NOTICE PROVISIONS IN THE TIME OF COVID-19

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By Stevens A. Carey

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Social distancing and stay-at-home, safer-at-home, and shelter-in-place orders during the current pandemic have changed the way we communicate. The notice provisions in our contracts, many of which were outdated before the current crisis, are now in even greater need of an overhaul to reflect the realities of current practice. This article will propose and explain notice provisions prepared for the ACREL Acquisitions Committee pre-negotiated purchase agreement project described at the end of this article. These provisions (the "**Sample Provisions**") are set forth on Appendix A.

METHOD OF DELIVERY

The method of delivery contemplated by notice provisions has evolved considerably over the past 50 years. At one time, notices were routinely sent by U.S. mail (sometimes registered or certified) or by hand delivery.[1] Then delivery by overnight (or same day) couriers became a common method of delivery and a permissible alternative in notice provisions. Delivery became even faster with the advent of facsimile (fax) machines. While many notice provisions were soon revised to allow for or restrict notice by fax (e.g., by requiring a confirming hard copy notice), many did not, and some did not mention fax notices at all. *See, e.g.*, *Dean Mgmt., Inc. v. TBS Constr., Inc.*, 339 Ill. App. 3d 263 (2d Dist. 2003) (overruling the trial court conclusion that notice by facsimile failed to comply with the requirement for "written notice"). And then came electronic email (email). Despite the apparent advantages of facsimiles (e.g., confidentiality), they were largely replaced in practice (in the author's experience) by electronic mail, which could be easily sent by computer or mobile device (and a document that could be faxed could also be sent by a PDF attachment to an email). But contractual notice provisions have been slow to follow this practice.

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[1] Even today, some published purchase agreement forms limit the permissible methods of delivery for notices to personal delivery, certified mail, and registered mail. *See, e.g.*, 1 ALVIN L. ARNOLD & MYRON KOVE, MODERN REAL ESTATE PRACTICE FORMS AND COMMENTARY § 8:37 [form PSA for hotel], at 8-236 (updated 2019–20) ("All notices required to be given hereunder shall be . . . delivered personally or mailed, certified or registered mail . . . ."), § 8:38 [form PSA for hotel], at 8-264–8-265 ("Except as otherwise provided in this contract, all notices . . . given with respect to this contract . . . shall be sent by registered or certified mail . . . ."), § 8:41 [form PSA for land and construction of office building], at 8-301, § 8:42 [form PSA for sale of land and certain uses], at 8-311; 2 STUART M. SAFT, COMMERCIAL REAL ESTATE FORMS § 9:29 [form deposit receipt and PSA], at 9-198 (3d ed. 2019) ("All Notices shall be . . . delivered . . . by personal delivery or by United States Mail, as a Registered or Certified item, Return Receipt Requested.").

RESERVATIONS ABOUT EMAIL

There is still some reluctance to allow email notices. Why? Emails often, if not usually, provide a good illustration of what Daniel Kahneman calls "System 1" thinking in his book "Thinking, Fast and Slow." System 1 thinking is fast, instinctive and emotional, while System 2 thinking is more deliberative and logical. It is possible for an email to be thoughtful and careful (e.g., when a party intends to send a formal notice). But more often than not, emails are casual, relaxed and informal. Emails tend to be prepared and sent much faster than hard copy messages, are often in shorthand (especially replies), and may be read in a cursory manner, if read at all:

- they are frequently sent using an iPhone or similar mobile device while traveling and often when there is not sufficient time to think deeply about the subject of the email (or consult the relevant contractual notice requirements);

- to save time and effort, many professionals send an email by replying to an existing email string that may involve (and be identified in the subject line by) a completely unrelated subject matter;

- many professionals get hundreds of emails daily and might easily miss an email, especially if the subject is not properly identified; and

- as discussed later in this article, there are several potential delivery issues that may result in an email not reaching an intended individual recipient.

It should be readily apparent that there are risks, from the *sender*'s perspective, of an *inadvertent* email (whether sloppy, ambiguous, or incorrect), and from the *recipient*'s perspective, of a *missed* email (whether unwittingly deleted, overlooked, or misunderstood), and from the perspective of *both parties*, of a *failed* email (whether intercepted, rejected or otherwise not delivered and received). It is therefore no surprise that many notice provisions (x) do not mention electronic communication, (y) do not permit electronic communication, or (z) permit electronic communication only in limited circumstances (e.g., by allowing a PDF attachment to an email or requiring a confirming hard copy notice, or both). And some organizations have gone a step further by adding disclaimers at the end of their emails purporting to negate any binding effect of email communications.

DANGERS OF PROHIBITING EMAIL NOTICES

But what good are these 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 freely ignore other provisions when they don't reflect their own experience? Or not to consult the contract (or counsel) at all?

REALITIES OF CURRENT PRACTICE

It may therefore be worthwhile to reconcile the behavior of the parties and their contractual obligations in light of current facts:

- the reality is that most notices are given by email; and
- in the world of COVID-19, with the vast majority of professionals working remotely for some period, some parties were not (and in the future, may not be) in a position to send or receive hard copy notices without inconvenience or delay. Several ACREL members 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).

The current crisis has brought home the fact that in some circumstances (e.g., business, building or street closures), timely delivery of hard copies may not be possible. Consequently, email notification may not only be common, it may be essential. The Sample Provisions reflect an acknowledgement of these facts by both *permitting* and *requiring* email notice.[2]

FORMALIZING THE EMAIL PROCESS

But what about the concerns with inaccuracies and misunderstandings?

Four Requirements. In an attempt to ensure a minimum amount of focus, deliberation and identification, the Sample Provisions impose some modest formalities:

(1) the sending party must send the email *from* one of the email addresses specified in the purchase agreement for the sending party (as they may be changed by subsequent notice);

[2] As further explained later, the Sample Provisions represent an initial attempt to create updated notice provisions for the pre-negotiated purchase agreement project of the ACREL Acquisitions Committee. Those notice provisions may continue to evolve (and might change completely). Moreover, while much of this article may also be relevant for notice provisions in other legal documents (i.e., legal documents other than commercial real estate purchase agreements), different types of documents may raise different concerns. For example, will the parties to a 99-year ground lease want to rely solely on email notice to extend the term for an additional 10 years?

(2) the sending party must send the email *to* all the email addresses specified in the purchase agreement for the receiving party (as they may be changed by subsequent notice);

(3) the sending party must include special wording in the subject line of the email; and

(4) the sending party must send certain specified material notices, such as default and termination notices, or (at the election of the receiving party) all notices, by PDF attachment to an email.

Why They Make Sense and Should Work. These formalities do not seem too demanding and they may perform a useful function.

- The *first* requirement requires the sender to use one of the specified email addresses for the sending party (as they may be changed by subsequent notice). This approach enables the other party to timely clear or release (or at least be on the lookout for) the specified email addresses in its spam filters. It may also, in effect, limit the potential senders so they are people the sending party trusts to send an email notice.

- The *second* requirement (requiring that the email be sent to all the specified email addresses of the receiving party) is nothing new: notice is commonly required to be sent to the contact information identified in the purchase agreement for the receiving party (as it may be changed by subsequent notice). The more recipients, the less likely the notice will be missed.[3]

- The *third* requirement (requiring special wording in the subject line) may seem to create the potential for a foot fault. But in the author's experience, clients generally get counsel involved for important notices, in which event the notice requirements are routinely checked.[4] The bigger risk is that the receiving party overlooks or misunderstands an important email and this small step may go a long way toward getting the recipient's attention.

- The *fourth* requirement (requiring that certain notices be sent by PDF attachment to an email) is limited to certain material notices[5] and demands a greater level of attention. But it is easier, faster, and less expensive than using mail or courier service. And like mail and courier services, it usually involves counsel.

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[3] As noted in the discussion below of the actual notice defense, there is some question as to the enforcement of a requirement to send notice to *all* recipients, especially those recipients who are merely entitled to a copy of the notice.

[4] For less important notices, there is a much greater risk that this requirement will be ignored. In the past few years, several real estate groups have used this approach (requiring language in the subject line) with some success in limited circumstances (e.g., for approval requests and approvals within certain dollar thresholds). But it does require a concerted effort. If noncompliance remains a concern, it may be possible to divide the notices into three groups and not require the special subject line for the least important group. But the Sample Provisions may already be too long and this extra step may not be necessary in light of the burden of proof solution (and the suggested narrowing of the scope of the notice provisions) discussed later in this article.

[5] As noted earlier, the Sample Provisions give each party the option to have this fourth requirement to all notices sent to such party.

Risk of Noncompliance. Some effort should be made to get the parties to buy in to this process to ensure that it fulfills its purpose: having clear and accurate communication.[6] But what if the parties ignore the requirements except when they perceive that the notice is legally important? As discussed earlier in this article, a lack of adherence to these requirements could undercut their utility and again expose the parties to the risk to the recipient of a *missed* email and the risk to the sender of an *inadvertent* email. To respond to this course of conduct concern, the Sample Provisions permit an email notice that fails to comply with the first three requirements above, but only if the sender proves that one of the Designated Representatives (i.e., the representatives identified to establish knowledge) of the receiving party actually received, read, and understood the notice on a timely basis. Thus, the first three requirements are, in effect, *elective*, but the election not to comply comes at a price.

- ***The Missed Email***. This (burden of proof) solution mitigates the risk of noncompliance (and the associated risk of undermining the email requirements altogether). It also mitigates the risk of missing an email that was otherwise delivered but not recognized, read, and understood: either the email is easy to identify (coming from one of the sender's designated email addresses to *all* the designated email addresses of the recipient with an identifying subject line) or the sender bears the burden of proving that a knowledge representative read and understood the email. To further address the missing email concern, it might be helpful to add more email addresses to which notices are to be sent. Another possibility would be to impose the fourth (PDF attachment) requirement on more notices in an attempt to make the parties more accustomed to using PDF attachments (which tend to get more attention and are less likely to be missed); but this particular idea may exacerbate the course of conduct concern because there is currently no escape hatch under the Sample Provisions for failure to send a required PDF attachment.

- ***The Inadvertent Email***. Admittedly, this (burden of proof) solution is not much help in eliminating the risk that a sender states something it would not have stated (or fails to state something it would have stated) after proper deliberation. There may not be a good way to avoid such self-inflicted wounds other than (1) to be selective in choosing the individuals who may send emails (and instruct those off the list not to exchange email notices with the other party that might create a course of conduct outside the parameters of the notice provisions), (2) to encourage (and train) the selected individuals to follow the formalities, and (3) to make more notices subject (and to make it known that more notices are subject) to the fourth (PDF attachment) requirement.

Scope of Notice Provisions. The risk of a conflicting course of conduct may also be mitigated by limiting the scope of the notice provisions. Some notice provisions could be read to apply to *almost any* (if not *all*) communication between the parties and in some cases even notices involving

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[6] The parties should also consider whether email disclaimers (if not eliminated or changed) might undercut an email notice – bringing into question the validity or effect of an email notice. One can argue that a boilerplate disclaimer (in use long before the current agreement to use email notices) should not override the express agreement to use email notices. But if one of the parties uses such boilerplate, the parties might consider adding an explicit statement in the notice provisions that pre-printed email disclaimers do not affect the validity of email notices otherwise given in compliance with the notice provisions.

third parties.[7] For example, prior drafts of the Sample Provisions referred to any notice or other communication *permitted* or *required* under the purchase agreement, which is relatively common wording.[8] But a communication that is *permitted* could be read to cover more than is intended. *Permit* may be defined to mean "allow (something) to happen" and *allow* may be defined to mean "To put no obstacle in the way of." BLACK'S LAW DICTIONARY 95, 1376 (11th ed. 2019). Aside from the confidentiality provisions and some restrictions relating to contacting governmental agencies and other third parties during due diligence, there may be "no obstacle in the way of" email notices (other than the notice provisions themselves).[9] Yet there will be email communications that are presumably intended to fall outside 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). In fact, there will be a lot of them. Although there are over 70 possible notices contemplated by the current draft of the pre-negotiated purchase agreement, most of them will not likely be given (e.g., notice of casualty or condemnation); and, in any event, they will be vastly outnumbered by the notices that are not contemplated.[10] Such informal email communication should not affect enforceability of the requirements for email notices. To this end, the Sample Provisions will no longer refer to *permitted* communications and (in the next draft) will apply instead only to communications between the

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[7] Some notice provisions are clearly so expansive (when read literally). *See, e.g.*, ARNOLD & KOVE, *supra*, § 8:36 [form PSA for hotel], at 8-217 ("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."); SAFT, *supra*, § 9:29 [form deposit receipt and PSA], at 9-197–9-198 ("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.").

[8] *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).

[9] By limiting the notice provisions to communications between the parties, one might eliminate all the obstacles that restrict communications (other than the notice provisions themselves), in which event this expansive interpretation may make even less sense. In any event, "permitted" may not be the best word choice if a narrower interpretation is intended. Unfortunately, it is difficult to determine the actual intent behind the notice provisions in many purchase agreements because parties frequently pay little, if any, attention to them. This lack of attention is evident from a review of published purchase agreement forms, which may vary even within the same publication. Some notice provisions are *expansive*. *See* note 7 above. 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 apply to all notices (e.g., that notices must be in writing to be effective) and some provisions that are limited (e.g., as discussed below, the timing and effectiveness of delivery may apply only to notices given by a particular method of delivery). *See, e.g.*, ARNOLD & KOVE, *supra*, § 8:33 [form PSA for shopping center], at 8-189 ("Any notice . . . shall be in writing and shall be deemed to be effective when . . . ."); SAFT, *supra*, § 9:28 [form PSA for office bldg.], at 9-165 ("Any notice . . . must be in writing and shall be deemed to be given (i) upon . . . .").

[10] Many of these informal emails would have been communicated by telephone before electronic mail became prevalent. This shift in the means of communication may have been overlooked in many notice provisions.

parties that are *required*, or *otherwise contemplated to be given or that purport to affect the rights or obligations of a party*, under the purchase agreement.[11]

OTHER EXCUSABLE DEVIATIONS

In addition to the parties' course of conduct, other grounds may be available to make a noncompliant notice effective. If the receiving party gets the message or is responsible for non-delivery, or the method used is functionally equivalent to the method required, then the receiving party should not expect to take advantage of noncompliance in an inequitable manner.

Actual Notice Defense. If actual notice (with a clear message) is timely received and there is no prejudice to the recipient, a court might be willing to ignore a failure to strictly comply. *See, e.g.*, *Denis F. McKenna Co. v. Smith*, 302 Ill. App. 3d 28, 32 (1st Dist. 1998) (notice under purchase agreement sent to buyer's broker instead of buyer as required by the notice provisions, but broker forwarded the notice to buyer the same day and the court concluded that actual notice was sufficient because it met the purpose of the provision: "to ensure that the notice was delivered and that the party was informed"); *11-01 36 Ave. LLC v. Quamar*, 41 N.Y.S.3d 684 (2016) (notice under purchase agreement sent by email and Federal Express failed to comply with notice provisions requiring delivery by personal delivery or certified or registered mail, but was sufficient because there was actual notice and no prejudice); *Megacenter US LLC v. Goodman Doral 88th Court LLC*, 273 So. 3d 1078, 1084 (Fla. Ct. App. 3d Dist. 2019) (although there was independent basis for termination, email termination notice not contemplated by notice provisions of purchase agreement was held to be sufficient notice: "[u]nder Florida law, strict compliance with a notice provision is not required if one of the parties . . . has actual notice . . . .").[12]

Functional Equivalence Defense. Some courts have allowed noncompliant notices if they accomplish the same purpose as the required notice. For example, one court allowed certified mail when registered mail was required, saying: "The function of a requirement that notice be transmitted by registered mail is to provide a means of resolving disputes as to the fact of delivery of the notice. [Under the circumstances,] the provisions . . . requiring notice by registered mail are satisfied by notice sent by certified mail, return receipt requested." *Gerson Realty, Inc. v. Casaly*, 316 N.E.2d 767 (1974). Although the functional equivalence defense is often used in tandem with the actual delivery defense (there was also actual delivery in *Gerson*), at least one court has applied the functional equivalence defense when actual delivery did not occur because the recipient had moved and failed to provide a new address, saying:

> Delivery of the [notice] . . . was attempted . . . within the . . . period required . . . . The completion of the delivery was frustrated by [the other party's] failure to give written notice of the [address change] . . . . Further, the method by which the written notice was delivered does not result in a material violation . . . . The written notice

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11 One can argue that there is no need to narrow the scope of the notice provisions if the notice requirements are elective (using the burden of proof solution discussed earlier). But it seems odd to impose requirements, even elective requirements on notices, if there is never any intention that they apply in the vast majority of circumstances.

12 The *actual notice* defense may also be available to overcome the failure to provide notice to those entitled to receive copies of notices. *See, e.g.*, *Rose, LLC v. Treasure Island, LLC*, 445 P.3d 860, 865 (Nev. App. 2019) (landlord failed to send a copy of a default notice to the subtenant (in addition to failing to send the notice to the correct officer of the tenant), as required by the notice provisions, but notice was nonetheless valid because the tenant had actual notice and there was no prejudice). For this reason, there are no "copies" in the Sample Provisions.

> was delivered by Federal Express . . . instead of by certified or registered mail as [required]. . . . Delivery by Federal Express, in the circumstances present here, serves the same function and provides the same proof of delivery as certified or registered mail.

Computune, Inc. v. Tocio, 691 N.E.2d 994, 997 (1998).

Prudent Course. On the other hand, there is no guaranty that the sending party will be able to use these defenses successfully (to send an *effective* email notice if it fails to comply with the relevant notice requirements). *See, e.g.*, Steven R. Berger, *Notices*, *in* NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE § 15.03, at 465 (Tina Stark ed., 2003) ("Courts are divided on the issue of whether a party's receipt of actual notice is sufficient where the form of notice or method of delivery does not comport with the requirements in the parties' agreement." (footnote omitted)).[13] The Sample Provisions attempt to incorporate some of these concepts when the first three requirements are not met, but in an attempt to protect the recipient against the risk of a missed email, the requisite burden of proof may be even more demanding. Consequently, the prudent course of action would be to follow the rules, including the elective ones. Under the Sample Provisions, that seems easy to do.

TIMING OF DELIVERY

The *timing* of delivery contemplated by notice provisions has also evolved over time.

Deemed vs. Actual Delivery. Historically, there was often, if not usually, a presumption of delivery that allocated the risk of non-delivery to the recipient (e.g., U.S. mail was sometimes deemed delivered a specified number of calendar or business days after mailing, and overnight courier was sometimes deemed delivered one business day after deposit with the courier).[14] This approach followed naturally from the "mailbox rule" in contract law (that "if an offer is made by mail, depositing the acceptance in the mail creates the contract"). *See* Berger, *supra*, § 15.02, at 463–64. More generally, the parties need not, and sometimes do not, require *actual* delivery in their notice provisions.[15] But on occasion, notices do not get delivered, and it may not seem fair for the recipient to bear that risk. For that reason, *deemed* delivery has largely become (at least in the author's experience) the exception rather than the rule. However, the apparent requirement of

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13 In some contexts, strict enforcement of notice provisions may be more likely. *See, e.g.*, Paige Spratt, *Strict Compliance With Construction Contract Notice Provisions: Detrimental to Contractors and Taxpayers*, 40 PUB. CONT. L.J. 911 (Summer 2011).

14 Some published forms continue to incorporate the concept of deemed delivery. *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 . . . ."), § 8:6 [form PSA for land and improvements], at 8-38 ("Notice [by certified or registered mail] shall be deemed to have been given *[number of hours]* hours after the same has been deposited in any U.S. mail post office box in the state to which the notice is addressed, or *[number of hours]* hours after deposit in any such post office box other than in the state to which the notice is addressed . . . ."); 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."), § 9:29 [form deposit receipt and PSA], at 9-198 ("[N]otices mailed shall be effective when deposited in a post office or other depository under the care or custody of the United States Postal Service . . . .").

15 *See, e.g., Westmoreland v. General Acci. Fire & Life Assurance Corp.*, 129 A.2d 623, 625 (1957) ("[T]he giving of a notice by the method contracted for is sufficient whether it results in actual notice or not.").

actual delivery doesn't necessarily eliminate *all* the risk associated with bringing the notice to the attention of the intended recipient; there still remains some notion of *deemed* delivery. For example, delivery of registered mail or overnight courier package is typically established by a signed receipt, but there is no guarantee that the individual who signs the receipt will deliver the mail or package to the intended recipient (or if delivery occurs, that it will not get lost on the recipient's desk among other papers), and that it will ultimately be opened and read by the intended recipient.

When Should Email Delivery Occur? Delivery by email raises a number of similar issues:

- What if the email is inadvertently deleted on an individual recipient's iPhone or other device?
- What if the email is not read because it is caught in a spam filter?
- What if the email is delayed because an individual recipient is in an area with no access to email other than its phone and that recipient's phone carrier doesn't have service in the area?
- What if an email is received but the response is an automated out-of-office message?
- What happens if the automated response is that the message could not be delivered? Does the reason for the purported non-delivery matter? What if the email address is no longer (or was never) valid (e.g., because it was incorrectly stated in the purchase agreement, because an individual recipient has moved to another company, or otherwise)? What if the size of the attachments exceeds the self-imposed limits of an individual recipient's email system? What if an individual recipient's in-box is full? What if an individual recipient's email system is down (e.g., for maintenance or because the power went out in the building where the mail server of an individual recipient's organization is located)? What if the reason is not specified?

We did not reach a uniform consensus on how to address these points. Currently, the Sample Provisions merely require that the email *enter* the *email system* (whether a cloud-based system such as Office 365 or Gmail or a local mail server, and including any associated email filtering service provider, such as Mimecast) for each designated email address. However, an email will not be deemed to have entered the relevant email system when it is rejected or quarantined if the sender is responsible for such rejection or quarantine (e.g., because the email was infected with a virus).[16] According to the IT directors the author consulted, most emails sent to a designated email address will *enter* the associated email system as long as the designated email address has the correct domain name and the domain name still exists – even though they may generate a message indicating that the email could not be delivered. They also said that the sending party should have

[16] Rejection might also occur because the sender misspells the designated email address. In that event, the email would not comply with the Sample Provisions and consequently, the email would not be delivered (unless *actual* delivery occurred and the requisite burden of proof were met).

(or can easily obtain) software that will enable it to track when delivery occurs. *See, e.g.*, www.cisco.com; www.rpost.com; and www.didtheyreadit.com.

No Acknowledgement of Receipt. But where does this leave the receiving party? An acknowledgement by the recipient might establish receipt (whether through registered receipt software or otherwise), but it is not required or even mentioned in the Sample Provisions. As noted by Peter Abreu, the IT director of Art Menor's law firm in Florida: "All email systems have the capability of requesting a read receipt. However, many times organizations block these types of responses from going back out once the email is delivered/read so the sending party does not know when the email was read."[17] Although the historical deemed-delivery approach was potentially unfair to the receiving party (because it might be treated as having received a notice that was never delivered), it also seems potentially unfair to make the sending party responsible for what an individual recipient or its company (or its phone carrier or other service provider) does with electronic notification after it is delivered (whether an individual recipient is on vacation, the email is in an individual recipient's spam filter, the in-box of an individual recipient is full, an individual recipient inadvertently deletes the email on his or her mobile device, or an individual recipient is in an area where he or she doesn't get service). Each individual recipient is in a better position to protect himself or herself against (but the sender has no control over) these problems; and the risk can be reduced by including multiple email addresses for the receiving party that must be used by the sender.

Proof. The IT experts the author consulted believe that they will be able to establish email delivery, as defined above, for several years after the email is delivered. However, they acknowledge that there remains a risk of manipulation and fraud if one of the parties or their employees is a bad actor. While issues of proof and fraud prevention may be mitigated if the parties agree to use a registered email service (e.g., RPost), they note that a long-term commitment to these services is generally required and many, if not most, companies may not be willing to make the requisite investment – certainly not for a single transaction. They also noted that the email filtering service providers that many organizations already have in place (e.g., Mimecast) may also mitigate these issues.

Unintelligible and Inaccessible Notices. But what if the notice is not intelligible or accessible to the recipient? For example:

- What if the email is encrypted or password protected, and the sender does not provide the recipient with the encryption key or the password?
- What if the email contains a link to the notice that is accessible only to users of the sender's computer system?

Does the definition of *delivery* in the Sample Provisions allocate to the recipient the risk of unintelligibility or inaccessibility? Compare the definition of *receipt* in Section 15(b) of the Uniform Electronic Transactions Act (UETA) (1999):

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[17] Some companies block delivery status notifications so that email spammers are not able to identify valid email addresses based on the automated response. And some companies may be unwilling to use a third party system that stores the company's emails due to data privacy and other security issues.

> (b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when: (1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and (2) it is in a form capable of being processed by that system.[18]

Comment 1 to Section 15 of the UETA states: "This section does not address the efficacy of the record that is sent or received. That is, whether a record is unintelligible or unusable by a recipient is a separate issue from whether that record was sent or received. The effectiveness of an illegible record, [and] whether it binds any party, are questions left to other law." Moreover, according to UETA Section 15(e): "[a]n electronic record is received under subsection (b) even if no individual is aware of its receipt." Sending notice that the sender makes unintelligible or inaccessible to the recipient would seem to be a breach of the implied covenant of good faith and fair dealing; and more directly, does not seem to be actual notice in the normal sense of the term. Consequently, this point has not been addressed in the Sample Provisions.[19]

Special Email Address for Notices. For many years, the author's firm has included among the specified email addresses, as a safety precaution, "realestatenotices" @ the firm's domain name. By creating such an email account and adding it to the list of designated email addresses, the staff of the recipient organization can check to see if the particular individuals associated with the organization who are copied on the email have in fact received the email. And in the unlikely event those individuals are not getting emails (e.g., because they are ice fishing above the Arctic Circle), the notice can be brought to the attention of another individual associated with the

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[18] This language is roughly 20 years old. A lot has happened in the internet world since that time. At least one IT expert with whom the author spoke suggested the language of this statute (and this provision in particular) may be out of date. *See, e.g.*, Jevon C. Bindman, *Student Note: The Spam Filter Ate My E-mail: When Are Electronic Records Received?*, 39 WM. MITCHELL L. REV. 1295, 1309 (2013) ("Spam filters were not on the radar of the UETA Drafting Committee."). A retired legal expert with whom the author spoke surmised that (1) the words, in clause (1), "and from which the recipient is able to retrieve the electronic record" were intended to be expansive (to distinguish actual retrieval, which is not required), and (2) the words, in clause (2), "in a form capable of being processed by that system" were not likely to be an issue for current domestic email. The first conclusion is supported by UETA § 15, cmt. 3: "Keying receipt to a system accessible by the recipient removes the potential for a recipient leaving messages with a server or other service in order to avoid receipt." To the extent the retrievability concept was also intended to protect the recipient, it doesn't seem appropriate when (as is the case under the Sample Provisions) the recipient is choosing the target email systems (by providing designated email addresses for delivery), unless the sender is responsible for the irretrievability (e.g., because the email it sends is infected with a virus). *See also Insight Sys. Corp. v. United States*, 110 Fed. Cl. 564, 581 (2013) ("The UETA, which has been adopted in almost every state, holds that an electronic document is received when it enters the recipient's computer system." (footnote omitted)).

[19] The more general question of what constitutes *notice* of particular information is beyond the scope of this article. There are many scenarios short of an unintelligible or inaccessible notice that raise similar concerns. If a letter is delivered with copies of documents (or an email is sent with the documents attached), has the sender notified the recipient of the contents of all the documents? What if the letter (or email) merely refers to the documents (without attaching them)? If an email contains a link, has the recipient been notified of everything available under that link? What if the linked site requires acceptance of terms or charges a fee? What if the link is to a site with disorganized folders and subfolders, or some of the documents in the folders are misfiled or mislabeled? Is a recipient of an email notified of the contents of the entire associated email string if the recipient was not directly sent (or copied on) the earlier emails of the email string? The answers to these questions may vary depending on the circumstances. *See, e.g.*, *Balboa Ins. Co. v. Barnes*, 123 A.D.2d 691 (1986) (insurance company allowed to miss 20-day deadline to respond to a demand by the insured because the demand was buried in a packet of documents).

receiving party. This approach may reduce some of the risk of emails that are actually delivered but not actually read.

Large Attachments. What if the seller sends an email (e.g., an email seeking approval of a voluminous lease, with extensive exhibits) that is so large that the sender receives an immediate notification from an individual recipient's email system that the email has been rejected by reason of its size (as opposed to rejection due to the individual recipient's email box not having sufficient capacity)? Under such circumstances, there is an exception to the rule for delivery described above. The Sample Provisions provide that the email will not be deemed delivered until the sending party delivers multiple emails with smaller attachments that do not generate such rejection or sends such attachments through a reputable secure file transfer service (such as Biscom, Dropbox, or Fileshare) by delivering an email with a link or other appropriate instructions that make such attachments available.

WHEN EMAIL ISN'T WORKING

Some professionals may still be nervous that email may not always be available. What if portions of the internet are somehow impeded by a broken cable under the ocean or other catastrophe? However unlikely, stuff happens. The proposed provisions allow for reasonable alternative methods of giving notice if timely delivery of email is not possible in the good faith judgment of the sending party and the sending party uses good faith efforts to notify (by telephone or other means without regard to the notice requirements) the receiving party immediately of such inability and the alternative method of delivery. There is still some disagreement as to what circumstances should allow delivery by means other than email. Some would prefer to allow other common methods and merely require good faith efforts to use email. But part of the reason for mandatory email is that other methods may result in delays or inconvenience due, for example, to building or street closures.[20] The current draft attempts to balance these concerns by letting the sending party (honestly) decide when it can't send email as long as it tries to contact the recipient and chooses a reasonable alternative under the circumstances. In addition, the Sample Provisions contain a provision recognizing that at some point in the future the Sample Provisions may be out of date. The purpose of the Sample Provisions is to ensure prompt and accurate communication. They are not intended to create a technical trap. Accordingly, if circumstances change, then the Sample Provisions require good faith consideration of requests by the other party to make reasonable modifications that would better accomplish their purpose.

GOVERNING LAW

It is of course important to check applicable law to confirm that email notices will be treated like other written notices and that there are no applicable legal requirements that will conflict with or supplement the contractual notice provisions. Emails are recognized by both the UETA[21] and the

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20 Permitting other common methods of delivery may work if the sending party has the same burden of proof that applies when the sending party elects to send a non-compliant email.

21 The UETA was promulgated by the National Conference of Commissioners on Uniform State Laws on July 29, 1999. Washington State's version of the UETA is effective June 11, 2020, and all other states, with the exception of Illinois and New York which have their own statutes regarding electronic signatures, have already adopted a version of the UETA.

Electronic Signatures in Global and National Commerce Act (E-SIGN)[22] as legitimate forms of communication if agreed to by the parties.[23] Keep in mind that the UETA and E-SIGN are basically procedural and not substantive so other applicable substantive law should still apply. Some purchase agreement email notice provisions might be excluded from the UETA (e.g., a notice under a printed, standard form condominium purchase agreement that requires electronic notice in the fine print, where there is no separate evidence of an intent to use electronic notices), as adopted in the applicable jurisdiction; but it is unlikely that email notices under a commercial real estate purchase agreement between sophisticated private parties electing to communicate electronically would pose any problem.

FINAL NOTE

This article is part of the ongoing efforts of the ACREL Acquisitions Committee to create a pre-negotiated purchase agreement to streamline the sale process.[24] It is not a complete summary of the Sample Provisions; it is intended to encourage further discussion and ultimately yield more thoughtful and balanced provisions for notice, especially in light of recent experience and common practice. Based on reactions to date, it is clear that the Sample Provisions may not work for all organizations. Some practitioners have expressed concern that some of their clients are too large and have too many contracts to keep track of email addresses for any particular contract. Governmental agencies, banks, public companies and other large organizations may prefer a different approach. Perhaps a more practical solution for such an organization would be to require all notices be sent by email attachment and require that emails to such organization go to a special email account for notices (which could survive any individual employee's tenure).[25] Perhaps they

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22 The E-SIGN is a federal statute signed into law by President Bill Clinton on June 30, 2000 and effective October 1, 2000. Like UETA, a fundamental purpose of E-SIGN is to remove barriers to electronic commerce; but as a federal statute, UETA is concerned with interstate commerce. Most real estate transactions involve interstate commerce (because the buyer, seller or the lender may be in a jurisdiction outside of where the property is located and emails themselves may travel across state lines). But E-SIGN does not preempt UETA if it is adopted without modification. Even if there are modifications, E-SIGN might not apply if the modifications are consistent with UETA. *See, e.g.*, BEN C. SCHEIBLE, ELECTRONIC TRANSACTIONS IN REAL ESTATE, Ch. 5, at 38–41 (2003); KENNETH W. CLARKSON, ROGER LEROY MILLER & FRANK B. CROSS, BUSINESS LAW: TEXT AND CASES § 12-3, at 245–47 (14th ed. 2018).

23 *See, e.g.*, UETA, Prefatory Note ("[T]he purpose of the UETA [includes] validating and effectuating electronic records [which are broadly defined to include emails] . . . ."); SCHEIBLE, *supra*, at 39 ("E-Sign has the same fundamental purpose as UETA . . . ."); CLARKSON, MILLER & CROSS, *supra*.

24 The subcommittee working on the pre-negotiated PSA project is currently comprised of: Cary Barton of Barton Benson Jones PLLC; Peter Breckheimer of Glaser Weil LLP; Steve Carey of Pircher, Nichols & Meeks LLP; Barbara Christy of Schell Bray PLLC; Thomas Coyne of Thompson Hine LLP; Raymond Iwamoto of Schlack Ito LLLC; Tom Kaufman of Montfort Fiduciary Advisors LLC; Lloyd Kepple of Fox Rothschild LLP; Robert Krapf of Richards, Layton & Finger, P.A.; Art Menor of Shutts & Bowen LLP; Ed Menzie of Nexsen Pruet, LLC; Thomas Muller of Manatt, Phelps & Phillips, LLP; Barry Nekritz of Lawrence Kamin, LLC; Phil Nichols of Pircher, Nichols & Meeks LLP; John Nolan of Winstead PC; Marc Painter of Holland & Hart LLP; Marty Schwartz of Bilzin Sumberg Baena Price & Axelrod LLP; Kevin Shepherd of Venable LLP; Adele Stone of Buchanan Ingersoll & Rooney PC; and Mark Yura of DLA Piper LLP. The Acquisitions Committee is still looking for volunteers to join the subcommittee because there is much work to be done (including state riders and riders to address different factual assumptions). If you are interested in participating, please contact Dina Steele at dsteele@pircher.com.

25 This alternative approach would address incoming emails to such organizations (the second formality mentioned earlier). Such organizations might also want to eliminate the first formality, which requires that an email come from a designated email address. To address the problem of an email getting trapped (inadvertently) in a spam filter, the other party could simply permit the domain name of such organization in its filtering service. Finally, the

will want to require a hard copy be sent as well. In any event, there will no doubt be many opinions, and all are welcome. If you have contrary thoughts about any of the concepts discussed in this article or the Sample Provisions, or if you have (1) any useful materials, insights, or other information regarding notice provisions, or (2) suggestions for (a) additions, deletions or other revisions to the Sample Provisions that are likely to be accepted by both a buyer and a seller, or (b) other steps to create a more useful form, please send them to the author at scarey@pircher.com. And if you are interested in seeing a copy of the current draft of the pre-negotiated purchase agreement, all you need to do is join our subcommittee (and if you are not already a member, the Acquisitions Committee). We are still looking for volunteers for, among other matters, state riders and riders for alternative factual assumptions (e.g., different property types) or an in-depth analysis of any particular provision of the purchase agreement. In particular, we would welcome someone more familiar with technology than the author (who is technologically challenged) to take over this notice provision project. If you want to volunteer, please contact Dina Steele at dsteele@pircher.com.

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third formality would be unnecessary because all the requisite identifying information could be included in the notice address on the PDF attachment.

APPENDIX A

SAMPLE (NOTICE) PROVISIONS

(FOR PRE-NEGOTIATED PURCHASE AGREEMENT)

This Appendix sets forth the "Sample Provisions" referred to in the article to which this Appendix is attached.

15.5 Notices. Except as otherwise expressly provided in this Agreement, any notice, request, direction, demand, consent, waiver, approval, or other communication required (or otherwise contemplated to be given or that purports to affect the rights or obligations of a Party) under this Agreement by one Party to the other (each, a "**Notice**") will not be effective unless it is in writing and complies with this Section 15.5. The purpose of this Section 15.5 is to ensure prompt and accurate communication. If circumstances change, then each Party shall consider, in good faith, requests by the other Party for reasonable modification of this Section 15.5 that would better accomplish the purpose of this Section 15.5.

15.5.1 Addresses. In the case of an email (i.e., electronic mail) Notice, the Notice must come from a Designated Email Address of the sending Party (although attachments may be sent through Biscom, Dropbox, or Fileshare or other reputable and commonly used secure file transfer service by way of a link or other appropriate instructions in such email) and must be addressed and delivered to all the Designated Email Addresses of the receiving Party. In the case of a hard copy Notice (if permitted under Section 15.5.2), the Notice must be addressed and delivered to each of the Notice Addresses for the receiving Party (and a Notice in the form of a PDF attachment to an email must be addressed to each such Notice Address).

15.5.2 Method of Delivery. A Notice must be delivered by email in accordance with Section 15.5.4. However, if timely delivery of a Notice by email is not possible in the good faith judgment of the sending Party (and the sending Party uses good faith efforts to notify (without regard to the requirements in this Section 15.5) the receiving Party immediately of such inability and the alternative method of delivery), then delivery may be made as follows, to the extent reasonable under the circumstances: (i) personally by an independent third party; (ii) by United States registered or certified mail, return receipt requested[26] and postage prepaid; (iii) by FedEx Express[27] or other reputable courier service regularly providing evidence of delivery (with charges paid by the Party sending such Notice); or (iv) by any other reasonable means under the circumstances.

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[26] Neither registered nor certified mail necessarily requires a return receipt although this feature may be requested in either case. *See, e.g.*, https://faq.usps.com/s/article/What-is-a-Return-Receipt-and-How-does-it-Work. "Registered Mail [also] allows for up to $25,000 of insurance *and* it's tracked every single step of the way, not just when it's out for delivery." https://bizfluent.com/facts-5825035-can-certified-mail-return-receipt-.html. Some notice provisions permit only one of the two: registered mail or certified mail, but not either. But a court might find that either approach satisfies the other because they both provide some proof of delivery. *See, e.g.*, BERMAN, *supra*, § 14:2, at 14-52 n.172 ("An express requirement of registered mail is satisfied by certified mail." (citations omitted)).

[27] In January 2000, FDX Corporation changed its name to FedEx Corporation and rebranded all of its subsidiaries. Federal Express became FedEx Express. Accordingly, the Sample Provisions do not refer to "Federal Express" and refer instead to "FedEx Express."

15.5.3 Timing and Evidence of Delivery. Delivery of a Notice made by email pursuant to Section 15.5.4 will be deemed effective at the time it enters the email system (whether a cloud-based system such as Office 365 or Gmail or a local mail server, or any associated email filtering service provider, such as Mimecast) for each of the Designated Email Addresses of the receiving Party, regardless of any non-delivery message received in response, unless the email is rejected or quarantined by such email system and the sending Party or anyone affiliated with the sending Party is responsible for such rejection or quarantine (e.g., because the email is infected with a virus). Other delivery of a Notice permitted by Section 15.5.2 will be deemed effective at the time of actual delivery (whether accepted or refused) (i) as confirmed in writing by the person delivering such Notice if delivered personally, (ii) as shown by the addressee's return receipt if delivered by registered or certified mail, (iii) as confirmed in writing by the courier service if delivered by courier, and (iv) otherwise, upon the date the sending Party proves receipt occurred. However, (1) if delivery of a Notice otherwise in accordance with this Section 15.5 occurs after 5:00 p.m. (local time where received) or on a non-Business Day, then such Notice will be deemed effective on the first Business Day after the day of actual delivery, (2) if a Notice to be delivered by email pursuant to Section 15.5.4 cannot be delivered because of a problem affecting the email system for one of the Designated Email Addresses of the receiving Party (including the failure to maintain a domain name included in any such Designated Email Address), then the deadline for receiving such Notice will be extended until the sooner to occur of actual delivery or the first Business Day after the sending Party has knowledge that such Notice was not delivered and that such problem has been fixed, and (3) if the sending Party receives immediate notification that an email Notice is rejected because the attachments to an email are too large (but not because the recipient's email box has insufficient capacity), then such email delivery will occur when an email with a link or other appropriate instructions (which give the receiving Party access to such attachments) is (or multiple emails with such attachments that do not generate such rejection message are) delivered in accordance with Section 15.5.4.

15.5.4 Emails. A Notice delivered by email will be effective only if: (1) such email complies with Section 15.5.1; (2) such email contains the following language in the subject line of the email message: "OFFICIAL NOTICE – **[**NTD: *Insert name or address of Property***]**"; and (3) in the case of a notice of default, **[*****If applicable*: an Arbitration Claim Notice****]**, a DDP Continuation Notice, a DDP Termination Notice or other notice of termination, such Notice is delivered by PDF attachment to an email Notice (although the attachments to such Notice may be delivered through a secure file transfer service to the extent permitted under Section 15.5.1). Upon written notice to the other Party, a Party may require that all email Notices to it comply with clause (3) above. In addition, the requirements of clauses (1) and (2) above will be waived as to any email Notice, but only if the sending Party proves the email Notice was timely received, read, and understood by a Designated Representative of the receiving Party. **[**NTD: *Consider requiring that other material notices be delivered under clause (3) depending on the specific transaction.***]**

15.5.5 Email Notice by Counsel. Counsel to a Party may provide a Notice on behalf of such Party that complies with Section 15.5 (and without limitation on the foregoing, an email Notice from such counsel must come from a Designated Email Address).

[Note: ***Section 1.3.8 to be modified to identify the Designated Email Addresses of each Party (as such addresses may be changed from time to time by notice from such Party to the other Party given in accordance with this Agreement), as indicated below.*****]**

1.3.8 Notice Addresses for the Parties. The addresses for hard copy (and PDF email attachment) notices ("**Notice Addresses**") from one Party to the other under this Agreement are as follows, as the same may be changed by notice given in accordance with this Agreement:

If to Seller:

_____
c/o _____
_____
_____
Attention: _____
Telephone: (___) ___-____

and

_____
_____
_____
_____
Attention: _____
Telephone: (___) ___-____

If to Buyer:

_____
c/o _____
_____
_____
Attention: _____
Telephone: (___) ___-____

and

_____
_____
_____
_____
Attention: _____
Telephone: (___) ___-____

The "**Designated Email Addresses**" of the Parties are as follows (as the same may be changed by notice given in accordance with this Agreement):

For Seller: _____;
_____;
_____; and
_____

For Buyer: _____;
_____;
_____; and
_____

* * *