

## Expert's Corner Paper 2013-03

### How to Properly Use Global Claims in Disputes

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*In the construction industry, Global Claims are the practice of many Contractors that submit an overall evaluation of loss / expense / delay under a number of events, without demonstrating direct causality, but rather inferring a global link. By their nature, Global Claims are more subjective than objective in defining a causal link and quantum. They often lead to disputes and can be outright rejected by arbitrators and Courts if they don't show a minimum of qualities. This paper explains the key characteristics that can make Global Claims receivable. In essence, while the estimate of the loss can be considered globally, there still needs to be a very clear causality demonstrated for Global Claims to be considered favourably. While recognizing that Global Claims often form the basis of a negotiation rather than a full-fledged dispute, Contractors should be wary and follow this paper's key recommendations whenever considering to raise Global Claims.*

A Claim is 'a demand for something due or believed to be due, a right to something; specifically: a title to a debt, privilege, or other thing in the possession of another'<sup>1</sup>. Contractual claims cover all demands of variations which are not covered or resolved through the application of the express contract terms.

Global claims are quite frequent in the construction industry, and represent a significant portion of those eventually escalating into a dispute. They are the practice of many contractors to submit an overall evaluation of loss / expense / delay under a number of events, without demonstrating direct causality, but rather inferring a global link. The Society of Construction Law Delay and Disruption Protocol<sup>2</sup> discourage the making of composite or 'Global Claims' by contractors, and Case Law confirm this aversion to lumped claims. Although revelatory of the initial reticence to consider global claims, such adverse criticism may be overstated, and Global Claims are generally accepted as capable; it is however of importance to consider carefully their particularities and limits.

#### Issues with the Global Claim concept

##### **Legal and contractual receivability**

The question of whether or not a party is free to make a Global Claim is one which has long exercised the courts. Case law is balanced between an hardline view against such Global Claims<sup>3</sup> where no reasonable course of action is formulated and some more encouraging decisions<sup>4</sup>, of which the Court of Appeal decision in *GMTC Tools and*

*Equipment v Yuasa Warwick Machinery*<sup>5</sup> where the Court said that a plaintiff should have been permitted to formulate its claims for damages as it wished, and not be forced into a constraint of the judge's or their opponent's choosing.

Legally, nothing opposes to a Global Claim, provided that the submissionner can comply with the requirements of proving the causality nexus, liability and quantum, if not conclusively, at least on a balance of probability. Contractually, most of the clauses do not impose specific requirements but only that the notice and specifics (logic and supporting documents as may reasonably be required) behind a request are sufficient to satisfy the Employer / Engineer / Architect / Contract Administrator in order for an ascertainment to be made. The recent standpoint adopted in Courts has been much more on the permissive side<sup>6</sup>.

Provided the pursuer is able to give adequate specification of:

- the events,
- the basis of the defender's responsibility for each of them,
- the fact of the defender's involvement in causing his global loss,
- the method of computation of that loss,

there is no difficulty, in principle, in permitting a claim to be progressed as a Global Claim

##### **Causality and standard of proof**

Mr Justice Ramsey, in his analysis of global claims, aptly stated that: '*Ordinarily, in order to make a relevant claim for contractual loss and expense under a construction contract (or a common law claim for damages) the pursuer must aver (1) the occurrence of an event for which the defender bears legal responsibility, (2) that he has suffered loss or incurred expense, and (3) that the loss or expense was caused by the event.*'<sup>7</sup> On the other side, contract forms usually require for the pursued entitlement to be detailed and supported to the satisfaction of the Employer.

However, Global Claims foster a complicated interaction of activities and the overall loss caused by the combination of a number of different events, with the impossibility to trace the connection

between each individual event and each individual loss. This is not to be held fatal to the Global Claim, for which the causal link and support of such is not evidenced as per usual practice but rather inferred. A properly supported Global Claim will give sufficient support to this inference so as to be conclusive, in a balance of probabilities view, even if this is on a more subjective level than more straightforward evidenced variation: *'provided the pursuer is able to give adequate specification of the events, of the basis of the defender's responsibility for each of them, of the fact of the defender's involvement in causing his global loss, and of the method of computation of that loss, there is no difficulty in principle in permitting a claim to be advanced in that way'*.<sup>8</sup>

Global Claims are easier and less expensive to prepare on the submissioner side, but push back burden of proof on the Defendant, reason why they have been so detracted, accused of being a shortcut used to camouflage, to conceal claims lacking in any real substance or degree of preparation and possibly an embarrassing abuse of the process of the court.

*'The distinction must be made between global evaluation, which may be permitted in appropriate circumstances and the global approach to liability, which is not permitted'*.<sup>9</sup>

#### **Time bar assumption**

Construction contracts usually include time bar clauses which are intended to have the effect of disallowing the contractor a claim that might otherwise be legally recognizable. For example, Clause 61.3 of NEC3 set this time as eight weeks, while Sub-clause 20.1 of the FIDIC form imposes a 28 days limit for a notice to be issued. On the contrary JCT Clause 2.27 does not impose such a limit. Generally, in England, the courts will take the view that timescales in construction contracts are directory rather than mandatory, so that the contractor should not lose its right to bring its claim if such claim is not brought within the stipulated timescale<sup>10</sup>. In the case of *Bremer Handelsgesellschaft mbH v Vanden Avenne Izegem PVBA*, however, the House of Lords held that a notice provision should be construed as a condition precedent, as it states the precise time within which the notice is to be served; and it makes plain by express language that

unless the notice is served within that time the party making the claim will lose its rights under the clause. How can Global Claims then come so late in the development of projects and still be successful? The Contractor has three ways to do this:

In order to make a relevant claim for contractual loss and expense under a construction contract (or a common law claim for damages) the pursuer must aver:

- the occurrence of an event for which the defender bears legal responsibility,
- that he has suffered loss or incurred expense,
- and that the loss or expense was caused by the event.

- either the specific terms of his contract does not render the serving of such notices mandatory,

- or, he has given notice for each separate cause of his Global Claim and reserved the right to claim for it once its consequences are ascertained, which is quite frequent for causes of individual low incidence. This necessitates the Employer, depending on the contract form, to acknowledge this right,

- or, he can demonstrate at the time of submitting his Global Claim and support documentation that individual causes were not significant enough at the time of their occurrence to raise a notice, and therefore fall in the case described earlier where the right to claim is not stroked out.

#### **Types of Global Claims**

Taking on board the above definitions, two main types of Global Claims can be presented depending on the award that is searched, time or money:

- The **'Total Cost'** claim, in which it is alleged that a global cost overrun on the project is attributable to numerous variations that cannot be disentangled; the common practice it to claim the difference between costs incurred and contract price, therefore seeking a cash-neutral position. Of course, certain submissioners, depending on the strength of their case and possibility to provide support will also claim the deemed profit of the contract, based on the original contract price schedule assumption,
- The **'Global Delay'** claim, in which various instructions, variation, interferences and disruptions are considered to have contributed to the overall delay of the project; there again, the basic claim will be the length of time between the as-built completion and contractual completion date.

In terms of causes for a Global Claim to be submitted, three types can be distinguished where the Employer is asked to see beyond the letter of the



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contract, although most of the Global Claims submitted in reality can be a mix of those:

- **Disruption Claims**, where the Contractor sums up variations and disruptions from the Employer side and claims a global cost or delay,
- **Hardship Claims**, where the Contractor shows that the odds against him were very unfavourable (climate, vendors delays, market prices surge, etc.) but there is no variation or breach nor vehicle for him to claim under the contract, and he requires the employer to retrospectively look at those events as events that could have been foreseen as compensation-triggering in the contract, and award a claim on that basis,
- **Sympathy or “ex gratia” Claims**, where due to outside events, unfavourable odds or even lack of management, the Contractor is suffering a loss not contractually recoverable, and asks a payment courtesy to be granted. Those usually are argued on the basis that the Client or Stakeholders objectives have been satisfactorily met (project delivered on time, no HSE issue), enabling them to take advantage of the project and on that basis asking for benevolence consideration for the Contractor loss.

Global Claims can be categorized from their content between:

and depending on their origin between

- Total Cost claims,
- Global Delay claims,
- Disruption Claims,
- Hardship Claims, and
- Sympathy Claims

- Be reasonable in your submission as you are requesting the other parties (and particularly an arbitrator or judge) to analyze it reasonably: a subjective reasoning shall be even clearer that an objective one to have a positive outcome,

- The objective is to satisfy the conviction on your claim on a balance of probability and based on contract standard of proof.

Mr Justice Vinelott<sup>13</sup> laid down the main conditions for a composite or global award as being:

- The contractor should not have delayed unreasonably in making the claim.
- The loss or expense attributable to each head of claim cannot in reality be separated.
- Apart from the practical impossibility of separating costs between causes, the conditions that have to be satisfied in relation to each head of claim, before an award can be made, include:
  - It must be clear that only the events under consideration caused the global loss<sup>14</sup>, and
  - It must be clear that the Employer is responsible for all these events.

*London Underground Limited v Citylink Telecommunication*<sup>15</sup> recognized that even if the Global Claim fails, that may not be the end of the matter, and it does not mean that no claim will succeed: the sections for which causation and quantum are sustainable may very well be resubmitted on their own.

### **Conclusion: Global claims as a negotiation leverage**

By their nature, being more subjective than objective in defining a causal link and quantum, Global Claims more often belong to the domain of negotiation. They are less prone to be brought forward in front of a court than fully supported claims. The SCL delay protocol<sup>16</sup> pushes for records to be kept in order to avoid the recourse to Global Claims, seen as a cover-up. And effectively, in practice, if you are 100% sure of your claim, then it is not a global one: the main characteristic of a Global Claim in terms of management is the level of incertitude it carries, both from the submitter side (in defining link and quantum) and on the side of the receiver (in

### **Requirements for an acceptable Global Claim**

As seen above, the capacity of Global Claims stands at the limit of the acceptable, in terms of causality and evidencing. It is therefore of utmost importance for those wanting to submit one to ensure it is based on strong grounds, so that it is not dismissed purely for lack of substance. Case Law is there useful in determining what can easily be fatal to the submission; Judge Akenhead went to review the law on global claims recently in a most instructive award<sup>11</sup>.

Some requirements of a robust Global Claim can be summed up as follows:

- Inferred causality is not inexistent causality<sup>12</sup>, lest it can undermine the logic of the global claim,



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A strong and unspoken point of a Global Claim is that it pushes the parties to settle. A Global Claim is sometimes used as this bargaining tool but one has to be careful not to use a Global Claim as a blackmail or ransom tool: inferred causality is not inexistent causality.

accepting, negotiating or risking dispute resolution) due to their subjective nature which makes it difficult to have a firm opinion. If accurate and complete records are maintained, the contractor should be able to establish the causal link between an Employer Risk event and the resultant loss and/or expense suffered without the need to make a global claim.

If events reasonably cannot be untangled, then a Global Claim can be acceptable, but it must be, if not conclusive, persuasive to succeed in front of a judge or arbitrator.

Before reaching the third party judgment stage, global claims are therefore often used as a negotiating argument, hoping it can be resolved directly with the employer. This is all the more true in some contracting cases, for example under FIDIC clauses where the Engineer stands in the middle of the two parties and is expected to support the settling of disputes internally.

*'A strong and unspoken point of a Global Claim is that it pushes the parties to settle. A Global Claim is sometimes used as this bargaining tool but one has to be careful not to use a Global Claim as a blackmail or ransom tool. Therefore, when submitting this type of claims, one should be as fair and reasonable as he can and be clear that, although willing to settle, the basis of the claim are just and the claimant is crystal clear that the components of the Global Claim exist.'*<sup>17</sup>

1 Merriam Webster dictionary definition

2 The Society of Construction Law Delay and Disruption Protocol October 2002, para. 1.14.2

3 Wharf Properties v Eric Cumine Associates (No. 2) [1991] 52 BLR 8 and ICI v. Bovis Construction (1992) 8 CLJ 293

4 British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd [1994] 72 B.L.R. 26 and J. Crosby & Sons Ltd v. Portland Urban District Council (1967) 5 BLR 121

5 GMTC Tools and Equipment v Yuasa Warwick Machinery (1994) CILL 1010 73 BLR 102

6 John Doyle Construction Ltd v Laing Management (Scotland) Ltd 2004 S.L.T. 678 and How Engineering Services Ltd v. Lindner Ceilings Floors Partitions PLC [1992] 2 All ER (Comm) 374

7 John Doyle Construction Ltd v Laing Management (Scotland) Ltd 2004 S.L.T. 678 at para. 35

8 Ibid

9 David Chappell, Understanding JCT Standard Building Contracts, 9th ed., Routledge Ltd, 2012, p.103

10 Temloc v Errill Properties (1987) 39 BLR 30, (CA) per Croom-Johnson LJ

11 Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC) paras 474, 484, 486, 491

12 'causation must be treated as a common sense matter' (Byrne J in John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd 82 B.L.R. 81 at p 84).

13 Merton LBC v Stanley Hugh Leach Ltd (1985) 32 BLR 51

14 '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' (Byrne J in John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd 82 B.L.R. 81, at p 85H and p 86D)

15 London Underground Limited v Citylink Telecommunications [2007] EWHC 1749 (TCC)

16 The Society of Construction Law Delay and Disruption Protocol October 2002

17 Ali D. Haidar, Global Claims in Construction, 2011, Springer at p. 152



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