Since notice provision in contractor's claim clause is increasingly challenged in the construction industry, it was interested to obtain quick opinion survey from the respondents as to what level they agree with the necessity of amending the contractor's claim clause in conditions of contract.

4.3.5.1 Is it Need to Develop Contractor's Claim Clause?

One of the main objectives of this research was to identify necessary amendments to be brought into condition precedent notice provision in contractor's claim clause. As discussed in the previous sections under this chapter, importance of condition precedent notice provision, contractor's reasons for failure to provide claim notices and legal provision on which challenged the enforcement of notice provision were identified from the view of professionals in contractor side. As to achieve the last objective, the respondents were firstly asked whether they would agree that the condition precedent notice provision should be developed.

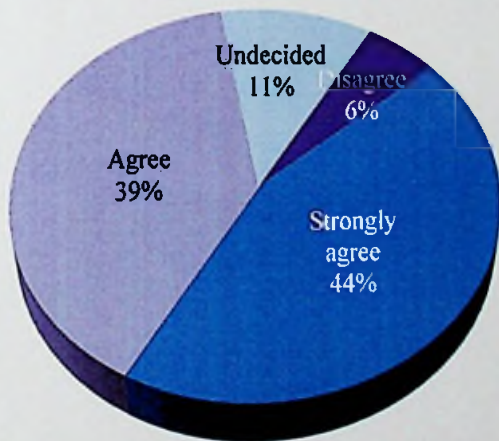


Figure 4-13: Should the condition precedent notice provision be developed?

Nearly 85% of the respondents had agreed for bringing developments to contractor's claim clause with respect to condition precedent notice provision. It gives a quite alarm to the contract drafters to consider about possible amendments to be brought so as to

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

avoid shortfalls encountered by the contractors when practicing claims where notice provision is condition precedent.

Hence, importance of notice provision, reasons for not complying with notice provision and significant factors that challenge the condition precedent notice provision is given in the table 4-12 below. Factors identified in the literature review and preliminary interview and further validated through the questionnaire survey were mentioned in the top part of the table and factors which were identified through the questionnaire survey were indicated in a different colour in the bottom part of the table. Accordingly, possible developments should be introduce in a reasonable manner in a way that address the factors mentioned in the table 4-12.

Table 4-12: Important factors for developing time bar notice provision

Importance of Condition Precedent Notice Provision	Reasons for Not Complying With Notice Provision	Significant Challenges to Condition Precedent Notice Provision
To improve the administration of the contract.	The Contractor doesn't want to lose the good working relationship with the employer	Conflicts with prevention principle
To alert the employer to the contractor's claim at an early stage.	The employer or the engineer may already know the events giving rise to claim.	Unjust enrichment
This allows the employer to evaluate the claim, and also take any steps to work with the contractor to mitigate the delay.	The delay or additional expense is not due to contractor's fault and it is due to employer's or engineer's instruction	Defense for claims
To avoid buildup of contractor's claims led to a final account dispute between the employer and the contractor.	Compliance with notice provision was frustrated or rendered impossible by the other party	Doctrine of Penalty
Otherwise contractors will not notify any delays or additional cost events.	Lack of knowledge of the site staff	Unlawful exercise of rights
To minimize misunderstanding when interpreted the claim.	Negligence	Loosing good faith obligation
To protect the right to know.	Lack of communication	
	Due to contractors are overloaded with work and the time targets	
	Lack of awareness	
	Some of the impacts unknown until execution or indirect impact.	
	Poor management	
	It is not benefit to contractor	
	Attitudes (fear of making anger the client)	
	Higher management decision to refrain from it	
	Concurrent responsibility for default	

4.3.5.2 Proposed Developments to Contractor's Claim Clause

Developments identified in the preliminary interview were asked to rank as the level of suitability to amend notice provision in contractor's claim clause for the betterment of the contractor. The respondents were advised to rank the developments proposed in the questionnaire survey as "highly suitable", "suitable", "neutral", "unsuitable" and "highly unsuitable". The highest weight of 5 was given for "highly suitable" and low beyond up to "unsuitable" in RII analysis.

Include the same condition precedent notice provision to the Employer's claim too

Compensate the Contractor only half of his claim due to the violation of notice provision

Release the Contractor from Liquidated Damages if he proves that the delay is not due to Contractor's fault

Compensate the Contractor if he proves that the Employer is not prejudiced by his failure to notify.

Compensate the balance of the claim amount after deducting the damage due to violation of notice provision.

There are circumstances which justify the late submission; he may submit the details to the DAB for a ruling.

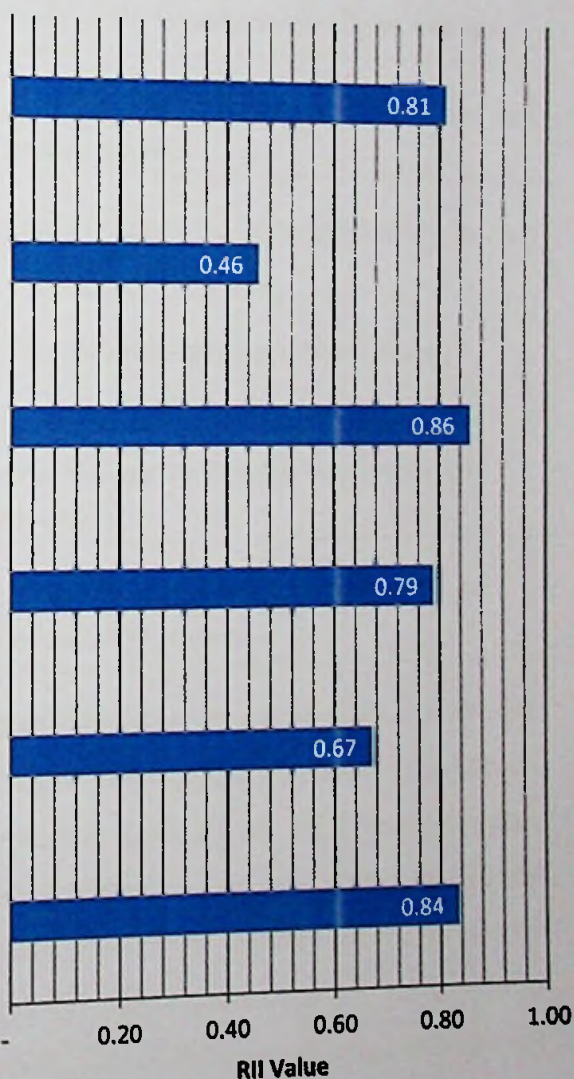


Figure 4-14: Suitability of proposed developments to contractor' claim clause



RII values in the above figure 4-14 are varied in between 0.46 to 0.86. Accordingly, five proposals have scored above average RII value of 0.6 and only one proposal has obtained 0.46 which indicate that majority of contractors' need is to somehow obtain the full claim and not the half of it due to notwithstanding condition precedent notice provision or in other words, they may not agree for a 50:50 sharing of their merit claim due to lack of prior notice. Other developments proposed to the contractor's claim clause can be list out in the following order as per the highest score.

Table 4-13: Suitable developments to the contractor's claim clause

No.	Suitable Developments for the Contractor's Claim Clause
1.	Release the Contractor from Liquidated Damages if he proves that the delay is not due to Contractor's fault
2.	There are circumstances which justify the late submission; he may submit the details to the DAB for a ruling.
3.	Include the same condition precedent notice provision to the Employer's claim too
4.	Compensate the Contractor if he proves that the Employer is not prejudiced by his failure to notify.
5.	Compensate the balance of the claim amount after deducting the damage due to violation of notice provision.

It can be seen that the majority of the respondents have thought to overcome the risk of been penalized through Liquidated Damages for delaying projects due to engineer's instruction or any other event which contractor is not liable but fail to provide notice. This development has been prioritized over all other developments. This can be a great development for the contractor's claim clause in a way to address doctrine of penalty challenge raised by contractors throughout the questionnaire survey. Next suitable development was already established in FIDIC 2008 Gold book, although it is still not familiar in the Sri Lankan construction industry. Interestingly, many contractors had the view of unfair contract term since; condition precedent notice provision was stipulated only for contractor's claim and at the same time a reasonable time was

stipulated for employer's claim. Therefore, though this is to identify suitable developments to the contractor's claim clause; establishing same notice provision in the employer's claim clause also had been considered as similar as developing contractor's claim clause.

Finally, the respondents were encouraged to propose their own amendments to enhance the contractor's claim clause as per their perspective.

Table 4-14: Proposed developments to contractor's claim clause

No.	Proposed Developments to Contractor's Claim Clause
1.	In a way that the contractor should be paid what he has actually performed at site with Engineer's instruction.
2.	Prevention principle to be added, notice to be reasonably and not to harm the contractor.
3.	The claim should be considered even in absence of a prior notice, may be subject to a penalty or some other 'punishment' for not complying with the notice requirement.
4.	Increase the time duration for notification and remove notice provisions from other clauses except for early warning notice.
5.	The condition precedent notice provision should be developed by incorporating some exceptional sub articles in clauses such as 1. unpredictable by an experience Contractor. 2. Force majeure event. 3. works or changes related to the health and safety, etc.
6.	It should be based on the value of the contract and the value of the claim. If it is a huge value then both parties shall aware within very short period.
7.	i) Monthly the Employer can demand for any notice for claims and regularly analyze it to identify any disputes or advice contractor to proceed with. ii) A compulsory DAB and undertake disputes regularly if any.

CHAPTER 05

CONCLUSION AND
RECOMMENDATION

CHAPTER FIVE

5 CONCLUSION AND RECOMMENDATION

5.1 Conclusion

There is increasing tendency in establishing time bar notice provision in contractor's claim clause in most of the internationally practicing standard forms of contracts. However, it is quite arguable that encouraging parties to settle their claims during the contract period is good as much as forfeiting the contractor's real claims due to his failure to comply with strict notice provision in contractor's claim clause. If the contractor has already done some work with the awareness of the engineer or the works got delay with the awareness of the engineer or the employer, is it truly reasonable to reject a claim which has actually incurred by the contractor? As a result, contractors are increasingly challenging the condition precedent notice provision with legal tools and some of the countries have a tendency in successfully previewing those legal tools for the betterment of the hurt party.

Considering FIDIC forms of contract, condition precedent notice provision is paramount in contractor's claim clause from 1999 Rainbow suit. Accordingly, failure to comply with early warning notice for contractor's claim shall completely deprive the contractor's entitlement to claim. Likewise, contractor's valuable additional cost claim and delay claims would be at risk and further end up in a situation where contractor may liable to pay LD charges for the employer as employer's claim. However, the need to provide notices by the employers with regard to their claims has not been considered as time bar to the employer, which clearly shows an unfair situation in contract terms. Therefore, this study was mainly focused to identify challenges to condition precedent notice provision and to propose suitable solutions to strict time bar provision for the betterment of the contractor.

In the first chapter it is explained about the research problem with a comprehensive background, aim, objectives, methodology and chapter breakdown. As the next chapter, literature review deeply described about the notice provision in FIDIC 1999 and NEC contracts and intended purpose of the same. There are only few publications are available about the reasons for contractor's inability to comply with notice provision and therefore, a less input is obtained through the literature review to achieve the said objective in the chapter one. Finally in the literature review, the challenges to time bar notice provision in different case laws with the inclusion of common law and civil law practices were explained with leaving a forum for a better approach to condition precedent notice provision. In the third chapter, research methodology was discussed and in the fourth chapter precisely explained about research findings along with the conclusion and recommendation in this chapter.

The first objective of this study was to identify condition precedent notice provision in FIDIC and NEC standard forms of contracts. This is purely achieved through the literature review. Accordingly, it was comparatively identified the clear wordings to be established in such a clause to interpret as time bar. However, it is still arguable, how exactly an engineer could determine the time when a contractor is aware or should have been aware of an event giving rise to claim additional cost and/or time as per the Sub Clause 20.1 [Contractor's Claim] in FIDIC 1999 Red Book. A specific time period for providing claim notice and consequence for non compliance are principal two elements of a time bar provision.

The second objective of this study was to identify the importance of condition precedent notice provision. Accordingly, a brief study on different types of claims was carried out to have a better knowledge on which the contractor should notify his intention to claim. Claims which contractor is entitled only for EOT and/or cost need to be distinguish properly to comply with a proper notice as to achieve the intended purpose of early warning provision. Significant importance so as to rule notice provision as condition precedent was then considered through the literature review and further it was encountered additional factors through the questionnaire survey. Alert the employer at an early stage regarding contractor's claim was one of the major

purpose of notice provision and by enhancing it in to condition precedent, it was further emphasized the uppermost requirement of employer's right to know. This had been identified as a penalty provision by the respondents where they had thought that the condition precedent notice provision was established since; otherwise contractor may not have provided notices.

At the same time only 33% of the respondents had said that they are always providing claim notices and others very often or sometimes provide notices. Likewise, 32% had experienced moderately rejecting their claims due to lack of notices. This result could be changed as per the educational level and experience of the respondents. Since, all the respondents involved in to this study were graduates, the real situation in the industry can be changed from their experience of getting rejected of claims due to lack of notices. Additionally, the respondents were further answered to the question whether they had received engineer's determination within a reasonable time after submitting the claim and only 5% had received always engineer's determination within a reasonable time. Whether the intended purpose of providing notice is actually achieved in the construction industry is questioned in that sense. However, 71% of the respondents had agreed to keep notice provision as condition precedent subject to some major developments.

The next objective was to identify the reasons for failure to giving notices by the contractors. Very less articles had been issued on this area although many of the researches had studied the intended purpose and its' compulsory requirement to alert the employer and so on. Among very few reasons identified from the literature review and preliminary interview, contractor's fear to lose good working relationship with the employer can be considered as the most affected factor with 0.67 of RII value. Other than that, lack of knowledge of the site staff, lack of communication, negligence, due to overloaded work and time targets, lack of awareness, poor management and other short falls had been identified by the respondents as reasons for lack of notices. Depending on Sri Lankan context, those can be highly affected reasons since less input is traditionally provided for contract administration in Sri Lankan projects compared with the effort put on achieving time targets of the projects.

Another objective of this study was to identify challenges to condition precedent notice provision. Mainly, challenges were identified through the literature review. Accordingly, 0.83 of RII was obtained for "Unjust enrichment" and thus it reveals that majority have the view that the employer should not be paid more than the loss suffered by him due to not having prior notice and he should be compensated only for his loss and not more. Another, challenge had scored the same RII value, which is "Conflicts with Prevention Principal". Accordingly, employer claiming LD from the contractor for events which the employer prevents the contractor from achieving completion and denying his entitlement for EOT due to non compliance with notice had considered as a significant challenge to condition precedent notice provision. Other than that all the other challenges such as "Defense for claims", "Doctrine of Penalty", "Unlawful exercise of rights" and "Loosing good faith obligation" had also obtained above 0.79 RII values, thus showing majority of the respondents had agreed to all the challenges identified in the literature review.

Likewise as the final objective, suitable developments for contractor's claim clause were identified for the betterment of the contractor. 44% of the respondents strongly agreed to develop the contractor's claim clause and further 39% agreed to the same. Hence more than 80% of the respondents had been agreed to have developments to contractor's claim clause with respect to condition precedent notice provision.

Possible developments which can act against the challenges identified in the literature review were firstly identified through the literature review and discussed in the preliminary interview and those were introduced to respondents to rank its' suitability with respect to amendments in contractor's claim clause. Based on the responses received to those developments, most of the respondents expected to get release from LD charges when they unable to provide notice and if they prove that the delay is not due to their (contractor's) fault with RII score of 0.86. By enabling this development, the accused "Doctrine of Penalty" and "Conflicts with Prevention Principal" challenges could be solved up to some extent. The second highest score of 0.84 of RII was obtained for justifying the late submission to DAB ruling and get release from prevention principal and or other so called challenges identified previously. This

development is any how open to the DAB ruling and this was already established in FIDIC 2008 Gold Book.

More interestingly, third highest score of 0.81 of RII was recommended for including the same condition precedent notice provision to Employer's claim too. Thus it has tried to address the most frequently raising issue of unfair contract terms in standard form of contract. RII score of 0.79 was scored for including a provision to compensate the contractor if he proves that the employer is not prejudiced by his failure to notify and RII score of 0.67 was recorded to compensate the balance of the claim amount after deducting the damage due to violation of notice provision. However, this provision may hard to establish and may cause more disputes as per the view of experts and consequently there should be a proper mechanism to calculate the actual loss to the employer due to violation of notice provision. As such, those provisions will facilitate possible solutions against the prevailing conflicts with regard to "Doctrine of Penalty", "Unlawful exercise of rights" and "Good faith obligation".

Based on these findings it is suitable to consider necessary amendments to condition precedent notice provision in contractor's claim clause as well as the employer's claim clause for the betterment of the contractor in due course.

5.2 Recommendations

In addition to the developments identified through the literature review and the questionnaire survey, following recommendations can also considered to enhance contractor's claim clause as well as the employer's claim clause for the betterment of the contracting parties.

- Establishing condition precedent notice provision to both contractor's and employer's claims subject to prevention principal and penalty provisions.
- Increase the time gap to notify claims. As lack of administration issues in Sri Lankan context were identified through the questionnaire survey.
- Engineer should monthly demand for any notice for claims to identify any disputes and to advice contractor to proceed with. Likewise the risk of being

penalized the contractor due to not complying with the notice provision can be reduced.

- Condition precedent notice provision should be included only in major contracts and should be removed from minor contracts.
- Meeting minutes, emails and other means of records should be considered as valid written notices.
- Contract administration part should be bring in to the site level and all the staff from top to bottom should be educated with regard to consequences of lack of claim notification, claim identification, record keeping and other relevant matters.

5.3 Further Research

This research was mainly focused on proposing possible developments to condition precedent notice provision in contractor's claim clause. The applicability of those provisions in Sri Lankan construction industry needs to be studied further.

The identified reasons through the questionnaire survey for not complying with notice provision as per the view of the respondents needs to be further studied to come up with possible solutions other than the amending contractor's claim clause.

This research was only carried out from the perspective of the contractor and for the betterment of the contractor. The suitability of proposed amendments can be further studied from the perspective of the employers, and the engineers/contract administrators.

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SAMPLE QUESTIONS

DEVELOPMENT OF THE...
PRECEDENT...
CLASS...
CON...
...

ANNEXES

APPENDIX A

SAMPLE QUESTIONNAIRE

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

* Required

1. Email address *

2. Mark only one oval.

Option 1

What is Condition Precedent Notice Provision (Time Bar Notice Provision)?

"A claim notice provision, which typically states that the failure to submit a notification of a claim within a defined time frame would lead to the loss of right to that claim" (Kassem, 2015)

Research Aim

Aim of this research is to find what developments to be brought in to condition precedent notice provision of contractor's claim clause for the betterment of the contractor in contractor's perspective.

Objectives of the Research

- To identify reasons for inability of contractors to comply with condition precedent notice provision in contractor's claim clause.
- To examine the suitability of condition precedent notice provision in contractor's claims as per contractor's perspective.
- To examine alternative developments to be brought in to condition precedent notice provision in contractor's claim clause as per contractor's perspective.

QUESTIONNAIRE

3. Please mention your name and designation in your organization *



4. Please indicate your working experience in the field of construction industry
Mark only one oval.

- Less than 5 yrs.
- 5-10 years
- 10-15 years
- 15-20 years
- 20 -25 years
- More than 25 years

5. Do you have work experience in construction contractor side? *
Mark only one oval.

- Yes
- No

6. Please indicate your experience as a contractor? *
Mark only one oval.

- Less than 5 yrs.
- 5-10 years
- 10-15 years
- 15-20 years
- 20 -25 years
- More than 25 years

7. Please indicate your educational and/or professional qualification *
Check all that apply.

- Certificate
- Diploma
- Degree
- Post graduate
- Chartered
- Other: _____

8. Have you potentially involved with contractor's claim during your past carrier life?
Mark only one oval.

- Yes
- No

9. What is the standard contract documents used in those contracts? *

Check all that apply.

- FIDIC 1999
- FIDIC 1987
- ICTAD SBD/ 01, 02, 04
- NEC
- Other: _____

10. Do you have experience in engaging with contracts where "Notice provision" in Contractor's claims is condition precedent (Time Bar)? *

Mark only one oval.

- Yes
- No

11. Do you think it is important to establish the notice provision in "Contractor's Claims" clause as a condition precedent /time bar? *

Mark only one oval.

- Yes
- No
- Maybe

Please state why do you think so

12. Did you receive responses from the Engineer/Employer for your claim notices within a reasonable time?

Mark only one oval.

- Always
- Very Often
- Sometimes
- Rarely
- Never

SECTION 5

13. How many times you have provided claim notices within stipulated time frame established in relevant contracts of your past carrier? *

Mark only one oval.

- Always
- Very Often
- Sometimes
- Rarely
- Never

14. Do you have any experience of having rejected your valid claims due to non compliance with notice provision?

Mark only one oval.

- Always
- Very Often
- Sometimes
- Rarely
- Never

15. If you did not always comply with claim Notice Provision, what were the reasons

16. To what frequency following causes matter for not complying with condition precedent notice provision in Contractor's claims clause as per your knowledge and experience *

Check all that apply.

	Very Frequently	Frequently	Occasionally	Rarely	Never
The Employer may be deemed to have actual knowledge of events giving rise to claim. Eg. Where unusual or severe weather results in project delays	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The Employer may be deemed to have waived its right to enforce a contractual notice provision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The delay or additional expense is not the Contactor's fault	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Compliance with notice provision was frustrated or rendered impossible by the other party	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The Contractor doesn't want to turn a good working relationship with the employer in to an adversarial one	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The Contractor doesn't believe that the Employer is capable to react to the notice on time, and the late reaction would end up the Contractor in a worst situation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lack of knowledge and experience to identify the event	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Due to limited time	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Negligence	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Communication gap between site technical staff and management staff	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Contractors are always struggling with the time and may be overloaded with work and the time targets,	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

17. Add your reasons indicated in question 13 and indicate the frequency of those reasons as per question 14

18. To what level do you agree that, the contractor is prejudiced (harmed) by enforcing condition precedent notice provisions for Contractor's Claim clause? *

Mark only one oval.

- Strongly agree
- Agree
- Undecided
- Disagree
- Strongly disagree

19. If the contractor is prejudiced, in what way do you think that the contractor could be prejudiced?

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Faculty of Architecture
University of Moratuwa
Sri Lanka

20. To what level do you agree the following negative effects could challenge the suitability of enforcing "condition precedent notice provision" for contractor's claim clause? *
 Check all that apply.

	Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree
"Loosing good faith obligation"; If an employer was made aware of the contractor's intention to claim in such manner, the employer could be seen as acting in bad faith; if he later argues that the contractor did not meet the condition precedent notice provision.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
"Unlawful exercise of rights"; The exercise of a right shall be unlawful if it is disproportionate to the harm suffered by the employer.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
"Unjust enrichment"; An employer may be relying on a time bar provision to avoid payment to the contractor for works performed and for works from which the employer has benefitted particularly if the only reason for withholding payment is the lateness of the contractor's claim.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
"Defense for claims"; The requirement for having notices is used as defense against claims and not for the intended purpose.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
"Conflicts with Prevention Principle"; When acts of employer prevent the contractor from achieving the completion date and deduction of LD due to not complying with notice for EOT is not reasonable under common law Prevention Principle	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
"Doctrine of Penalty"; When the contractor's entitlement to an EOT is subject to the complying with notice provision and failure to do so will deprive the contractor of an EOT and allow the employer to claim LD. This LD could be a penalty	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

21. Do you agree that the condition precedent notice provision for contractor's claims clause should be developed? -

Mark only one oval.

- Strongly agree
- Agree
- Undecided
- Disagree
- Strongly disagree

22. 19. If it should be developed, in what way do you think that it should be developed?

23. To what level following alternative developments are suitable for notice provision in contractor's claim clause for the betterment of the contractor? *
 Check all that apply.

	Highly suitable	Suitable	Undecided	Unsuitable	Highly Unsuitable
However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
However, if the Contractor fails to comply with notice provision, compensate the balance of the claim amount after deducting the damage due to violation of notice provision.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
However, if the Contractor fails to comply with notice provision, compensate the Contractor if he proves that the Employer is not prejudiced by his failure to notify.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
However, if the Contractor fails to comply with notice provision, release the contractor from liquidated damages if he proves that the delay is due to Employer's action	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
However, if the Contractor fails to comply with notice provision, compensate the Contractor only 50% of his claim due to the violation of notice provision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Include a provision to the clause for the Employer to react to the notice generated based on notice provision in a time frame with committed decision to increase the faith of the Contractor on provisions.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

24. Add your developments mentioned in question 19 and indicate the suitability of those developments as per question 20

Thank You

APPENDIX B

PRELIMINARY INTERVIEW GUIDE LINE

Personnel information

Name:.....

Name of the Company:.....

Designation:.....

Qualification:.....

Experience:.....

Introduction

Research Topic:

Developments to be brought into condition precedent notice provision in contractor's claim clause for the betterment of the contractor; contractor's perspective.

Research Objectives:

- To identify condition precedent notice provisions in FIDIC and NEC standard forms of contracts.
- To identify the importance of condition precedent notice provision to notify of contractor's claim.
- To identify reasons for inability of contractors to comply with condition precedent notice provision in contractor's claim clause.
- To examine challenges to condition precedent notice provision in contractor's claim clause as per contractor's perspective.
- Examine different views to develop condition precedent notice provision in contractor's claim clause as per contractor's perspective.

Questions

1. What are the importances of notifying contractor's claim situations to the employer?
2. Do you think that it should be condition precedent?
3. What is your view on condition precedent notice provision?
4. Do you think that contractors are unable to provide timely notices?
5. If so; what are the reasons for lack of notices?
6. Do you think the following challenges affect to condition precedent notice provision?

Conflicts with prevention principle

Unjust enrichment

Defense for claims

Doctrine of Penalty

Unlawful exercise of rights

Loosing good faith obligation

7. Do you think that the contractor's claim clause should be developed?
8. If so; what are the proposed amendments to contractor's claim clause?

