

Cerno

Distinguish; determine; resolve.

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Welcome

Welcome to this newsletter from Cerno, a consultancy providing dispute resolution advice and services to the construction, engineering, industrial and maritime industries and related professions such as lawyers, architects and engineers.

The purpose of Cerno's newsletters is to provide information on matters of general interest and updates on latest the developments in the field of dispute resolution and related case law. In this issue the main subject under consideration is global claims and the level of evidence needed to prove an entitlement asserted in a global claim.

Global Claims – Not as easy as you think!

What is commonly referred to as a "global claim" is a claim which identifies numerous potential or actual causes of delay and/or disruption, a total cost on the job, a net payment from the other contracting party and a claim for the balance between costs and payment which is attributed without more and by inference to the causes of delay and disruption relied upon. The authors of the highly respected volume *Keating on Construction Contracts* (9th Edition) define a global claim as "...one that provides an inadequate explanation of the causal nexus between the breaches of contract or relevant events/matters relied upon and the alleged loss and damage that relief is claimed for."

Construction contracts or similar enterprises frequently produce difficult problems of explaining the causative impact of numerous events acting simultaneously or sequentially, causing delay, disruption and expense. Contractors often argue that separating out and identifying individual events and tying those events to specific effects is impossible or impractical. Employers often contend in response that the contractor must do just that.

A global claim provides inadequate explanation of the case against the defendant. Sometimes this is of necessity; sometimes it is deliberate.

In front of courts or arbitrators the cry will come from the employer that the claim put forward is under-particularised and should be regarded as an impermissible "global claim". Sometimes the contractor is capable of better particularising the claim but wishes for tactical reasons not to do so. Sometimes it simply is impossible for the contractor to do so. Very often the reality lies somewhere in between these two positions.

In a claim, the plaintiff (P) normally has to prove the existence of events for which the defendant (D) is responsible; the existence of loss suffered by P; and a causal link between the events and the loss. A global claim is a modification of this principle because P cannot or will not adduce evidence to prove the causal link.

Courts in many jurisdictions have taken the position that global claims should be approached with a great deal of caution, even distrust and that arbitrators and tribunals should be assiduous in pressing P to set out the nexus with sufficient particularity to enable D to direct its discovery and its attention to that case. P who has a claim will not be denied the

opportunity to prosecute that claim only because there may be difficulty in identifying with precision each individual element of the claim. Whether the claim can be sustained will depend upon the evidence in relation to it.

Whilst the recent case of *Walter Lilly & Company Limited v (1) Giles Patrick Cyril Mackay (2) DMW Developments Limited* [2012] EWHC 1773 (TCC) can be seen as giving some comfort to claimants who persist in making global submissions that their claims will not be as readily defeated as was previously the case, it nevertheless reinforces that such claimants will face added evidential difficulties which need to be overcome to improve the prospects of success.

Whilst there is nothing wrong in principle with global claims, they face added evidential difficulties.

In the case of *Walter Lilly v Mackay*, Mr. Justice Akenhead reviewed previous authorities on global claims and concluded:

1. Claims for delay or disruption related loss and expense must be proved as a matter of fact.
2. P has to demonstrate on the balance of probabilities that, firstly, events occurred which entitle it to loss and expense; secondly, that those events caused delay and/or disruption; and thirdly that such delay or disruption caused it to incur loss and/or expense.
3. Contractual clauses can restrict global cost or loss claims.
4. It is open to P to prove the three elements with whatever evidence will satisfy the tribunal and the requisite standard of proof.
5. There is nothing wrong in principle with global claims but there are added evidential difficulties which P has to overcome. It will generally have to establish that the loss which it has incurred would not have incurred in any event. The burden of proof to prove this does not pass to D.
6. There is no need for a court to go down the global or total cost route if the actual cost attributable to individual loss causing events can be readily or practicably determined.
7. Unreasonable delays by P in making the claim can lead to it failing; as can non-compliance with conditions precedent for example, the failure to give early warning notices).

Global claims will always provoke controversy and balancing the rights of the parties will continue to vex tribunals. Whilst there is nothing wrong in principle with global claims, they face added evidential difficulties which need to be overcome to improve the prospect of success. Plaintiffs can prove such claims by whatever evidence will discharge the burden of proof.

CI Arb News

*News for members of
the Chartered Institute
of Arbitrators in Trinidad
& Tobago*

The Trinidad & Tobago branch of the Chartered Institute of Arbitrators (CI Arb) is a branch of the regional, Caribbean Chapter and is looking to host regular meetings for its members; however it needs one or more venues.

If anyone can provide a suitable meeting place preferably with light refreshment facilities, to accommodate up to 50 persons, please contact Cerno.

Anyone interested in joining the CI Arb can obtain information directly from the Institute (www.ciarb.org) or by writing to info@cerno.org.

Upcoming Events

It is intended that Cerno's newsletters will include details of local happenings and events of interest. Anyone wishing to have details of an event considered for inclusion here should write to info@cerno.org and provide relevant details.

22-23 & 26-27 November 2012: Hyatt Regency, Trinidad: "The Practical Use of the 1999 FIDIC Conditions of Contract for EPC Turnkey Projects & Comparison with the Plant & Design Build Contract " & "The Practical Use of the 2008 Conditions of Contract for Design Build and Operate Projects." For details and registration e-mail to jccfidic2@gmail.com.

Contact Information

Cerno can be contacted by e-mail to info@cerno.org.

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