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What constitutes a valid notice of claim?

Construction contracts often become mired in disputes over the technicalities of claim notification such as the content, but a recent court decision has injected a dose of commercial realism into the process, according to STUART JORDAN*.

CONSTRUCTION contracts often include provisions for administering claims for extensions of time and/or additional costs due to specified events and circumstances. A common question is: Once a contractual claim has been notified, how often (in your experience) do the parties go straight into discussion and assessment of the substantive claim?

In my experience, it is not often!

Almost always, time and money claims begin with an argument about the timing and the content of the initial notice … in other words, a wrangle about whether the claim is invalid because it was given late and/or does not contain the required data.

We have looked at the timing aspect before, including the enforceability of time bars. Today, we'll look at the required content of a notice. This is prompted by a recent court decision. It is not about a construction contract, but it covers the same issues as we have. The decision brought some welcome commercial common sense to this question. The background to the case was as follows:

A share purchase agreement (SPA) was entered into between Drax Smart Generation Holdco Ltd (Drax) and Scottish Power Retail Holdings Ltd (SPRH). The SPA related to shares in a company which owned a piece of land on which a power station was likely to be built. The viability of that project depended (among other things) on that company gaining rights to run cables across other land, in order to connect to the power grid. SPRH held a time-limited option to require the grant of those rights and they warranted to Drax, in the SPA, that this option would be assigned to the company before completion of the share purchase by Drax. SPRH also agreed to indemnify Drax against all losses should SPRH fail to make the assignment. As you may have guessed, SPRH failed validly to transfer the option, resulting in the company not being able to exercise it during the option period.

Now, taking us back onto familiar construction contract ground, the SPA also included a clause prescribing the required content of a notice of claim. Clause 2.1 required a notice *"stating in reasonable detail the nature of the claim and the amount claimed (detailing the Buyer's calculation of the Loss thereby alleged to have been suffered)"*.

Drax's notice of claim stated the breach of warranty and claimed under the indemnity but it was materially different from the claims set out in its later court action against SPRH. In particular, Drax's contractual notice of claim was based on expected losses by the company (including the cost of acquiring the other land, or the rights over it) whereas the subsequent court action was to recover losses by Drax itself, in the form of the reduced value of its shares in the company.

The English High Court dismissed Drax's action on a summary basis, agreeing with SPRH that Drax's notice of claim had not complied with the requirements of SPA cl.2.1. In particular, the fact that Drax's court action was based on reduction in value in its shares in the company, meant that its original notice of claim was deficient both in stating the nature of the claim and in calculating the loss.

The Court of Appeal disagreed. On the above two points, the court said that it was not necessary for Drax to specify in the notice of claim that its loss arose in the form of a reduced value of its shares in the company. It was enough to point out that SPRH's warranty breach had caused a loss, which is a straightforward point to make. And on quantification of that loss, the court said that the SPA required no more than a good faith calculation of the loss.

In both of these conclusions, the court took a practical approach; focusing on the commercial purpose of the SPA requirements for a notice of claim. In requiring *reasonable detail of the nature of the claim and the amount claimed*, the question is: what details does SPRH actually need in order to understand this notice, assess its potential liability and respond to it? Applying that approach, there is no commercial purpose in SPRH needing to know, at the time of receiving the notice, that the claim was based on reduced share value.

Jordan ... the court took a practical approach.

The court took the opportunity to draw out some general points about notice-of-claim clauses, including that they should not become contractual minefields to be navigated for reasons unconnected to their commercial purpose. The court also reminded us that such provisions are effectively exclusion clauses, as they limit or condition a party's potential liabilities. So, when there is room for interpretation of those limits or conditions, it should be done narrowly.

We should be careful not to see this decision as the court ignoring contract requirements because they are too formal. The judgment made clear that parties are free to agree contracts that impose any requirements they want. Clear obligations will be enforced but general concepts such as "*nature of the claim*" and "*reasonable detail*" will be interpreted in the light of their commercial purpose. ■

** Stuart Jordan is a partner in the Global Projects group of Baker Botts, a leading international law firm. Jordan's practice focuses on the oil, gas, power, transport, petrochemical, nuclear and construction industries. He has extensive experience in the Middle East, Russia and the UK.*

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