HOPING FOR THE BEST, PREPARING FOR THE WORST

CONTRACTUAL NOTICE AND OPPORTUNITY-TO-CURE PROVISIONS

BY JEFF CHAPMAN

PARTIES CONTRACTING FOR GOODS OR SERVICES typically attempt to anticipate and allocate risks between them. In many contracts, express provisions outline material obligations and covenants owed between the Parties. Parties can utilize contractual language as a tool for the allocation of risk and the enforcement of remedies. In addition to delineating rights, responsibilities, obligations, and risks, contracts frequently contain provisions that address breach, termination, and dispute resolution.

Along with provisions addressing breach and termination, contractual language can create opportunities to resolve problems or potential breaches. These provisions can induce improved performance and facilitate a resolution to significant problems. To this end, contracts often include an Opportunity-to-Cure or Notice-to-Cure provision. As their names suggest, the perspective and interpretation of these provisions depends on whether you are the party invoking the provision or the one responding to a demand to cure.

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On the one hand, an opportunity to cure implies that the party alleged to be in default has been granted an opportunity to make right what may be going wrong. On the other hand, a notice-to-cure provision implies a warning that failure to right the ship will result in a more severe consequence. When invoked, the provision typically provides the alleged breaching party the opportunity to learn of the alleged breach and cure—prior to the opposing party being able to avail itself of another remedy. In other instances, however, the provisions merely act as conditions precedent to the invoking party's remedial action.

Typically, notice-to-cure provisions work in conjunction with other provisions in the contract—namely the provisions outlining what constitutes an event of default and those providing remedies for a non-breaching party. Absent a specific provision delineating the events that constitute an event of default, such as late delivery, nonpayment of downstream liabilities, or failure to pay, the opportunity-to-cure provision can be invoked if the breaching party fails to comply with a covenant or obligation under the contract. These provisions are not typically limited in application to a material breach.

For example, assume a contact requires the parties to carry various insurance policies and obligates the provision of both certificates of insurance and endorsement pages as proof of the binding nature and scope of coverage. Failure to maintain insurance as required may well be a material breach of the contract. But the provision of either the certificate or the endorsement page, but not both, is a breach that may not ultimately be material. Invoking an opportunity-to-cure provision would be proper in either scenario. When invoked, the party owing the obligation would have an opportunity, usually expressed as a definite time period, to cure. The cure would be the procurement of the requisite coverage or the presentation of the appropriate paperwork.

Opportunity-to-cure and notice-to-cure provisions can be drafted in multiple ways. Often, the way the clause works with associated clauses, such as a termination clause, impacts the manner of its incorporation into the contract. For example, if a contract contains a clause defining events of default as addressed above, an independent, notice-to-cure clause might immediately follow it.

The following provision comes from a construction contract between an owner and a contractor. It provides an example of a clause that defines events of default:

a. The Contractor commits an event of default if he:

i. performs of defective work or Work not in conformance with the requirements of the Contract Documents;

ii. repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
iii. fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
iv. repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
v. otherwise is guilty of substantial breach of a provision of the Contract Documents.

Following the event-of-default provision, one might expect to see opportunity-to-cure language. An example of such language is the following:

> Prompt notice of all defective Work of which the OWNER or ENGINEER has actual knowledge will be given to the Contractor. Upon receipt of said notice, Contractor shall, within seven (7) calendar days, commence curative action to resolve the default. Such curative action must continue without interruption until the default is fully resolved.

If the Owner considers the Contractor to be in default of the contract for one of the reasons listed as an event of default, the opportunity-to-cure provision would provide the contractor the chance to resolve the alleged default before the owner becomes entitled to another contractual remedy, such as termination. Under a typical opportunity or notice-to-cure provision, the non-breaching party must provide the breaching party specific notice of the alleged events of default. The recipient would then have a certain amount of time to correct or cure the default before the non-breaching party could lawfully take any action. Untimely action by the party invoking the clause would be a breach of the contract.

In a similar but slightly varied application, the clause may be combined with a remedial clause. Consider the following termination clause, also from a construction contract, that contains notice-to-cure language.

> **15.3.1** Upon the occurrence of any one or more of the following events:
>
> .1 if the Contractor persistently fails to perform the Work in accordance with the Contract Documents;
>
> .2 if the Contractor disregards laws or regulations of any public body having jurisdiction;
>
> .3 if the Contractor disregards the Owner's authority;
>
> .4 if the Contractor fails to maintain a work force adequate to accomplish the Work within the Contract Time;
>
> .5 if the Contractor fails to make adequate progress and endangers successful completion of the Contract; or
>
> .6 if the Contractor otherwise violates in any substantial way any provisions of the Contract Documents;
>
> Then the Owner may, after giving the Contractor seven (7) calendar days' Written Notice, terminate the services of the Contractor. The Owner, at its option, may exclude the Contractor from the site and take possession of the Work, incorporate in the Work all materials and equipment stored at the site, and finish the Work as the Owner may deem expedient.

In the foregoing provision, the contextual implication of the clause is that the notice provision is a condition precedent to the owner's exercise of its termination rights. Unlike the example provided previously, this clause is worded with a less collaborative, more adversarial tone. Including the notice-to-cure provision within the termination provision also implies that its use is reserved for when the non-breaching party thinks a material breach has occurred. Choosing to terminate a contract because of a nonmaterial breach will likely result in the material breach of wrongful termination by the previously non-breaching party.

Usually, the proper response to a nonmaterial breach is to engage the breaching party and facilitate correction of the breach. At times, an opportunity-to-cure provision provides the formal method for such engagement. The example provided above is by no means the only way to draft such a provision. However, when drafting an opportunity-to-cure provision, drafters should consider the provision's mechanics and goals. Assuming a collaborative goal and relationship between the parties, the language should be crafted to enable curative efforts. In so doing, keep in mind that at various times during contractual performance either party may find itself in the

position of invoking the clause. Additionally, a situation may arise where the party against whom the clause may be invoked is not wholly aware of the incidents giving rise to the alleged default.

With these factors in mind, drafters may want to consider addressing the following items in an opportunity-to-cure provision:

- A requirement that a detailed description of the alleged default be provided to the opposite party;
- The provision of adequate information to the opposite party of what will be considered a fully curative effort;
- The requisite time frame for a cure or activities demonstrating curative efforts to begin;
- Language allowing the alleged breaching party to provide a response or challenge the imposition of the cure period;
- An express acknowledgement that the invoking party has accepted the cure.

If these five items are addressed in the provision, the parties will be positioned to utilize the opportunity to cure and ensure that either a breach is cured or that subsequent remedial rights can be properly invoked.

Even without a termination provision, contract drafters may want to consider remedial options that will allow a non-breaching party to cure a default. For example, should an allegedly breaching party challenge the notice to cure or fail to perform the corrective action demanded by the non-breaching party, the party providing the notice may want to reserve the curative rights for itself. The inclusion of a remedial provision may facilitate continued performance under the contract, eliminating the possibility of a wrongful termination challenge and lowering the potential for litigation or other dispute resolution.

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A remedial clause should take into account the ability of the non-breaching party to cure the event of default by itself, with the assistance of the other party, or with help from a third-party. While variations exist, a commonly used structure for such non-breaching remedial options is below. The following example is from a contract for the construction of water and roadway installations.

> In the event Contractor fails to cure the event of default as noticed pursuant to the preceding section, Owner may exercise its remedial rights under this Agreement. In so doing, Owner shall proceed expeditiously. In connection with such corrective or remedial action, Owner may exclude Contractor from all or part of the Site, take possession of all or part of the Work and suspend Contractor's services related thereto, and incorporate in the Work all materials and equipment stored at the Site or for which Owner has paid Contractor but which are stored elsewhere. Contractor shall allow Owner, Owner's representatives, agents and employees, and Owner's other contractors access to the Site to enable Owner to exercise the rights and remedies under this paragraph.
>
> All claims, costs, losses, and damages incurred or sustained by Owner in exercising the rights and remedies under this section will be back-charged against Contractor from the contract balance. Should an insufficient contract balance exist to offset said costs, Contractor shall pay the Owner the difference. Such claims, costs, losses and damages will include but not be limited to all costs of repair, or replacement of work of others destroyed or damaged by correction, removal, or replacement of Contractor's defective Work.

This example is only one way to address the remedial, self-correction option and is provided as food for thought. The clause's scope is relatively narrow and somewhat harsh. In a more collaborative contractual relationship or in a contract intended to be more robust, additional language can be included to further delineate the parties' options for cure and rights regarding costs and potential claims.

When drafting contracts in which one intends to use an opportunity-to-cure or notice-to-cure provision, practitioners may want to consider the inclusion of this type of remedial clause in the event curative efforts fail to relieve the default or fail to satisfy the non-breaching

party's concerns. An event-of-default clause, together with a notice-to-cure clause, can provide the parties tools for effective contract administration and performance.

When drafting opportunity-to-cure or notice-to-cure provisions, practitioners should work with their clients to determine the best way to address the opportunity to cure. Having conversations geared at answering the following series of questions can be productive in the drafting process. Is the clause intended to facilitate a collaborative relationship? Is it present merely to provide notice sufficient to allow a non-breaching party the ability to terminate? Or is it there to enable curative measures through multiple means while seeking to preserve the performance by both parties beyond any given dispute? The answers to these questions will direct contract drafters to the appropriate language to accomplish the client's goals.

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