

A brief review of commercial issues relevant to the construction, engineering and energy industries.

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For further information contact Mark Stewart or David Sloan

Tel: +44(0)1325 488048 Fax: +44(0)1325 281245 E-mail: info@stapleton.co.uk

Stapleton International Limited

Head Office: Stanhope House, 111-117 Stanhope Road South, Darlington, County Durham, DL1 7SF

GLOBALLY Challenged

Complicated things buildings...especially when things start to go wrong. When that happens of course someone is out of pocket and likely to make a claim under or for breach of his contract. But in doing so he comes up against one of the law's prime requirements. What is technically known as "causation". The ability to show that what is complained of caused you loss.

Where there is a complex matrix of factors happening at the same time this can be anywhere from very difficult to impossible, particularly where contemporary records may be missing. This has led to the recognition of what are known as "global claims", under certain circumstances.

What are the rules about making "global claims"?

- There must be an extremely complex interaction between the consequences of various matters and the financial effects.
- As a result of this situation it must be difficult or even impossible to make an accurate allocation of cause to monetary effect.
- This difficulty of proof should be stated on the claim/pleadings.
- You can make your claim (both liability and losses) in whatever way you choose.
- However you must provide the defendant with sufficient details such that it knows the case that it has to meet at trial. This means that you must:
 - Fully specify the events that comprise your claim;
 - Show the contractual or other basis of the defendant's responsibility for each event;
 - show how, as a matter of fact, the defendant is responsible for each event;
 - show how the loss has been computed.
- Hence there must be linkage shown between cause and effect on a factual (non-monetary) level.

Also causation is a question of common sense. The degree of particularity has a cost-effectiveness component.

Once that is done, and given the above complexity, it is permissible to deal with the monetary consequences on a global basis.

Where should I look for the case law on the subject?

The main cases are as follows:

- Crosby Ltd v Portland UDC (1967 5 BLR 121)
- Merton LBC v Stanley Hugh Leach (1985) 32 BLR 51
- Wharf Properties v Eric Cumine Associates (1991) 52 BLR 1
- Mid-Glamorgan CC v J.Devonald Williams & Partner (1992) 28 Const LR 129

- John Holland Construction & Engineering Pty Ltd v Kvaerner R J Brown Pty Ltd (1996) 82 BLR 83
- Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd (1997) 82 BLR 39

Any breaking news on the subject?

From Scotland comes a new judgment dated 18 April 2002. This is the case of John Doyle Construction Ltd v Laing Management (Scotland) Ltd. What did the court say?

- The case focuses on the situation where at least one factor causing delay/expense in a global claim is the responsibility of the claimant (or anyway not the defendant's responsibility). Is this fatal to the claim?



• The court held:

- "The logic of a global claim demands however that all the events that contribute to causing the global loss be events for which the defender is liable. If the causal events include events for which the defender bears no liability, the effect of upholding the global claim is to impose on the defender a liability which, in part, is not legally his. That is unjustified."
- "A global claim, as such, must therefore fail if any material contribution to the causation of the global loss is made by a factor or factors for which the defender bears no legal liability."
- "The rigour of that analysis is in my view mitigated by two considerations. The first of these is that while in the circumstances outlined the global claim as such will fail it

does not follow that no claim will succeed... there may be in the evidence a sufficient basis to find causal connections between individual losses and individual events or to make a rational apportionment of part of the global loss to the causative events for which the defender has been held responsible. The second factor... is that causation must be treated as a common sense matter."

Conclusion

A global claim cannot be the excuse for a failure to adequately particularise and plead your case. The courts will not allow a global claim to saddle a defendant with a liability that is not

his. The global claim itself is at risk of the defendant showing that one of its causative events is not his responsibility. However the courts will be looking to deal with the difficult question of causation in a common sense manner and hence parts of the claim may be salvaged.

This article was written by Ian Pease of Taylor Wessing, Telephone 020 7300 7000. www.tjg.co.uk

Ian is a Senior Associate Solicitor specialising in construction and engineering law, advising major contractors, professionals, public authorities and specialist subcontractors in connection with a variety of projects.

The Laws governing INTERNATIONAL ARBITRATION

It is not uncommon for the parties to an international contract to choose arbitration as the means of dispute resolutions. This allows the parties to have some degree of control over the proceedings rather than submitting to the jurisdiction of a foreign court. The parties should, however, be aware that in any international reference there may be a number of different national systems of law which govern different aspects of the reference.

• **The legal capacity of the parties to enter into the arbitration agreement**

The rules governing legal capacity vary from country to country, although there are a number of rules which are common to most countries. The capacity of a legal body will be governed by the law under which the body is constituted, and that of a natural person by the place where the arbitration agreement was entered into. If either party has no legal capacity to enter into the arbitration agreement, then the arbitration agreement will be invalid and any award made under it will be unenforceable.

• **The arbitration agreement**

The law governing the arbitration agreement will decide any questions as to the validity, effect or interpretation of the arbitration agreement. It will therefore determine questions as to whether the arbitration agreement is void or illegal or questions relating to the jurisdiction of the arbitrator to decide a particular issue. Where there is an express choice of governing law in the main contract, then this will apply to the arbitration agreement.

• **The procedure of the arbitration**

It is open to the parties to specify the rules which will govern the procedure to be followed in the arbitration eg, the parties may agree that the procedural rules of UNCITRAL be followed. Where the parties fail to specify the choice or there is a gap in the procedural rules which have been specified, then the law governing the arbitration procedure is the law of the country in which the arbitration is held, which is otherwise known as the seat of the arbitration.

• **The determination of the substantive issues**

This is the law which the tribunal will apply to its findings of fact in order to reach its decision. The parties are free to choose the law which is to apply

to the substantive issues either at the time that the contract is made or at the time of the dispute.

Failing such a choice the parties may agree how the tribunal is to choose the application law, eg, where the parties agree that the ICC Rules of Arbitration apply these provide that the tribunal shall apply the law which it considers appropriate. Where there is no agreement in place care has to be taken. The laws of some countries provide that the arbitrator himself is able to decide what rules he considers are appropriate to determine the dispute but most require the arbitrator to apply the conflict of laws rules of the seat of the arbitration.

• **The enforcement of the award**

The law which applies to the recognition and enforcement of an award is the law of the country where recognition or enforcement is sought, usually the country where the debtor's assets are located. The New York Convention, which has been ratified by over 100 countries worldwide, requires contracting states to enforce awards. Enforcement may be refused

where the parties to the agreement lacked capacity, where the arbitration agreement was not valid or where the procedure of the arbitration was not in accordance with the agreement of the parties or failing agreement was not in accordance with the law of the country where the arbitration was held.

Consideration should be given to the laws which are to apply to each aspect of the reference not only at the time of drafting of the contract but throughout the reference of any dispute to arbitration.

This article was written by Andy Williamson of the Construction Unit of Pannone & Partners Solicitors. Call on 0161 909 4547. www.pannone.com

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For further information please contact Mark Stewart.

Head Office:

+44 (0) 1325 488048

+44 (0) 1325 281245

E-mail: info@stapleton.co.uk

Website: www.stapleton.co.uk

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If you have any comments on the issues raised in this edition or there are any subjects you would like to see addressed in future issues of this newsletter please contact Mark Stewart
E-mail: m.stewart@stapleton.co.uk