



Technical

Global Claims Article 3 – De-Globalising Global Claims

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[Click here for Global Claims Article 2 – Causation and Global Claims](#)

Introduction

1. My previous two Articles have looked at “*What are Global Claims*” and “*Causation and Global Claims*” and have established that a global claim can be made, if necessary, but should be avoided wherever possible.
2. This article will look firstly at how to prevent the need to make a global claim, by setting out what records are required to assist in identifying causation and loss. Secondly, it will look at how to break down your claim to make it less global.

Preventing the need to make global claims

3. The most effective way for a Contractor or Sub-Contractor to avoid the need to prepare a global claim is to **KEEP RECORDS**. In our experience, the reason a global claim is often presented is due to the lack of records. The Society of Construction Law, in its Delay and Disruption Protocol 2nd Edition, sets out a comprehensive list of records¹ and these are summarised in the following six record types:

Record Type 1 –

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4. Programme Records (evidence the original plan for the works and status through the project):
 - Tender Programmes.
 - Accepted Programmes.
 - Updated Programmes.
 - Proposed Revised Programmes.
 - Supplemental Detail Programmes for Specific Works.
 - Explanatory Notes for Programmes.

Record Type 2 –

5. Progress Records (evidence progress of the works at a particular time):
 - Raw data records: health and safety, handover of area records, geological mapping records, site test records, progress photographs, web-cams.
 - Compiled records: weekly progress reports, monthly progress reports.
 - Procurement records: quotations from sub-contractors, supplier contracts, delivery records.

Record Type 3 –

6. Resource Records (evidence utilisation of labour, plant and materials):
 - Labour allocation sheets.
 - Equipment allocation sheets.
 - Major material deliveries.

Record Type 4 –

7. Cost Records (demonstrate the costs incurred and assist substantiating amounts claimed):
 - Allocate costs into management, labour, plant, materials, sub-contractors, non-staff overheads.
 - Cost records including internal cost reports, cost and value reconciliation, time sheets, monthly payment applications from sub-contractors, claims by sub-contractors, supplier records.

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- Contractor's financial statements documenting annual head office general and administrative costs and revenue, business plans for generating profit, tendering history and opportunities, audited accounts.

Record Type 5 –

8. Correspondence and Administrative Records (evidences management and administration of the contract):
 - Letters and Emails.
 - Contract Management: All notices and documents under the Contract such as instructions, early warnings, etc.
 - Technical: Drawings, method statements, requests for information, design team meeting minutes, as-built drawings, operation and maintenance manuals etc.
 - Milestones: Taking-over certificates, requests for certificates, CA certificates.
 - Claims: Extension of time requests and responses, etc.

Record Type 6 –

9. Contract and Tender Documents (assist in establishing entitlement):
 - Contract Documents: Contract agreement, pre-contract correspondence, conditions of contract, specifications/employer's requirements, drawings, breakdown of contract sum, tender enquiry and documents submitted.
10. A common-sense approach in relation to the size and complexity of the project should be taken with regard to the amount and type of records kept.
11. Records that may seem trivial can lead to unexpected grounds to advocate a claim. A lack of records may be exaggerated by Lawyers and Claims Consultants to cast doubt on any claims made.
12. If these records are kept, it makes it easier for the Claimant to identify cause and effect and link these to actual costs.

Breaking down your global claim

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13. In *Walter Lilly v Mackay (2012)*² the Judge stated:

“I do not accept that, as a matter of principle, it has to be shown by a claimant contractor that it is impossible to plead and prove cause and effect in the normal way or that such impossibility is not the fault of the party seeking to advance the global claim.”
(*Walter Lilly v Mackay (2012)*, para 486a)

14. This may lead you to believe that it is acceptable to issue global claims. However, there are a number of reasons why you should (if possible) avoid issuing global claims.

- The Judge placed a caveat on this paragraph by saying that the contractual clause relied upon must be checked.
- Paragraph 486(f) of the Judgment stated that a Tribunal was likely to be

*“more sceptical about a global cost claim if the direct linkage approach is readily available but is not deployed”*³.

- Different heads of claims have different legal and/or contractual bases.

15. Therefore, it would be advisable for a Contractor/Sub-Contractor to attempt to separate out the following:

- Variations.
- Prolongation Costs.
- Disruption Costs.

16. Differences in unit costs for variation activities are normally capable of being identified. It is advisable to separate out variations from the remainder of the claim (especially with regard to labour costs) and value them under the relevant Contract Provisions. Where rates do not account for all the additional works of the variation and the circumstances in which it is carried out, a Contractor/Sub-Contractor could value the variations and consider incorporating the remainder of the increase in the valuation of the variation. For example, Clause 5.6.1.2 of the SBC/Q 2016⁴ provides:

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“...where the additional or substituted work is of similar character to work set out in Contract Bills but is not executed under similar conditions thereto and/or significantly changes its quantity, the rates and prices for the work so set out shall be the basis for determining the valuation and the Valuation shall include a fair allowance for such difference in conditions and/or quantity.”

17. What is a fair allowance is not prescribed. Contractors and Sub-Contractors should avoid percentage adjustments, as these can be hard to justify and could be seen as a global claim through the “back door”.
18. Prolongation costs primarily relate to time-related costs and Contractors/Sub-Contractors should analyse these costs and carry out some kind of delay analysis to prove that delay events are Employer’s Risk. How recoverable prolongation costs are is dependent upon the terms of the Contract and the cause of the prolongation. Obviously, any prolongation, which is as a result of Contractor’s Risk Events, must be borne by the Contractor/Sub-Contractor and they should look to proportion costs. Contractors/Sub-Contractors should remember that recoverability of “actual” costs should be assessed by reference to the period of the delay and not the period at the end of the project. Details of typical prolongation costs are included in “Record Type 4” above.
19. Disruption claims relate to loss of productivity in carrying out work activities, which cannot be carried out as efficiently as originally planned due to events including crowding of labour, stacking of trades, fragmented work gangs, excessive overtime, poor morale of labour, etc. The loss and expense resulting from the loss of productivity may be recovered where it is caused by Employer’s Events. Most Standard Forms of Contract do not expressly address recovery for disruption. Therefore, the Contractor/Sub-Contractor needs to explain in its claim document, the extent and legal basis of its entitlement. Disruption is demonstrated by applying analytical methods and techniques to establish the loss of productivity. The starting point for a disruption analysis is to review achieved levels of productivity over a period of time, in order to determine when the loss in production occurred and what work activities were impacted. A “measured mile”⁵ approach is often used by firstly establishing when the presumed level of production was achieved, compared with a disrupted period/location. Actual costs for the disruption should then be linked to the relevant time periods and activities.

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20. Not all disruption claims can be untangled and a “*global claim*” is required. The Society of Construction Law, in its Delay and Disruption Protocol 2nd Edition, summarises this point well:

“When it comes to explaining the cause of disruption, it is often the case that the contractor will rely upon multiple and intermingled disruption events to explain its loss of productivity and to support its claimed entitlement to loss and expense relating to impacted work activities. Depending upon the circumstances, it may not be possible or practicable to identify the loss of productivity, and hence loss and expense, relating to individual disruption events. Hence, once the Contractor has excluded the costs and/or loss relating to specific Employer Risks Events for which the causal link can be established, the remaining disruption claim may present the rare situation in which it is acceptable to claim compensation as a composite whole (i.e. a global claim) ...” (SCL Delay Protocol 2nd Ed, page 44)

Summary

21. In summary, global claims can be made but Contractors and Sub-Contractors should look to identify delays and causal links with the relevant actual loss and expense costs, wherever possible.
22. As is often stated, to have the best chance of success when making a claim, you should maintain throughout the project accurate and relevant RECORDS, RECORDS, RECORDS. This will enable the party claiming additional time and/or money to De-Globalise its Global Claim.

Note: This article is based on the author’s own research.

Bibliography

23. Society Construction Law, 2017. The Society of Construction Law Delay and Disruption Protocol. 2nd Edition. Hinckley: Society of Construction Law.

Cases

24. Walter Lilly & Company Ltd v Mackay [2012] EWHC 1773

Footnotes

1. Appendix B SCL Delay and Disruption Protocol 2nd Edition: February 2017
2. Walter Lilly & Company Ltd v Mackay [2012] EWHC 1773
3. Walter Lilly & Company Ltd v Mackay [2012] EWHC 1773
4. JCT Standard Building Contract with Quantities 2016
5. Other methods of analysis are available. See section 18 of SCL Delay and Disruption Protocol 2nd Ed.

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