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A Fine Line: Admissibility of Global Claims

Andreas Roquette (CMS Hasche Sigle) and Henry Stieglmeier (GE Power Conversion) · Monday, November 6th, 2023

Large cases with detailed, extensive submissions and hundreds, if not thousands, of annexes, often lead to a degree of complexity that is hardly digestible. The handling of such cases, most prominently of delay and disruption claims, therefore poses a challenge to practitioners, experts and arbitrators. Common law jurisdictions have developed a specific way to deal with such complexity, and recognize – under strict requirements – the admissibility of global claims.

This post compares the theory of a global claim under English law with the discretion of courts under German law to determine the amount of a claim by way of estimation (Sec. 287 Code of Civil Procedure, *ZPO*) and draw inferences for the application in international arbitration.

Global Claims Under English law

The Society of Construction Law Delay and Disruption Protocol defines: "A global claim is one in which the Contractor seeks compensation for a group of Employer Risk Events but does not or cannot demonstrate a direct link between the loss incurred and the individual Employer Risk Events." (see The Society of Construction Law Delay and Disruption Protocol, 2nd Ed. 2017, p. 64) Its admissibility was first established in Doyle v. Lang and Walter Lilly & Company Ltd v. Mackay.

Such easing of the burden of proof of causality requires, however, that the contractor demonstrates that the loss would not have been incurred "in any event" and that it was not mainly responsible for the delays. Although the theory of a global claim is not immune to criticism, its admissibility is nowadays widely accepted in English law and other common law jurisdictions.

The German Perspective

While the concept of alleviating the burden of proof by means of the global claim might seem alien to the German System, a closer comparison with an estimation according to Sec. 287 ZPO offers a different perspective. An estimation of the quantum of a claim is admissible if a definitive determination is not possible or associated with disproportionate difficulties. By comparing Sec. 287 ZPO and the global claim, differences and similarities arise as to (1) the dispensability of proof

of causality (2) the minimum requirements and (3) the impossibility of proof of causality.

(1) An estimation under Sec. 287 ZPO is only admissible regarding the causation between the delay and the resulting costs (*haftungsausfüllende Kausalität*). An estimation is, however, not admissible to determine the causation between an event attributable to the employer and the resulting delay (*haftungsbegründende Kausalität*). This differentiation does not exist under English law. However, the exclusion of the global claim if the loss would not have been incurred in any event, is a comparable limit.

(2) The German Federal Court of Justice (*Bundesgerichtshof, BGH*) requires that the estimation is based on tangible indications and not made "out of the blue" (see BGH Urt. v. 23.10.1991 – XII ZR 144/90, NJW-RR 1992, 202 f). In case law, the Federal Court defines that the contractor's submission must be as substantiated and concise as possible. Conversely, global claims are to some extent more flexible regarding what can be estimated.

(3) Lastly both the estimation under Sec. 287 ZPO and the global claim are applicable when a precise proof of causality is impossible or extensively difficult.

In summary, while some methodical differences exist, the estimation under Sec. 287 ZPO and the approach to global claims have more similarities than is apparent at first glance.

Global Claims in International Arbitration

Sec. 287 ZPO is part of the national procedural law, and, therefore, not applicable in arbitration proceedings. If the arbitral tribunal has its seat in Germany, only the provisions of the ZPO on arbitration, i.e. Secs. 1025 – 1066, apply. The non-applicability of the domestic rules of civil procedure also applies in other jurisdictions, though it must be noted that some jurisdictions (e.g. Switzerland) include easing of the burden of proof in their substantive law.

The relevant provision of the German arbitration law, Sec. 1042(3) ZPO, provides that the proceedings are subject to the parties' agreement. Absent such agreement, Sec. 1042(4) ZPO provides that the tribunal may determine the arbitral proceedings in its discretion and freely assess the evidence. This principle also applies in other jurisdictions (such as Switzerland with its arbitration law). It is recognized in German legal literature and case law that an estimation of the amount of a claim can be made within the tribunal's free assessment of evidence (see *Risse*/*Höfling*, SchiedsVZ 2020, 73 (76)).

Since estimation and global claims share similar requirements, global claims can equally be considered within the tribunal's free assessment of evidence. However, in doing so, the arbitral tribunal must consider the prohibition of equity decisions under Sec. 1051(3) ZPO (or other comparable national arbitration laws). Considering the requirements set out for the global claim, this prohibition should not apply: the global claim requires that the loss would not have been incurred "in any event", that the causality between the breach of contract and delay event is proven and that the arbitral tribunal bases its estimation on reasonable grounds.

In summary, arbitral tribunals may be able to the theory of a resort to global claim in international arbitration within the above limits.

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