WHEN WAS THE LAST TIME YOU UPDATED YOUR NOTICE PROVISIONS?

ACREL Acquisitions Committee

(May 2020 Pre-Negotiated Purchase Agreement Project Report on Notice Provisions)

By Stevens A. Carey

ACREL ACQUISITIONS COMMITTEE REPORT

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The current pandemic has brought home the fact that many notice provisions are long overdue for an overhaul. For this reason, the May 2020 meeting of the Acquisitions Committee was largely devoted to the subject of notice provisions. (Although the discussion focused on real estate purchase agreements, much of it was relevant for other contracts.) This report will provide some of the reasons why notice provisions commonly used may not work and summarize the questions that were raised regarding possible solutions.

1. OVERLOOKED AND FORGOTTEN?

It is hard to get excited about the notice provisions in a real estate purchase agreement. Clients routinely ignore them. And counsel (the author included) rarely give them much attention. This lack of attention is evident from a review of purchase agreement forms in professional practice publications, which may vary even within the same publication. (This analysis is not intended as an indictment of the cited materials or their authors. A similar review might have been conducted of the author's purchase agreement forms or many of the draft purchase agreements reviewed in the author's practice. Published materials were chosen to provide a more convincing case of the prevalence of the problem.)

1.1 **Comparison**. Consider three aspects of notice provisions that often differ: scope (which may be expansive or limited); method of delivery (which may be mandatory or permissive); and timing of delivery (which may be deemed or actual).

1.1.1 ***Scope: Expansive vs. Limited***. The scope of the notice provisions (i.e., to what communications do they apply?) may vary considerably:

- Some notice provisions are *expansive*. *See, e.g.*, 1 ALVIN L. ARNOLD & MYRON KOVE, MODERN REAL ESTATE PRACTICE FORMS AND COMMENTARY § 8:36 [form PSA for hotel], at 8-217 (updated 2019–20) ("All . . . communications of any type [between the parties] . . . in any way related to the transaction contracted for herein, shall be given in accordance with . . . this Article."); 2 STUART M. SAFT, COMMERCIAL REAL ESTATE FORMS § 9:29 [form deposit receipt and PSA], at 9-197–9-198 (3d ed. 2019)

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("All . . . communications of any type [between the parties] . . . in any way related to the transaction contemplated herein, shall be void and of no effect unless given in accordance with . . . this Section.").

- Some are *limited*, governing, for example, only *required* notices. *See, e.g.*, ARNOLD & KOVE, *supra*, § 8:37 [form PSA for hotel], at 8-236 ("All notices required to be given hereunder shall be given in writing and delivered personally or mailed, certified or registered mail . . . ."); SAFT, *supra*, § 9:26 [form PSA], at 9-102.35 ("All . . . communications required to be provided by any Party under this Agreement . . . shall [comply with this Section].").

- Some are a *hybrid*, with some provisions that are *expansive*, applying to *all* notices (e.g., that notices must be in writing to be effective), and some provisions that are *limited*, applying only to *some* notices (e.g., as discussed in 1.1.2 below, the timing and effectiveness of delivery may apply only to notices given by a particular method of delivery).

Frequently, in the author's experience, the notice provisions apply to any notice or other communication *required* or *permitted* under the purchase agreement. *See, e.g.*, GREGORY M. STEIN, MORTON P. FISHER, JR. & MICHAEL D. GOODWIN, A PRACTICAL GUIDE TO COMMERCIAL REAL ESTATE TRANSACTIONS: FROM CONTRACT TO CLOSING, App. B § 11.2 (ABA 3d ed. 2016); 1 MARK A. SENN, COMMERCIAL REAL ESTATE TRANSACTIONS HANDBOOK, App. 5A-A, Art. 18, at 5A-56–5A-57 (4th ed. supp. 2020). But what does *permitted* mean? Is it intended to cover only notices that the purchase agreement expressly states *may* be given by a party? Or is it more expansive, covering any notice that is not *prohibited* by the purchase agreement? By using the word *permitted*, the scope is arguably ambiguous.

1.1.2 ***Method of Delivery: Mandatory vs. Permissive***. Some notice provisions require that all subject communications (i.e., communications within the scope of the notice provisions) *must* be sent by certain specified delivery methods. *See, e.g.*, ARNOLD & KOVE, *supra*, § 8:38 [form PSA for hotel], at 8-264–8-265 ("Except as otherwise provided in this contract, all notices . . . shall be sent by registered or certified mail . . . ."); SAFT, *supra*, § 9:26 [form PSA], at 9-102.35 ("All notices . . . shall be in writing and delivered . . . by (i) personal delivery, (ii) . . . reputable overnight courier service, or (iii) facsimile . . . ."). Some are (implicitly) *permissive*: providing that a notice will be effective if given by one of the specified alternative means of delivery, but not addressing the consequences of notice given by other means. *See, e.g.*, ARNOLD & KOVE, *supra*, § 8:24 [form PSA for multiple apt. bldgs.], at 8-149 ("Any notice . . . shall be deemed duly served if mailed by certified mail . . . ."); SAFT, *supra*, § 9:28 [form PSA], at 9-165 ("Any notice . . . shall be deemed to be given (i) upon confirmed receipt if given by facsimile . . . .").

1.1.3 ***Timing of Delivery: Deemed vs. Actual***. Some notice provisions provide for *deemed* delivery at a certain time (i.e., the notice is deemed delivered, and that deemed delivery is effective as of a certain time) if given by one of the specified delivery methods. *See, e.g.*, ARNOLD & KOVE, *supra*, § 8:2 [form PSA for commercial real estate], at 8-14 ("All notices . . . shall be effective: (a) on the third business day after the same has been deposited in the United States mail, postage prepaid, certified mail, return receipt requested . . . ."); SAFT, *supra*,

§ 9:26 [form PSA], at 9-102.35–9-102.36 ("All Notices . . . shall be effective upon . . . (iii) one (1) Business Day after such Notice is deposited with an overnight delivery service for overnight delivery."). Others require *actual* delivery or receipt. *See, e.g.*, ARNOLD & KOVE, *supra*, § 8:36 [form PSA for hotel], at 8-217 ("Notices shall be effective upon: (i) actual receipt [in the case of personal delivery or commercial messenger service]."); SAFT, *supra*, § 9:27 [form PSA], at 9-102.59 ("Any such notices shall be deemed given . . . as of the date actually delivered . . . (whether or not the same is then received . . . due to a change of address of which no notice was given, or any rejection or refusal to accept delivery)."); SENN, *supra*, App 5A-A, Art. 18 at 5A-56–5A-57 ("Any notice . . . shall be deemed given when actually received (or if receipt was refused, when first attempted)."). Some are a hybrid providing for *deemed* delivery but only if there is also *actual* receipt. *See, e.g.*, ARNOLD & KOVE, *supra*, § 8:41 [form PSA for land], at 8-302 ("Notices shall be deemed given when mailed in the manner aforesaid, provided they are received in due course.").

1.2 **Rationale**. Why the variations? In some cases, there may be a good explanation. For example, there seems to be a trend away from *deemed* delivery to *actual* delivery and some older forms haven't had their notice provisions updated. *See, e.g.*, Steven R. Berger, *Notices*, *in* NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE § 15.11, at 474–75 (Tina Stark ed., 2003). But the prevalence of all three inconsistencies (sometimes within the same publication) suggests a more haphazard rationale. It may be more likely that the parties simply didn't think about the notice provisions. In many deals, the notice provisions do not change from the notice provisions in the form or prior agreement used as a starting point for drafting the purchase agreement. And often they are not read at all by the parties. Consider, for example, notice provisions with an *expansive* scope. It is hard to believe that the parties would have intended (had they thought about it) that all informal written communications would be subject to the requirements of the notice provisions (e.g., an email to schedule a call or meeting not specified in the purchase agreement, an email to request an explanation of a recent event, an email to request a document not contemplated by the purchase agreement, an email to provide input or discuss issues associated with a draft closing document, or an email to establish logistics for the execution of signature pages). Such informal written communications will vastly outnumber the notices that one would expect to be governed by the notice provisions. Many of these informal emails would have been communicated by telephone before electronic mail became prevalent. But in light of the apparently slow evolution of notice provisions, this shift in the means of communication may simply have been overlooked.

2. EMAIL NOTICE

The reality today is that most written communication in connection with a purchase agreement is accomplished by email. But none of the forms mentioned above specifically authorizes email notice. (Another form in one of the referenced books does authorize email notice but only if "followed up by an overnight courier delivery . . . ." SAFT, *supra*, § 9:30 [form PSA for multifamily], at 9-212.11.) And, it is relatively common, in the author's experience, for a contract to prohibit or limit the use of email to give notices. Some organizations have gone a step further by adding boilerplate warnings at the end of their emails disclaiming any intent to be bound by an email. Why? Because emails frighten many lawyers (and some of their clients): they are often prepared, sent and reviewed quickly (sometimes too quickly) and are easily lost (e.g., in a spam filter), overlooked, or misunderstood.

3. DANGERS OF PROHIBITING EMAIL NOTICES

3.1 **Undercutting Limitations**. But what good are email prohibitions and other limitations if the parties ignore them? The course of conduct of the parties may override the provisions in a contract that prohibit or limit email notices. As stated by one court (in connection with a lease notice dispute):

> Parties to a contract have the power to waive provisions placed in the contract for their benefit, and such a waiver may be established by conduct . . . . Here, the record establishes that [the plaintiff] repeatedly ignored [the defendant's] lack of compliance with the notice provision . . . . [The defendant] consistently responded to . . . notices, despite the fact that they did not comport with the [notice] requirements . . . .

Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc., 388 Ill. App. 3d 81, 91 (1st Dist. 2009) (citations omitted); *see also* 2 ANDREW R. BERMAN, FRIEDMAN ON LEASES § 14:2, at 14-52 (6th ed. 2019) ("A requirement that notice be given by registered mail is waived by the giving and acceptance of notice by ordinary mail . . . ."); *Ray v. Metropolitan Life Ins. Co.*, 858 F. Supp. 626, 628 (S.D. Tex. 1994) ("The court finds that there was a modification of the precise address requirement through practice."). Indeed, prohibiting (or otherwise restricting) email notices in a manner that is not likely to be followed by the parties may be no better (or possibly even worse) than not addressing electronic communications at all. Query whether imposing technical requirements that contradict the parties' conduct might somehow erode the sanctity and value of the contract: might it create an impression that the contract was sometimes not intended to be taken seriously? Might it encourage the parties to ignore other provisions when they don't reflect their own experience? Or not to consult the contract (or counsel) at all?

3.2 **Preventing Timely Delivery**. Another risk of prohibiting email is that it may preclude the most effective means of communication. During the COVID-19 pandemic, many lawyers have had hard copy notices returned without getting a return receipt (whether due to business closure, the inability of the courier to locate a signatory, or otherwise); and some hard copy notices have been delivered successfully but have not reached the intended recipient until one or more days later if at all. It has become apparent that in some circumstances (e.g., business, building or street closures), timely delivery and receipt of hard copy notices may not be possible. Consequently, email notification may not only be common, it may also be essential. Parties may want the right to *send* notice by email to ensure timely delivery and parties may want the right to *receive* notice by email to ensure timely receipt.

4. NEXT STEPS

So, what should be done about this problem? Questions to consider include the following:

4.1 **Method of Delivery: Mandatory vs. Permissive?** Should one or more specified methods of delivery be mandatory? Or should the purchase agreement permit notices to be given by any reasonable method so long as they are in writing, but with only those notices delivered in the specified manner and complying with the specified requirements receiving the benefit of the deemed delivery rules?

4.2 **Email?** Should email constitute a *permitted* form of notice? If so, should it be *mandatory*? Should the rule be more flexible (so that, for example, the sending party may (i.e., is *permitted* to) use email except during periods specified, from time to time, by the receiving party when email may not be practical and alternative methods of delivery are available that will not result in a delay)?

4.3 **Other Methods of Delivery?** What other delivery methods should be *permitted* or *required*?

4.4 **Add Email Formalities?** Should formalities be established for email notices to reduce the likelihood of *inadvertent* or *missed* emails? For example:

- Should special (identifying) text be included in the subject line of the email?
- Should the email come from *one* of the email addresses for the sending party specified in the purchase agreement (as modified by subsequent notice)?
- Should the email go to *all* of the email addresses for the receiving party specified in the purchase agreement (as modified by subsequent notice)?
- Should the notice be similar to a hard copy notice, except that it is attached as a PDF to an email? Should this requirement be limited to specified material notices such as termination or default notices? Should the receiving party be able to elect that it apply to all notices to be sent to it?

4.5 **Limit Scope of Notice Provisions?** Should the scope of the notice provisions be narrowed to limit the possibility of an inconsistent course of conduct argument that would undercut those requirements?

4.6 **Make Email Formalities *Elective*?** Would it be a safer solution to the course of conduct problem to make the email formalities *elective*, and if the sender elects not to follow the rules, to impose upon the sender a burden of proving that one or more key individuals associated with the receiving party received and understood the email?

4.7 **Timing of Email Delivery?** What constitutes *actual* delivery of an email? Should an email be *deemed* delivered and if so, when?

4.8 **Rejected Emails?** How should rejected emails be treated? Should the reason for the rejection matter?

- What if the email is mistakenly identified as spam?
- What if the specified email address for an individual recipient is no longer functional (because, for example, the individual is no longer employed by the receiving party)?
- What if the email is infected with a virus?

- What if the email exceeds the self-imposed size limits of an individual recipient's email system?

- What if the email is rejected because an individual recipient's email in-box is full?

4.9 **Other Impediments to Email Delivery or Receipt?** What if there is a problem with the internet or a party's email system or other impediment to delivery or receipt of emails?

4.10 **Future Modifications?** Should each party be required to consider requests by the other party to make reasonable modifications to the notice provisions as and when circumstances change (whether by reason of advances in technology or otherwise)?

The author does not expect uniform answers to these questions because of the varying needs and concerns of different organizations in the real estate world. But one thing is clear at this point: an update is long overdue. In the upcoming June 2020 publication of ACREL NEWS & NOTES, a longer version of this report will be published with potential answers to most of the questions raised in this report.

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