

Pink Or Blue – How Strict Are The Notice Requirements?

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It is fair to say that a great number of disputes address the issue of notices ranging from notices for extension of time, to termination notices and notices of dissatisfaction. One of the crucial issues that is often in dispute is the compliance with the requirements set forth by the contract and hence the validity of a notice.

In this article we consider the approach towards the issue of compliance of notices with the formalities set out in the contract in relation to the method of service of notices, including the new requirements introduced by the pre-released version of the FIDIC Yellow Book.

Under Sub-Clause 1.3 of the FIDIC Yellow Book General Conditions of the Contract 1999, the notices, determination, approvals and other listed communications must be:

1. in writing i.e. hand-written, type-written, printed or electronically made and resulting in a permanent record,
2. delivered by hand against receipt, sent by mail or courier, or transmitted using any of the agreed systems of electronic transmission as stated in the Appendix to Tender, and
3. delivered, sent or transmitted to the address to the recipient's communications unless the recipient gives notice of another address, in which case the communications shall be delivered to that address accordingly.

Further, Sub-Clause 1.4 requires all the communications to be in the language stated in the Appendix to Tender.

But how strict are these requirements? Would a notice sent to a wrong address or minutes of meeting recording a delay in the programme constitute valid notices? How likely is it for the courts to take a similar approach to notices as Lord Hoffman did in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19²:

“If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on a pink paper [...]”.

There have been a number of decisions from courts in various jurisdictions on this issue. Some of these decisions support strict compliance with the notice requirements while some are more lenient towards relaxed compliance.

This article only considers the requirements as to method of service of a notice.

Cases supporting relaxed notice requirements

1. *Obrascon Huarte Lain S.A v Government of Gibraltar* [2014] EWHC 2291 (TCC)- England and Wales [Receiver of Notice] [Method of Service]:

The contract between the parties was based on the FIDIC Yellow Book 1999. The notice of termination was delivered by hand to OHL's site office in Gibraltar, while Sub-Clause 1.3 of the contract required all notices to be delivered by hand or sent by mail or courier to OHL's Madrid office. The court in this case refused to invalidate the notice because (i) correspondence had been frequently sent to OHL's site office in Gibraltar without any objections from OHL and (ii) the project manager with a very substantial authority was based in that office. The court made a distinction between provisions which make certain requirements a condition precedent for the validity of the notice

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² In this case, it was decided that a unilateral contractual notice may be valid despite minor incompliances.

and thus the entitlement, and provisions which do not.

In doing so, the TCC decided that sending the notice to the Madrid office was not an indispensable requirement of Sub-Clause 15.2 nor 1.3. It was sufficient that the notice was served on OHL's personnel of sufficient seniority. Mr Justice Akenhead also stated that as long as the notice has been served on the "responsible officers of the recipient" the courts have been slow to regard notices in non-compliance with the requirements, such as service at a different address, as invalid. This is one of the only reported court cases in which the issue of compliance with notice requirements in FIDIC was considered.

While the following cases do not deal with FIDIC they are useful to consider to ascertain how the courts deal with similar notice provisions:

2. *Yates Building Co Ltd v Pulleyn & Sons (York) Ltd [1975] 273 EG 183* - England and Wales [Method of Service]:

In this case, the proposed buyer of land had to send a notice by registered or recorded delivery post to the registered office of the seller or its solicitors before purchasing the land. The notice by the buyer was sent by ordinary post. The Court of Appeal held that the notice by the buyer was valid. In doing so, Lord Denning, the Master of the Rolls at the time, held that this requirement was for the benefit of the buyer so he can be sure of his position, having sufficient proof of posting. Thus it was held that as long as the sellers received the notice in time, they should be bound by it.

3. *Goodwin & Sons v Fawcett [1945] EG 186* - England and Wales [Method of Service]:

In this case, Stevenson J decided that the words 'sent by registered post' are not mandatory if read in a common-sense business way. Therefore, the notice was valid.

4. *HOE International Ltd v Andersen [2017] CSIH 9* - Scotland [Method of Service] [Receiver of the Notice]:

In this case, the agreement between the parties provided that the buyer should give a notice of claims for breach of warranty to the seller's representative. The notice had to be in writing, delivered personally or by pre-paid first-class post or recorded delivery, and be sent for the attention of MH to the postal address provided in the agreement.

The buyer sent a notice to the seller's representatives by DX and for the attention of SC. The court held that the notice was not invalid and strict compliance with the notice formalities was not required in this case. The court considered the purpose behind such requirements was to inform the sellers of a claim and established that:

"if there is no prejudice, insisting on strict compliance for its own sake serves no useful purpose."

Cases supporting strict compliance with notice requirements

1. *Eriksson v Whalley [1971] 1 NSWLR 397³*- Australia [Method of Service]:

In this case, the Contract required the notices to be sent by registered post. However, the Architect physically handed the notice to the builder's foreman.

Collins J held that the method of service was specified in the contract to prevent future disputes between the parties as to whether notice was served or not having the receipt from an independent official source. As a result, the notice was invalid.

2. *Central Provident Fund Board v Ho Bock Kee [1980-1981] SLR 180; [1981] SGCA 4* - Singapore [Server of Notice] [Method of Service]:

In this case, the contract between the parties provided that the notice of termination had to be

³ Mentioned in the decision of Central Provident Fund Board v Ho Bock Kee.

given by the Chairman on behalf of the board and that the notice must have been served by registered mail.

Simplifying the facts, the notice was delivered by hand by the superintending officer, to a member of the respondent's staff.

The question before the Court of Appeal was whether the notice served was valid and in accordance with the contract. In other words, was the notice served by the right person and whether the words 'sent by post' were mandatory as opposed to 'merely directory'.

Court of Appeal reasoned that:

- (referring to the quote by Collins J in the *Eriksson v Whalley* [1971] 1 NSWLR 397) the method of service was specified in the contract to prevent future disputes and had to be complied with, and
- The superintending officer was not the correct person to serve the notice on the respondent.

As a result, the notice of termination was not in compliance with the requirements of the contract and was invalid.

3. *West Dunbartonshire Council v William Thompson & Son (Dumbarton) Ltd* [2015] CSIH 93 – Scotland [The Receiver of Notice]:

In this case, the Claimant sent a notice to the defendant attempting to trigger a rent review provision in a lease. The lease agreement provided that the notice shall be given to the Tenants. The notice by the Claimant was addressed to "*Wm Thompson & Sons Ltd*" instead of "*William Thompson and Son (Dumbarton) Limited*".

The court distinguished between errors in the content of a notice and errors going to the fundamental validity of a notice. Despite the fact that the notice eventually ended up in the right

hands, the Court decided that the notice was invalid.

4. *John L. Haley v Dumfries & Galloway Regional Council* [1988] 39 GWD 1599 - Scotland [Form of Notice]:

The question for the Court of Session in this case was whether minutes of meetings would constitute a valid notice for claiming extension of time. The Contract between the Parties was based on JCT 63. The Court held that the minutes did not constitute a valid notice and therefore the Claimants lost their right to claim an extension of time.⁴

5. *Ben Cleuch Estates Ltd v Scottish Enterprise* [2008] CSIH 1- Scotland [The Receiver of the Notice]:

In this case, the notice pursuant to the break clause in a lease was given to the parent company of the Claimant rather than the defendant company. Despite the fact that the notice later found its way to the hand of directors of the Claimant Company, the court decided that the notice was not validly served. The same approach was taken in *Balgary Limited v William Hodgson* [2016] CSIH 55.

New FIDIC Yellow Book 2017

The new FIDIC Yellow Book which was pre-released in the FIDIC Conference in London on 6 and 7 December 2016 and is expected to be published in 2017, introduces new changes to the concept of notices⁵. These changes arguably clarify the requirements for a valid notice. "Notice" is given a definition and is defined as:

"[.] a written communication identified as Notice and issued in accordance with Sub-Clause 1.3[.]"

Sub-Clause 1.3 of the new Yellow Book is lengthier than that in the 1999 version and it sets forth further requirements for a valid Notice. The requirements set out by Sub-Clause 1.3 provide that the notice:

⁴ See also "200 Contractual Problems and their Solutions", Knowles, R., 3rd Ed, PP 125-126.

⁵ Please be wary that this is the pre-release version and the final published version may change the pre-release version of the Yellow Book 2017.

- Shall clearly state that it is a Notice and specify the Sub-Clause under which it was issued,
- must be in writing,
- shall be a paper-original signed by the Contractor's representative, the Engineer or the authorised representative of the Employer, or an electronic original generated from any of the systems of electronic transmission stated in the Contract Data (if not specified, system(s) acceptable to the Engineer) or both,
- must be delivered by hand against receipt, sent by mail or courier, or transmitted under any systems of electronic transmission in the Contract Data (if not specified, system(s) acceptable to the Engineer), and
- shall be copied to the Engineer.

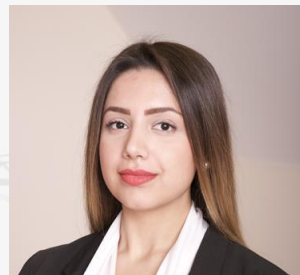
A Notice under the Yellow Book 2017 will have effect when it is received at the recipient's address in the Contract Data (or to another address if notified by the recipient). Although the Yellow Book 2017 sets out more requirements for the validity of a Notice than that in the 1999 version, it is unclear how strictly the courts, arbitrators or adjudicators will decide on the issue of compliance with these formalities and whether imposing further requirements on the parties would in fact reduce the number of disputes revolving around such formalities.

Conclusion

Although it can be understood that a relatively stricter approach is taken when the contract or statute confers a unilateral power on one of the parties to terminate or vary the contract, the position on the issue of validity of a notice failing to comply with formal requirements of the contract is not consistent across a single jurisdiction let alone across different jurisdictions.

Therefore, the parties to a contract are advised to comply with the requirements set forth by the contract, i.e. (for unamended

contracts under the General Conditions of FIDIC Yellow Book 1999) to state the Sub-Clause under which the notice is given, to clearly express that the notice is a "notice" in compliance with the Sub-Clause under which the notice is given, to be in the language of communications, be in writing and be transmitted one of the accepted means of transmission specified in the Appendix to Tender, be sent to the correct address for communications, and be copied to the Engineer. Failure to do so, might cause the notifying party to lose the entitlement it would otherwise be entitled to.



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