

Issue No : 25
Published : Autumn 2001
Article No : 1
Author : Julian Cohen
Title : How much Proof is Enough Proof?

The phrases "burden of proof" and "standard of proof" conjure up dry legal arguments that are a million miles away from the reality of everyday claims' work. Yet, everyone involved in the claims' process regularly has to struggle with the practical aspects of these concepts: how much and what sort of evidence is needed for your side's case to prevail at the end of the day? In this two part article, lawyer Julian Cohen provides his comments and advice.

THE "*burden of proof*" identifies which party is responsible for proving their case whilst the "*standard of proof*" identifies the degree of certainty with which the party with the burden must prove its case in order to win.

The theoretical position

It is, of course, generally the party pursuing the claim that has the burden of proof 1

So, for example, if a contractor starts an arbitration to claim extensions of time, the contractor must prove that he is entitled to the extension of time. The employer, if he is defending the claim, does not have to prove his defence - in other words he does not have to prove that the contractor is liable for the delay. He can simply cast doubt on the Contractor's case and then argue that given the doubt, the contractor has not proved that he is entitled to more time.

If, however, the defending employer pursues a counterclaim (say for defects), the employer has the burden of proof in relation to the counterclaim.

In civil cases (such as construction disputes), the standard of proof that the party with the burden must achieve is "on the balance of probabilities". In other words, he must persuade the tribunal that his claim is "more probable than not". If the tribunal thinks it is 50/50 that he is correct, he loses. If the tribunal thinks its 51/49 that he is correct, he wins.

On paper the position is deceptively simple.

A glimpse at reality: the burden of proof

The burden of proof is, in fact, not as simple or as straight-forward as I have described above. The burden of proof in practice has two separate but inter-related parts to it: (i) the evidential burden and (ii) the persuasive burden.

The evidential burden is the formal burden of proof - which party needs legally to prove its case? This evidential burden usually remains with the party pursuing the claim through out the case.²

The *persuasive burden*, on the other hand, is the *informal but practical need to persuade the tribunal that your own argument is sufficiently credible to mean that it should be taken seriously and that the other side needs to introduce further evidence / explanation in order to negate it*. It is important to appreciate that the Persuasive burden in practice shifts backwards and forwards between the parties as the case and evidence unfold – quite independently of which party has the formal evidential burden.

Even if the claimant has the evidential burden and must legally prove its case, the defendant needs to consider how it is going to meet the persuasive burden. If the defence case is not sufficiently persuasive, the defence is unlikely even to get off the ground. If, however, the defendant's case appears sufficiently persuasive, the claimant will be faced with a challenge and must then provide sufficient evidence and argument to negate the Defendant's case and so on.

Consider, for example, a contract / no contract argument – where the claimant says there is a contract and the defendant denies this.

The claim simply states that there is a contract between the parties. This in effect shifts the persuasive burden onto the defendant. To be persuasive the defendant not only denies the existence of the contract but also offers an alternative explanation of the parties' relationship. There was a letter of intent but no formal contract. The defendant produces a copy of the letter of intent.

The claimant now has to explain away the letter of intent – the persuasive burden has shifted back to him. The claimant produces a copy of a subsequent letter that says that the formal contract was being drawn up. The persuasive burden again shifts to the defendant. If the defendant wishes realistically to prevent the claimant from convincing the tribunal that there is a contract, the defendant now needs to present a persuasive explanation as to why there is no contract despite the latest letter - and so on.

The way in which the persuasive burden swings between the parties means that it is important to assess in advance what evidence you have available to support your side's case and how this evidence may be best deployed. This is important whichever party you represent. Even if the other party has the formal evidential burden of proof, you will still need to be able to push the persuasive burden back onto them if you are going to have the best chance of winning.

A glimpse at reality: the standard of proof

As I mentioned above, the standard of proof is the degree of certainty with which the party with the formal evidential burden must prove its case if it is to win.

The goal appears simple. If you represent the party with the evidential burden, you need to leave the tribunal concluding that it is at least 51/49 that you are correct. If you represent the other party, you need to introduce enough doubt into the minds of the tribunal for them to conclude that it is at best 50/50 that the claimant is correct.

However, what does this mean in practice? How much proof do you need to tip the scales in your favour?

This same question arises even if you are trying to settle a case. In determining your settlement strategy, a key consideration may be how much proof is needed to persuade the other party's decision makers to settle the dispute on a basis that is acceptable to you.

Striking an appropriate balance in terms of evidence is key to the successful and cost efficient resolution of the dispute.

On the one hand, insufficient or the wrong kind of evidence may lose you the case. On the other hand, too much evidence can be just as problematic. The introduction of excessive evidence drives up costs and tends to multiply the number of contested issues. It can also hinder your ability to present your case persuasively. For example, too much evidence can make it hard for the decision maker to see your client's case clearly or can end up muddying the waters in ways that are unhelpful to your client and that could legitimately have been avoided.

Before potential evidence is used, it is therefore important to consider whether or not it actually takes you nearer to achieving the standard of proof that you need to achieve.

The first stage in this evaluation process is usually to identify what facts need to be proved. Against this, one can identify what types of evidence are or may be available. From this list, one can then start to assess how much proof is needed for each fact and which particular items of evidence appear to be the most appropriate.

There are a whole variety of factors that I would suggest should be taken into account when making these sorts of assessments including:

The contract

(i) any specific contractual requirements;

Timing and objective

(ii) the purpose of the claim submission;

(iii) the stage of the claim;

The nature of the claim itself

(iv) the amount of money involved;

(v) the complexity of the claim;

(vi) the degree of difficulty of proving actual losses; and

(vii) the nature of the supporting records and evidence available;

(viii) the challenges being put up by the other side.

In the next Trett Digest, I shall review each of these.

Julian Cohen is a Senior Associate with the Hong Kong office of Masons Solicitors Tel +852 2521 5621

1 There are some specific exceptions where the burden of proof is reversed such as allegations of fraud – where the party alleging fraud has the burden of proving it irrespective of whether he is the defendant.

2 There are some specific exceptions where the evidential burden shifts because of legal rules but these are the exceptions.

Issue No : 25
Published : Autumn 2001
Article No : 2
Author : David Carrick
Title : Recent Developments in Civil Engineering Arbitration

The General Prognosis

The advent of Statutory Adjudication under HGCRA seems to have driven thoughts of arbitration out of everyone's mind - or has it? The rough and tumble of adjudication suits some disputes but there has definitely been a resurgence of interest in both conciliation and arbitration under the civil engineering forms of contract. Conciliation has a lot to offer but only if both parties have a will to settle. However, what happens when they don't?

Where there is a single dispute 28 day adjudication is fine, but what happens where there are several high value matters of dispute? With all due respect to adjudicators there is little chance of properly disposing of disputes of this nature within 28 or 42 days. That may be a sweeping statement but I have a genuine concern that HGCRA has led to a spate of grotesquely inflated claims mounted on a global basis endeavouring to attract a sympathy vote. Rough and ready justice ought not to spring from rough and ready claims. Complex claims need another procedure and in most civil engineering forms of contract that procedure is arbitration.

The 1996 Arbitration Act

In England and Wales there was a common perception of arbitration as being a slow and expensive process dominated by court practices. The Act made arbitrators accountable to the courts with speedy and efficient conduct of cases. It had been said that arbitrators were toothless and could impose no sanction where a party was being dilatory.

The Act allows the arbitrator to affix dentures and then sanctions can be effected against a party causing inordinate or inexcusable delays. The Arbitrator has the ability to set limits on recoverable costs but there has been a degree of misunderstanding over this point. The arbitrator cannot cap how much a party spends but he can set a maximum that will be paid to the winning party. The effect of sealed offers will have the potential to affect the status of the parties but notwithstanding, recoverable costs can be limited.

Procedural difficulties are common in arbitration resulting in the adoption of court style pleadings and procedures. Whilst properly particularised pleadings do bring clarity their universal adoption was not always required. Schedules, tables and diagrams can replace many words. The 1996 Act imposes a duty on arbitrators to adopt appropriate procedures appropriate to the type of dispute.

The 1996 Act is not a panacea for all ills but it is an important start to modernising the arbitration process. Most arbitrators are aware of the new procedures but based on personal experience their adoption is not universal. It may be that training has lagged behind but as the years go by since the Act came into place this excuse is wearing a bit thin. Some old school arbitrators still give the impression of hesitating to be proactive and this may be as a result of intimidation by Barristers or solicitors. However, the day of the proactive arbitrator ought to be with us and the general consensus among my colleagues is one of gradual, if not meteoric, progress towards proactive arbitrators.

The Scottish Arbitration Code

In contrast to England, Scotland has been relatively free of statutory provisions. The leading statute dates from 1695 being updated in 1894, 1972 and 1990. In the absence of a new

statute from a devolved Parliament the combination of the Scottish Council for International Arbitration, the Chartered Institute of Arbitrators (Scottish Branch) and Scottish Building Contracts Committee produced the Scottish Arbitration Code. ICE has substantially adopted the Code for arbitration in Scotland.

This has been achieved with the introduction of the Appendix (2001). The Appendix is restricted to two brief sections. The first sets out procedural and evidential matters and the second a short procedure and an expert procedure. This is incorporated by revision into the main ICE forms.

It is too early to tell how this will affect Scottish arbitration but the overall consensus seems to be that the introduction of the Code is a step in the right direction. However, there is a strong body of opinion that says the Code should have been adopted without any amendment. There is insufficient space to discuss this in more detail but anyone using the Code is advised to look at the wide ranging powers bestowed by Sections 15 and 16.

Some Recent Cases on Civil Engineering Arbitration.

Reported cases in civil engineering are few and far between and the recent cases relate mainly to sub-contract arbitrations. (It might be helpful if the reader had the FCEC and CECA Forms of Sub-contract to hand)

Case 1

In *Dredging and Construction Ltd. -v- Delta Civil Engineering Co. Ltd* the new CECA bluish form of sub-contract applied with its heavily altered Clause 18. The sub-contractor Delta issued a notice to concur on Dredging Construction who within 4 days requested an engineer's decision in the terms of the main contract. They also served a notice under the new Clause 18(8). Delta had an arbitrator appointed regardless.

Unsurprisingly Dredging and Construction challenged his jurisdiction. The main contract referral progressed with Dredging and Construction serving another Clause 18(8) notice. The Construction and Technology Court held that under the circumstances Clause 18(8) had been successfully invoked. Under these circumstances the contractor could rely on the protection of a tri-partite arbitration.

Score Subbies 0 Contractors 1

Case 2

In the House of Lords case *Lafarge Redlands Aggregates Ltd. -v- Shepherd Hill Civil Engineering Ltd* the main contractor sub-contracted under the FCEC Blue Form. Clause 18(2) of this form provides that where a dispute in regard to the main contract touches on or concerns the sub-contract then the main contractor can require the sub-contract dispute to be dealt with jointly by the same arbitrator, provided that the main contract arbitrator has not been appointed. Lafarge gave notice calling for arbitration under Clause 18(1) but Shepherd Hill applied giving notice under Clause 18(2) however they did not give notice of arbitration under the main contract.

Lafarge's patience grew thin and eventually dummy and teddy exited pram and they set off to court. At first instance the provisions of Clause 18(2) were held to effectively block the sub-contract arbitration but this was overturned in the Court of Appeal. This was upheld by the Lords finding that Shepherd Hill were not permitted to stall the progress of the sub-contract arbitration indefinitely by relying on Clause 18(2). This poses double moral problems to the main contractor. Not being able to rely on Clause 18(2) and not having the sub-contract being bound by the main contract arbitration will result if the sub-contract claim is not forwarded expeditiously.

**Score Subbies 1
Contractors 1**

Case 3

In *Loudenhill Contracts Ltd. -v- John Mowlem* the sub-contractor (Loudenhill) was employed under an FCEC Blue Form. Mowlem terminated the sub-contract under Clause 17(1). At that stage the sub-contractor had not submitted claims but subsequently tried to. The provisions of Clause 15(6) preclude claims after the Engineer has issued a maintenance certificate. The sub-contractor argued that the clause was ineffective and the arbitrator appointed to hear the dispute agreed. The main contractor requested a stated case for the opinion of the Court of Session. The courts disagreed with the arbiter and found that the provision of Clause 15(6) applied to all claims.

**Score Subbies 1
Contractors 2**

The theme that runs through all of these arbitration cases is the importance of adhering to timescales. For small disputes adjudication may have overtaken arbitration. Arbitration has an important role to play in major disputes improperly handled. Arbitrators North and South of the border now each have a vehicle in civil engineering contracts to help them to make civil engineering arbitration a more efficient process and a sensible alternative to adjudication in appropriate circumstances. In summary, arbitrators do your stuff and arbitrating parties watch your timescales.

David Carrick is a Director of Trett Consulting based in the Stirling office. He sits as arbitrator, adjudicator, conciliator and mediator and has been active as an expert witness for some time. David is a past president of ICES, sits on their Council of Management, chairs their Commercial Management Practices Committee and also chairs the Joint ICE/ICES Commercial Management Board and sits on the ICE Arbitration Advisory Panel.

Issue No : 25
Published : Autumn 2001
Article No : 3
Author : Roddy Gordon
Title : Partnering

Partnering

On 14 September 2000 Sir John Egan launched PPC 2000 The First Standard Project Partnering Contract drafted by Trowers & Hamblins (solicitors in London) in collaboration with the Association of Consultant Architects. Whilst it is, perhaps, a little early to call such a document a "Standard Form" it is good news that a contract has been produced in which the main aim would appear to be to resolve some of the longstanding issues which caused the construction industry to have such a poor reputation with regard to litigation.

THERE have been a number of attempts to identify what are the problems inherent in the construction industry that lead it to appear to be one of the most litigious industries – most people will have heard of the Latham Report and the Egan Report.

The Latham Report, entitled "Trust and Money" concluded that (as indicated by title) two principal matters were the root cause of the industry's problems, namely a lack of trust between the various parties brought together on any project and a lack of money. In essence, with regard to the latter point, Latham felt that, in particular, developers were not prepared to pay enough for good quality buildings and that the emphasis on competitive tendering led to low price – low quality.

Somewhat surprisingly, perhaps, as his report was designed to identify the causes of the industry being so dispute orientated, he advocated a new form of dispute resolution, namely adjudication. This is now a statutory right brought in by the Housing Grants Construction and Regeneration Act 1996.

Sir John Egan's report, commissioned by the present government, concentrated more on comparing the construction industry with other industries (not surprisingly the car industry) and one of Egan's principal recommendations was that more attempts should be made to create partnerships within the industry – in particular, in the supply chain.

The question arises as to how such partnering can actually be implemented such that it has some force in law. There are two ways of doing this. The first is to create a partnership within the meaning of the Partnership Act 1890 and create an organisation similar to a firm of (say) solicitors, accountants or architects. I do not believe that that is anyone's intent when they talk about "partnering".

The other means is, of course, to create a contract between the parties which obliges the parties to behave towards each other in a way that is conducive to partnering. Not many building or engineering contracts, with the exception of the relatively new Engineering and Construction Contract, seek to do that. Without a contract requiring the parties to behave towards each other in a partnering manner then the fall back position is simply that the parties simply agree to try and behave towards each other and no doubt make all sorts of hopeful and optimistic noises to that effect.

There are, it seems to me, two principal requirements for a partnering arrangement. The first is that there should be a real commitment by all parties to the project to each other and to the project such that they understand that the success of the project overrides individual parties ability or requirement to make a profit. The second is that the parties should act towards each other in "good faith".

The question of what is meant by "good faith" has not really come before the English courts and it is still unclear as to what, say, the Court of Appeal would say was the meaning or definition of an obligation to act in "good faith". However, in the fairly recent case of *Birse Construction -v- St David* the judge, whilst not asked to consider the meaning of good faith in order to come to his judgment, did indicate that he thought that where the parties had talked about acting in good faith when it was clear that, but for that technical point, the contractor would have been entitled to an extension of time.

The next question is what sort of "partnering" can take place? It seems to me that, whilst "one off " partnering arrangements might be successful – if the parties involved just happen to get on with each other and the project runs successfully, more likely is the creation of some long term relationship where the parties can feel that, even if this project is not going particularly well through no fault of their own, it is still worthwhile working together to try and make certain that the project is successful (even if an individual party loses money as a result) because further good value work is virtually guaranteed. The feeling that "I can take a hit on this project" is unlikely to be forthcoming if there is no guarantee of more work to come.

If the parties are going to rely on something other than a general hope that they will act towards each other in a "partnering" manner then they will need a contract and, in my view, to turn a fairly normal building contract into a partnering arrangement does not require that much effort but it does need at least four main ingredients.

The first is that there should be a staggered dispute resolution process. All too often in building and engineering contracts a minor dispute arises and the only way that can be resolved is to go to arbitration. Much better to have a staggered process of notices, meetings, meetings at more senior level, mediation and only then, if that fails, arbitration.

Consequently the second ingredient is a requirement that meetings take place on a regular basis at senior level. Too often, in my experience, disputes arise because junior members of companies involved in the project are too nervous of admitting a mistake and would rather allow the company to get embroiled in a difficult dispute than admitting they have made a mistake. That is less likely to happen at a more senior level.

The third requirement is a contractual obligation to behave towards each other in good faith. There is no doubt that the courts will soon be asked to state what that means and I have no doubt that they will follow the lines indicated by the judge in *Birse -v- St David*.

Finally, there needs to be some form of target price mechanism whereby, instead of the usual penalties for failing to complete on time etc there are bonuses offered for completing early etc. That, of course, can be difficult where there is a finite amount of money and it may be that developers need to persuade their bank that such a term in a building contract is to everyone's benefit.

If the partnering arrangement works then the advantages for everybody is that they are less likely to get involved in expensive litigation, there will be commitment to each other and to the project and that, hopefully, will lead to more flexibility when things do go wrong (as they inevitably do on a building contract).

Without a partnering arrangement then the old ways are bound to continue but we will have to wait and see whether the courts will enforce obligations such as good faith and whether parties will not use partnering ideas somewhat cynically. Hopefully the PPC 2000 will lead to successful projects. Of course, if it does, we will never hear about it as it will never come before the court.

Roddy Gordon of Robert Muckle, Solicitors, Newcastle upon Tyne, UK can be contacted on +44 191 232 4402

Issue No : 25
Published : Autumn 2001
Article No : 4
Author : Bronwyn Mitchell
Title : Procurement using the ECC

The Engineering and Construction Contract (ECC) is a document belonging to the New Engineering Contract family of documents. It was published in Consultative Edition as the New Engineering Contract in 1991 and is currently in second edition while a third edition being planned for the future.

THE ECC is designed to be flexible enough to be used for any construction contract and has been used in civils, process, mechanical and electrical and building projects. Some more well-known examples of its use are the Cardiff stadium, the Eden Project, the Kingston Bridge in Glasgow and the Channel Tunnel Rail Link.

The ECC second edition was drafted to incorporate Latham's principles of a modern contract as described in his report Constructing the Team. The contract has three objectives: flexibility; clarity and simplicity; and a stimulus to good management. It is this latter objective that encourages many people to use the ECC for the first time.

The ECC incorporates non-adversarial actions and encourages the parties to work together collaboratively and proactively. It is drafted in a different manner from traditional contracts and facilitates a different relationship between the parties. As such, it should be procured in a manner that correlates with its objectives and drafting principles. Procuring an ECC contract in the same way as traditional contracts could lead to difficulties and tensions from the very start.

This is the first in a series of six brief articles about the choices made when procuring a contract using the Engineering and Construction Contract. Other articles will include:-

- the selection of secondary options,
- drafting the Works information,
- the use of the programme,
- compensation events, and
- mutual trust and co-operation.

The choice of main option.

The Employer has a choice of six main options under the ECC. These six main options effectively represent the way in which the Contractor will be paid during the period of the contract. Some of the choices are easy: if you want a management contractor, you choose option F; if you want a cost reimbursable contract, you choose option E. Options B and D use a bill of quantities, while options A and C use an activity schedule, which describes milestone payments. Options A and B are priced contracts and options C and D are target contracts.

Many Employers tend to prefer a fixed price (option A) or a remeasurable bills of quantities contract (option B), where the budget for the contract is relatively secure, barring variations ordered by the Employer or his representative. In order to receive a fixed price contract from a Contractor, however, the scope of works is required to be fixed, too. This is often not possible due to planning, budget or time constraints. In this case, the Employer has a decision to make about whether he wants to take the risk of changes made to the contract, or whether he wants to share the risk with the Contractor, who could make valuable contributions to the solving of work scope dilemmas. This could change his choice of option from A to C or from B to D.

In some cases, an Employer may have an idea about what a target contract (options C and D under the ECC) represents. Some employers may regard a target contract as a means of 'sharing the risk'. This is, of course, an aspect of any target contract, but there are other considerations as well. Principally, the behaviour of the two parties to the contract should be modified from the armslength attitude of a fixed price contract, to the more collaborative relationship that is required to make a target contract work.

The primary driver for choice of main option under the ECC is the status of the Works Information, which describes the Employer's Requirements. An option A contract based on a Works Information that is only 50% complete is difficult to reconcile and would inevitably result in large compensation events.

The selection of secondary options will be discussed in the next article.

Bronwyn Mitchell is a Senior Consultant in the Stirling office and specialises in Procurement methods.

Issue No : 25
Published : Autumn 2001
Article No : 5
Author : Barry Kirby
Title : Dutch Engineers cut the cost of Arbitration

The construction industry in the Netherlands is not adversarial by nature, thus, many Contractors proceed on the basis of "execute a good job and we'll get paid at the end". This has been the norm but times and attitudes are changing.

THE introduction of new commercial and contractual conditions and the advent of large consortium contracts means that Contractors are having to adopt a tougher line. In the present climate claims are increasing, as is recourse to formal dispute resolution.

The major cost of litigation lies in any prolongation and delay endemic to the proceedings themselves. The largest cost to be experienced in arbitration is, however, the time taken to assemble and collate all the necessary information. The remedy lies largely with the Contractors themselves and, more particularly, with the Engineers, who need to ensure that the time to be taken for the formulation of the necessary documentation is minimised.

In practice, despite the advent of information technology, and the simple techniques and the vast cross referencing capability now available, what is often found too often is that:-

- the estimate does not make sense,
- the base programme is no more than just a picture to 'obtain the job',
- the project procedures are such that information is not easily available in the format required, when it is actually required.

Thus, the initial paperwork does not provide the source and is not the suitable foundation required on which to build the dispute documentation.

To overcome this problem, the larger international contracting organisations employ a few in-house Quantity Surveyors, Contract Engineers and Planners or 'Consultants'. Such personnel are employed to properly administer contracts by issuing notices, applying for extensions of time and preparing and presenting applications for payment for variations arising under the contract. The intention is that this will hopefully avoid disputes and, therefore, any formal arbitration or litigation.

Where claims are inevitable, the Consultants then present the Contractor's claims. More than likely, this information will have been relayed to them by an Engineer. Therefore, the claims as submitted are rather general in content, sometimes even global and do not necessarily represent the detail necessary for resolution by formal arbitration. However, it is not often appreciated that, whilst these Consultants may be well versed in routine quantity surveying, planning or contract management, they are not necessarily skilled in the resolution of disputes. Should the matter proceed to arbitration then the Consultant may be required to prepare an 'Expert' claim. However, it is also often unacceptable to the Arbitrator for these Consultants to act as an Expert Witness because of the close association with the commercial considerations involved in the project. It may, therefore, become necessary to appoint a second Consultant or an Expert skilled in matters of dispute resolution. This duplication of effort can be expensive.

If the Expert is not brought in early enough, the case may already have been pleaded, and may even have been prepared on the basis of the original consultant's opinions. If this is the case, the Expert is faced with adopting the consultant's work and, hopefully, endorsing it. If the Expert disagrees with it, the cost and delay implications can be substantial.

The Expert will be required to undertake an extensive forensic exercise, reconstructing particular aspects of the project, based on the documentation and his own judgement. In general, a construction Expert's role is to come to terms with an overwhelming mass of detail and to present a clear and credible overview.

Sometimes a draft Expert's report, once shown to key witnesses has led to improved recollections and greater understanding of the project and this can significantly alter opinions. This is common, for example, in the use of "Critical Path Methodology" ("CPM") in analysing delays to a project. The CPM is an excellent visual method of illustrating the way in which a project has been delayed. The preparation of a CPM analysis can be regarded as a logical exercise. However, the notion that the CPM is a method of proving the way in which a project was planned and delayed is, of course, incorrect. The CPM programme will be a snapshot of the project at a particular date. Consequently, the choice of the date is particularly important. The selection of the activities to be shown on the programme (and the way in which they are described) can substantially alter the 'story' that the programme tells. A major project at 'level 3' may have as many as 6,000 individual activities. Any presentation showing each and every activity would be unnecessarily complex.

Consequently, individual activities are 'hammocked' into groups to present a smaller number. This can disguise or emphasise the extent of delays attributable to particular causes. All such matters are subjective and affect the way in which a delay or influence is applied to the programme. If the activities are independent of each other, the consequences of a delay are very different than if the same activities were linked.

With a few exceptions, an experienced Expert Planner has to exercise his own judgement in selecting the various determining features of his CPM network. He is heavily reliant on actual information about the project (without which a perfectly logical CPM may bear no resemblance to reality) and his own judgement.

Paramount to his these efforts, however, is the existence of a logical programme, constructed at the outset.

In summary, there is a need to concentrate on the paper and administrative processes from the outset. This would, in turn, control the time and, therefore, the cost of Experts. This concentration needs to come from the Engineers utilising IT tools and developing skills and techniques which will support and demonstrate the Contractor's arguments and theories.

There is no need for Engineers to become expert in the law but there is a need to spend a day or two learning about basic commercial awareness.

Sadly, Barry Kirby has passed away since writing this article. Any queries regarding this article or our operations in the Netherlands should be directed towards John Lott of our Netherlands office

Issue No : 25
Published : Autumn 2001
Article No : 6
Author : Michael Black QC
Title : Global Claims

In the last issue of the Trett Digest, **Michael Black, QC** explained the general principles which the courts have set down regarding global claims. In this second of three instalments, he looks at some specific examples from case law.

IN **ICI PLC v Bovis Construction Limited and others** (1992) 8 Const. L.J. 293 ICI brought proceedings against Bovis as management contractors and its architects and consulting engineers in connection with the refurbishment and reconstruction of its headquarters at Millbank. The Defendants objected to the lack of particularity in the pleading and the Official Referee ordered a Scott Schedule setting out against whom the complaint was made, the breach and the factual consequences. However, the Scott Schedule simply set out the total alleged overspend without attributing it to any of the compendious allegations now made. Further, the figures in the Scott Schedule failed to comply with those in the Statement of Claim and were not broken down. The Official Referee held that ICI had failed, where it was able, to make the link between breaches and their financial consequences. He struck out the Scott Schedule.

McAlpine Humberoak Ltd v McDermott International Inc (1992) 58 BLR 1 concerned the construction of the deck structures of an off-shore drilling rig. Part of the Plaintiffs' claim included indirect costs caused by VO's, revised drawings and late answers to TQs. The Court of Appeal criticised the Plaintiffs for failing to call any witnesses to address the issue of causation. The Plaintiffs employed a consultant, Mr. Waggett, to calculate the indirect costs claim. Mr. Waggett first went through each VO and arrived at a number of days for each based either on the time actually taken or a calculation. He prepared bar charts illustrating the cumulative effect of all causes of delay. He then took the additional time occupied for each activity (as opposed to the actual time taken) and applied the tender rates, making adjustments for the Christmas break, night working and the value of variations. The Court of Appeal said of Mr. Waggett's method:

"...it suffers from two major defects. So far as the first stage of the calculation is concerned, Mr. Waggett's approach assumed that if one man was working for one day on a particular VO, the whole contract was held up for that day..."

The second, even more serious defect relates to the second stage of the calculation. It assumes that the whole of the workforce planned for a particular activity was engaged continuously on that activity from the day it started until the day it finished..."

By reason of these defects, we conclude that the Plaintiffs did not prove, or indeed come near to proving, on the evidence which they called at trial, that the delay in delivery of [the structures] was due to revised drawings, VO's and late response to TQs. Further they never came near to proving that the indirect costs resulting from these matters amounted to £2,020,198. The very fact that the total entitlement claimed by the Plaintiffs on the basis of Mr. Waggett's evidence came to £1M more than their actual costs should surely have put the judge and his assessors on enquiry." [25-6]

They contrasted Mr. Waggett's approach with that of the Defendants:

"When the Defendants' witnesses came to give evidence, they undertook the task which was never undertaken by the Plaintiffs, of tracing the impact of every drawing revision, VO and TQ... [26]

The judge dismissed the Defendants' approach to the case as being a retrospective and dissectional reconstruction by expert evidence of events almost day by day, drawing by drawing, TQ by TQ and weld procedure by weld procedure, designed to show that the spate of additional drawings which descended on McAlpine virtually from the start of the work really had little retarding or disruptive effect on its progress. In our view the Defendants' approach is just what the case required." [28]

In **John Holland v. Kvaerner (1996)** 82 BLR. 8 1, the plaintiff claimed damages as a result of breaches of contract. Losses were calculated in terms of the difference between the tender estimate and actual cost. Argument before Byrne J. focussed on the extent to which it is necessary in the statement of claim to set out the causal link between two groups of fact: the breaches of contract and the alleged extra cost. The plaintiffs form of pleading was described by the judge as implying rather than stating the necessary causal relationship. The claim was accordingly a global claim:

"that is, the claimant does not seek to attribute any specific loss to a specific breach of contract, but is content to allege a composite loss as a result of all the breaches alleged, or presumably as a result of such breaches as are ultimately proved. Such claim has been held to be permissible in the case where it is impractical to disentangle that part of the loss which is attributable to each head of claim, and this situation has not been brought about by delay or other conduct of the claimant." [85]

The claim was also a "total cost claim, on which Byrne J. stated the following:

"In its simplest manifestation a contractor, as the maker of such claim, alleges against a proprietor a number of breaches of contract and quantifies its global loss as the actual cost of the work less the expected cost. The logic of such a claim is this:

(a) the contractor might reasonably have expected to perform the work for a particular sum, usually the contract price;

(b) the proprietor committed breaches of contract;

(c) the actual reasonable cost of the work was a sum greater than the expected cost.

The logical consequence implicit in this is that the proprietor's breaches caused that extra cost or cost overrun. This implication is valid only so long as, and to the extent that, the three propositions are proved and a further unstated one is accepted: the proprietor's breaches represent the only causally significant factor responsible for the difference between the expected cost and the actual cost." In such a case the causal nexus is inferred rather than demonstrated. The unstated assumption underlying the inference may be further analysed. What is involved here is two things: first, the breaches of contract caused some extra cost; secondly, the contractor's cost overrun is this extra cost. It is the second aspect of the unstated assumption; which is likely to cause the more obvious problem because it involves an allegation that the breaches of contract were the material cause of all the contractor's cost overrun. This involves an assertion that, given that the breaches of contract caused some extra cost, they must have caused the whole of the extra cost because no other relevant cause was responsible for any part of it [85-86]

The judge found that in John Holland's pleading no causal nexus was asserted linking any breach with any item of loss or damage claimed. He approached this flaw in the pleading as follows:

"The fundamental concern of the court is that the dispute between the parties should be determined expeditiously and economically and, above all, fairly. Where the proceeding is being managed in a specialist list, the judge, whose task it is to steer the case through its interlocutory stages, might, and perhaps should, explore the claim to determine whether the form it takes is driven by its nature and complexity, or by a desire to conceal its bogus nature

by presenting it in a snowstorm of unrelated and insufficiently particularised allegations, or by a desire to disadvantage the defendant in some way. Relevant to this is an acknowledgement that... a total cost claim puts a burden on the defendant. This burden may involve the defendant in extensive discovery of documents relating to the performance of the project; it may mean that at trial the defendant must cross-examine the plaintiffs witnesses to expose the flaws in a claim which assumes that the defendant is, itself, responsible for every item of the plaintiffs cost overrun; it may mean that the defendant must lead evidence to explain what in fact, was the impact of each of the acts complained of on the project, as was done in **McAlpine Humberoak**. Litigation inevitably imposes burdens on the parties; the court must exercise its powers to ensure that, as far as possible, these burdens are not unreasonable and are not unnecessarily imposed.

*In my opinion, the court should approach a total cost claim with a great deal of caution, even distrust. I would not, however, elevate this suspicion to the level of concluding that such a claim should be treated as prima facie bad: British Airways Pension Trustees. Nevertheless, the point of logical weakness inherent in such claims, the causal nexus between the wrongful acts or omissions of the defendant and the loss of the plaintiff, must be addressed. I put to one side the straightforward case where each aspect of the nexus is apparent from the nature of the breach and loss as alleged. In such a case the objectives of the pleading may be achieved by a short statement of the facts giving rise to the causal nexus. If it is necessary for the given case for this to be supported by particulars, this should be done. But, in other cases, each aspect of the nexus must be fully set out in the pleading unless its probable existence is demonstrated by evidence or argument and further, it is demonstrated that it is impossible or impractical for it to be spelt out further in the pleading. Moreover, the court should be assiduous in pressing the plaintiff to set out this nexus with sufficient particularity to enable the defendant to know exactly what is the case it is required to meet and to enable the defendant to direct its discovery and its attention generally to that case." And it should not be overlooked that an important means of achieving the result that, once it starts, the trial should be conducted without undue prejudice, embarrassment and delay, is by ensuring that, when it begins, the issues between the parties including this nexus are defined with sufficient particularity to enable the trial judge to address the issues, to rule on relevance and generally to contain the parties to those issues. And if, in such a case, the plaintiff fails to demonstrate this causal nexus in sufficient detail because it is unable or unwilling to do so, then this may provide the occasion for the court to relieve the defendant of the unreasonable burden which the plaintiff would impose on it: **Wharf** [90-91]*

The John Holland analysis and restatement of principle was accepted and adopted by H H Judge Lloyd, QC in **Bernhard's Rugby Landscapes Ltd v. Stockley Park Consortium Ltd** (1997) 82 BLR. 39:

The statement of claim left the reader to ferret in the enormous supporting schedules to find the heart and real nature of the plaintiffs case. The terms of the contract were not set out in the statement of claim; the nature of the breaches of these terms which were relied upon as founding claims for damages were not set out in the statement of claim; the basis upon which claims were advanced under express terms of the contract for the recovery of additional costs were not pleaded in the statement of claim. The pleading was therefore of the type customarily known as a "forest" pleading since the statement of claim was virtually no more than a vehicle for the relaunch of the plaintiffs original contractual claims submissions. No attempt has apparently been made to consider the contractual claims submissions and to extract from them the material which ought properly to have appeared in a statement of claim, leaving to the schedules, as is customary and proper, the finer details of the specific allegations in the statement of claim. Although the statement of claim superficially looked as if it complied with the Rules of the Supreme Court, in reality its structure was fundamentally wrong in that one had to delve in the accompanying schedules in search of the factual and the legal bases for the claimant's case. Whilst it is clearly desirable to make the best use possible of material that has already been prepared so as to avoid unnecessary costs being incurred and to maintain a continuity of approach, it must not be forgotten that there may be a marked difference between the form and content of a claim presented under the terms of a contract for consideration by an architect, engineer or other person appointed to issue

certificates and/or reach decisions and the presentation of a claim in legal and arbitral proceedings.

On the global claim part of the case, the judge stated as follows:

Official referees are expected to control the cases in their list and do so, either on application or, where permitted and appropriate, of their own motion, with a view to ensuring, within the rules of court, that the presentation of a case is such that it ensures that the issues raised by it are or will be clearly defined, as a matter of procedure, both with a view to trial and also to see that the parties should be aware of the strengths and weaknesses in their respective cases so that only those disputes which require to be tried should come to the court for decision. If Lord Woolf's proposals are to be adopted the time is fast approaching when a claimant party will be required from the outset to present its case in considerably more detail than is at present customary. For present purposes the position may be restated as follows:

(1) Whilst a party is entitled to present its case as it thinks fit and it is not to be directed as to the method by which it is to plead or prove its claim whether on liability or quantum, a defendant on the other hand is entitled to know the case that it has to meet.

(2) With this in mind a court may - indeed must - in order to ensure fairness and observance of the principles of natural justice - require a party to spell out with sufficient particularity its case, and where its case depends upon the causal effect of an interaction of events, to spell out the nexus in an intelligible form. A party will not be entitled to prove at trial a case which it is unable to plead having been given a reasonable opportunity to do so, since the other party would be faced at the trial with a case which it also did not have a reasonable and sufficient opportunity to meet.

(3) What is sufficient particularity is a matter of fact and degree in each case. A balance has to be struck between excessive particularity and basic information. The approach must also be cost effective. The information may already be in the possession of a party or readily available to it so it may not be necessary to go into great detail.

In the next issue Michael Black will summarise the principles and the application of global claims.

Michael Black QC is the Head of the Construction Group at 2 Temple Gardens, London EC4Y 9AY
telephone number: +44 20 7822 1200
e-mail: mblack@2templegardens.co.uk

Issue No : 25
Published : Autumn 2001
Article No : 7
Author : Justyn Jagger
Title : Arbitration in Asia

In the second of three articles examining the arbitration process as it applies to disputes of an international nature in six Asian jurisdictions, **Justyn Jagger**, an international arbitration and litigation lawyer of the Singapore office of international law firm Herbert Smith, looks at the arbitration process in Singapore and Indonesia.

SINGAPORE

International Arbitration Law

International arbitration in Singapore is governed by the International Arbitration Act (Cap 143A) (the "IAA") and, by reason of section 3 of the IAA, the UNCITRAL Model Law on International Commercial Arbitration. In simple terms, an 'international arbitration' is defined as an arbitration in which one of the parties has its place of business outside Singapore or the place of the arbitration or the performance of the commercial relationship is outside the parties' usual place of business. Domestic arbitration in Singapore is governed by the Arbitration Act (Cap 10).

International Arbitration Institutions

The IAA recognises both ad hoc and institutional arbitrations. Institutional arbitrations may be conducted under the rules of an overseas institution, such as the International Chamber of Commerce Court of Arbitration, or under the rules of the Singapore International Arbitration Centre (the "SIAC"). The SIAC was set up in 1991 and has developed the SIAC Arbitration Rules that are based upon the UNCITRAL Arbitration Rules. Since its inception, the SIAC has handled 473 cases relating mainly to construction, engineering, shipping and insurance.

However, it should be noted that whilst the parties may be represented by counsel of their choice at the arbitration, section 34A of the Legal Profession Act stipulates that if the substantive or governing law of the matter in dispute is Singapore law then counsel must appear jointly with a Singapore qualified lawyer.

The Role of the Courts in International Arbitration

The role of the Singapore Courts in international arbitration is limited. If a contract contains a valid arbitration clause then, upon the application of either party, the Court must grant a stay of any litigation in favour of arbitration. Following the commencement of an arbitration, the Court may hear a challenge to an arbitrator's appointment or an appeal against the tribunal's ruling as to the extent of its jurisdiction. The Court may also grant interim or conservatory relief.

The Singapore Courts may only set aside awards made in Singapore. Foreign awards are subject to the rules of enforcement set out below. The grounds for setting aside an international arbitration award are contained within Article 34 of the Model Law and section 24 of the IAA. Article 34 is concerned mainly with due process of the arbitral process. Section 24 of the IAA however, allows the award to be set aside if it was induced or affected by fraud or corruption or the rules of natural justice have been breached to the prejudice of one of the parties.

Enforcement

An international arbitration award made in Singapore is enforced by application to the High Court which has a discretionary power to grant enforcement. Enforcement of an international arbitration award made outside Singapore and in a country that is a party to the United Nations Convention for the Recognition and Enforcement of Foreign Awards 1958 ("the New York Convention") is again made by application to the High Court. Upon that application, the court can only refuse enforcement if any of the provisions of section 31 of the IAA that reflect Article V of the New York Convention and relate principally to failure of due process are established. Enforcement of a Non-Convention award will be by the issue of proceedings in the Singapore Court.

INDONESIA

International Arbitration Law

International Arbitration Law in Indonesia is governed by the Indonesian Arbitration Law, Law No. 30 of 1999 (the "Arbitration Law"). This sets out the procedure to be followed in an arbitration and, particularly, the timetable within which applications to set aside an award must be made to the local court. The Arbitration Law does not distinguish domestic arbitration from international arbitration except in the procedure for enforcement.

International Arbitration Institutions

The Arbitration Law permits both ad hoc and institutional arbitrations. Institutional arbitrations may be conducted through either an overseas arbitration institution or the Badan Arbitrasi Nasional Indonesia ("BANI"). BANI was established in 1977 under the auspices of the Indonesian Chamber of Commerce. There are no restrictions as to who the parties may appoint to act as counsel.

Article 45 of the Arbitration Law requires the arbitral tribunal to seek a settlement between the parties at the first hearing. In the event that a settlement is not reached, the arbitrators appointed are not deemed to have prejudiced their position as they do not participate in the settlement process.

The Role of the Courts in International Arbitration

Provided that a valid and enforceable arbitration agreement has been entered into between the parties, section 11 of the Arbitration Law provides that the District Court shall not interfere in the arbitration. The power to hear a challenge to the appointment of one of the arbitrators, however, remains with the Court. In addition the Court may appoint the Chairman of the arbitral panel in the event that the parties are unable to agree. The power to grant conservatory relief to prevent the dissipation of assets pending the outcome of the arbitration rests with the arbitral tribunal.

Enforcement

An award rendered in Indonesia either through an ad hoc or institutional arbitration is registered with the District Court in which the award was rendered. Enforcement of that award is then sought by way of an application for an enforcement order. The grounds upon which the award may be set aside or appealed are limited. An award may be successfully challenged if it contravenes "decency or public order", if forged or falsified documents have been used in evidence, if a critical document has been disclosed or if false evidence has been given by one of the parties.

Indonesia acceded to the New York Convention in October 1981, although the implementing regulations for enforcement of foreign awards were not introduced until 1990. Under those regulations, a foreign award is registered at the District Court of Central Jakarta together with

an application for an "Exaquetur" or request for execution. The Chairman of the District Court then passes the request for execution to the Supreme Court together with the original award or certified copy and official translation; the original arbitration agreement or certified copy and official translation and a statement from the Indonesian diplomatic mission in the jurisdiction in which the award was rendered that that jurisdiction has diplomatic relations with Indonesia. An application for enforcement of a foreign award can be resisted on the grounds set out in Article V of the New York Convention or on the basis that the award offends public order or morality.

Justyn Jagger can be contacted at Herbert Smith's Singapore office on +65 536 7990.

Issue No : 25
Published : Autumn 2001
Article No : 8
Author : David Scott
Title : Dispute Management and Resolution in a Global Market

In Issue 24 of the Digest we commenced a series of Articles on Arbitration in Asia, we also heard from Philip Harvey about dispute resolution under FIDIC, the international standard form of construction contract. In this issue **David Scott** looks at the broader picture of dispute resolution in the global market.

A LARGE western engineering company, let us call it Power Contractors Inc', contracts with the State-owned utilities company of an emerging south-east Asian State, which we shall call Sea-State, to construct a new power plant in Sea-State. Consideration of the commercial risks is likely to dominate the thoughts of those negotiating the deal within PC Inc, but hopefully, prior to finalising the commercial terms of the contract, they also give sufficient consideration to the dispute resolution terms contained therein. These are often relegated in the contract negotiations to last minute cursory review, and yet may, ultimately, prove to be some of the most important provisions in the contract. It is, of course, highly unlikely that PC Inc would accede to the contract being subject to the jurisdiction of the Peoples Court of Sea-State. Quite apart from concerns as to the separation of the judiciary from the executive, and the manner in which differences between parties are resolved it may be highly inconvenient, for all sorts of practical reasons, for PC Inc to be involved in a dispute resolution procedure in Sea-State.

So what options are open for consideration by the parties? The most obvious, and indeed the most common, is international arbitration. Generally speaking, the ultimate compromise solution is usually that any arbitration be based in a third party jurisdiction, with the law of the State of either of the parties, or indeed of another third party jurisdiction, being chosen to govern the contract. The choice of venue (or "judicial seat") of the arbitration will be a vital consideration for two principal reasons:

- First, and most importantly, it may determine the enforceability of any award. If the venue State is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, any award made in that State will, subject to a number of stated defences in the New York Convention (as incorporated into the domestic legislation of any relevant member State) be recognised and enforced in any other member State. As the number of parties to the New York Convention currently stands at 121 this factor is of considerable importance;
- Second, notwithstanding the choice of substantive law governing the contract itself, the legal regime governing the process of the arbitration will be that of the venue State, and will dictate, among other things, the extent of the jurisdiction of the local courts to support the arbitration (for example by way of interlocutory relief) and the extent to which the award may be challenged. As is well known, the regime adopted by many States (currently 34, including Scotland, plus 4 US States) is the UNCITRAL Model Law, whereas other States rely on their own individual regimes (for example, the 1996 Arbitration Act in England).

Once it has been agreed that disputes should be referred to international arbitration, and a venue (and, consequently, a governing legal regime) chosen, the parties will then have to decide whether the arbitration should be administered by, and possibly also be made subject to the Rules of some established international arbitration institution/secretariat, alternatively whether it should simply be an *ad hoc* arbitration. The choice of the former can be extensive. Perhaps the more obvious and well known, however, are those of the LCIA, the ICC, the

AAA, and the Arbitration Institute of the Stockholm Chamber of Commerce, but there are many more. As in our example, a State contracting with the national of another State, arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) might also be possible, assuming both States to be party to the 1966 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. As for *ad hoc* arbitration, perhaps the most common set of rules adopted are those promulgated by UNCITRAL. These are clearly designed to be most compliant in those jurisdictions where the UNCITRAL's Model Law applies.

One final cautionary message for PC Inc., it would want to ensure that, in its contract, the State (in the guise of the utilities company) waives any sovereign immunity to which it might otherwise be entitled in any dispute resolution proceedings.

Of course, neither party may relish the prospect of every dispute or difference arising during the course of the project being referred to arbitration; and multi-tiered dispute resolution clauses are frequently encountered. A typical example may be:

- First, the parties must make reasonable endeavours to resolve the dispute amicably;
- Failing amicable resolution, the dispute should be sent to mediation;
- Only failing successful mediation should arbitration apply.

The construction by PC Inc. of the power plant in Sea-State is clearly a large project. The larger and more long-running the project, arguably the greater the need to focus on dispute *management* in preference to dispute resolution. This may, again arguably, best be achieved by the introduction into the project of what in the United States is referred to as a Dispute Resolution Board, or in the FIDIC forms as a Dispute Adjudication Board. The attraction of this facility is that the members of the DRB/DAB meet regularly throughout the project, acquire a detailed and in-depth knowledge of the project, and aim to "nip in the bud" any simmering differences between the parties, thus avoiding such differences escalating into disputes and requiring to be referred to a more formal dispute resolution procedure.

In any event, prior to undertaking work in a foreign jurisdiction, advice should always be taken as to the local regime. For example, the right of any party to a construction contract in the United Kingdom to have any dispute referred to adjudication under the strictures of the Housing Grants, Construction and Regeneration Act 1996, with all its attendant implications, has, it is known, taken unsuspecting and ill-advised non-UK contractors by surprise. It would not avail any such contractor, for these purposes, that the governing law of the contract is a law other than that of England or Scotland, nor, indeed, that a tribunal (judicial, arbitral or other) outside the UK is otherwise stated to have exclusive jurisdiction over disputes. Equally "draconian" statutory dispute resolution procedures may also exist in other jurisdictions, and a "foreign" party would be well-advised to be aware of such in advance

The choices available, the complexities involved, and the risks to be run in the context of dispute resolution may appear daunting to any operator in the global market. In the European context, some help may be near to hand. Article 65 of the Treaty establishing the European Community provides that measures adopted by the Council in the field of judicial co-operation should, *inter alia*, be aimed at improving and simplifying the recognition and enforcement of decisions in civil and commercial cases, including decisions in extra-judicial cases. In March 2000, the Commission submitted to the Council a progress report, recommending the establishment of minimum quality standards for the extra-judicial settlement of disputes. During the course of 2001, the Commission will be drawing up a Green Paper initiating wide-ranging consultation with a view to establishing basic principles, either in general or in specific areas, which offer the necessary guarantees to ensure that the settlement of disputes by extra-judicial bodies enjoys the degree of reliability which the administration of justice requires.

Nonetheless, the choice of dispute resolution procedure will continue to require careful thought and consideration when operating internationally, and the conduct of any proceedings careful handling.

David Scott is a Partner in McGrigor Donald, practising from that firm's Edinburgh and London offices. David is a solicitor qualified in England, Scotland and Hong Kong.