

Addressing high volumes of low value claims in construction arbitration

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TOOLS USED BY ENGLISH COURTS TO ADDRESS MULTIPLE LOW VALUE CLAIMS

- Active case management
- Scott Schedules
- Sampling and extrapolation
- An alternative approach



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NON-STATISTICAL SAMPLING

- Most commonly used approach
 - Due to time/resource/money constraints
 - Claimant looks at only some of the events which → loss
 - “Sample” has no statistical basis
 - Claimant evidences claim events, and expert opines as to the resulting loss
 - Technical expert opines that the sample was representative
 - Quantum or technical expert extrapolate findings in “samples” to overall project
 - Claimant relies on results from sample to demonstrate overall loss claimed





STATISTICAL SAMPLING

- Expert evidence provided by a statistician
 - Expert defines the population and sample
 - Expert sets the procedure for assessment of samples by others
 - Expert monitors assessment for consistency
 - Expert extrapolates the findings of others to the overall population
- % confidence in outcome depends on
 - Homogeneity of population
 - Consistency in application of assessment procedure
- Advantages
 - Can achieve very high % confidence from very small sample sizes
 - Difficult to challenge (the right expert) in cross examination
 - Can produce large figures through extrapolation





SAMPLING IN THE ENGLISH COURTS

- *Amey LG Ltd v Cumbria CC [2016] EWHC 2856 (TCC)*

“I accept that it is open to Cumbria as a matter of law to seek to persuade me to accept its extrapolation case on the basis that its sample is sufficiently representative to be relied upon. I accept that there is no principle of law nor of statistical theory that a claim or a proposition can only be established by statistically random sampling. I accept that it is perfectly open to a claimant to seek to establish a claim by reference to representative sampling, although further and different considerations will apply to such a claim, with which I shall have to engage in due course.”

- *ICI v. Merit Merrell Technology [2017] EWHC 1763 (TCC)*
- *Standard Life Assurance Ltd v Building Design Partnership Ltd [2021] EWCA Civ 1793*

High volumes of low value claims

Courts in the Middle East



Regular courts

- No specialist courts for construction claims
- Each claim assessed individually
- No specific case management tools
- Limited disclosure
- Tribunal-appointed expert
- Settlement considerations



Dubai International Financial Centre

- English law / English Commercial Court model
- Technology and Construction Division (TCD)
- Specific case management tools

The DIFC Courts

Technology and Construction Division

56.19

In addition to the topics the Court is likely to consider at a Case Management Conference set out in Rule 26.35, in TCD Claims further topics the Court will consider are likely to include:

(1) whether any issues can be conveniently dealt with by a Court-appointed expert and whether ancillary orders may be necessary for the carrying out of inspections, the obtaining of samples, the conducting of experiments, or the performance of calculations;

(2) whether it would be appropriate and proportionate to make any interim orders for the preservation of evidence under Rule 25.1; and

(3) whether it would be appropriate and proportionate for elements of the claim (or any counterclaims or other additional claims under Part 21) to be set out by way of a Scott Schedule. A Scott Schedule is a table in which elements of the Claimant's case are set out item by item and the Defendant's response is set out in the adjacent columns. When the Court orders the production of a Scott Schedule:

(a) a Judge may give directions for the relevant column headings; and

(b) each party's entries on the Scott Schedule must be supported by a statement of truth in accordance with Part 22.



TCD Rules Part 56.19

- Case management conference
- Sampling
- Scott Schedules

In-house Counsel Issues and Considerations

- Serve the In-House Client:
 - Business driven analysis
 - Maximize value and minimize cost and complexities
 - Consider the particulars of the project and the staff involved
 - Consider the overall situation of the company
 - Pay attention to management and shareholder

Does it Make Sense to Pursue Low Value Claims in Court?

- Low Value Disputes Present a Challenge in the Construction Industry
 - Technically complex
 - Large amount of documents, number of witnesses and experts
 - Consuming internal resources of various departments
- How do Courts Work?
 - Slower than arbitration
 - Cheaper than arbitration
 - No secrecy
- Which Country and Law System?
- What is the Main goal?
 - Getting paid the claims and minimising damages
 - Create pressure on the other party for strategy and tactics in project execution
 - As defendant: cash flow

Digression: Pursuing Claims in German Courts (under German Law)

Factors of Influence:

- No discovery procedure
- Burden of proof – formal determination of evidence
- Duty of the court to clarify the decisive facts of the case (§ 139 ZPO)
- Duty of the court to take a settlement of the parties into consideration (§ 278 ZPO)

Consequence:

- Labour-intensive work for the parties to demonstrate and evidence their claims (each claim!)
- Paper flood and technical issues to be explained and evidenced lead to increasing settlement efforts.
- Threatening the parties: a long-lasting and expensive proceeding with increasing interest amounts

How to Handle a High Volume of Low-Value Claims Internally, Before Even Turning to External Dispute Resolution Counsel?

Analysis of the Basic Underlying Facts

- Analysis of the project and its status
- Claims plausibility analysis
- Clustering and sorting out the claims:
 - Dumping unreasonable claims
 - Clustering claims having the same factual and/or contractual basis
 - +/- list kept by the project management? Is a “wash” achievable?
 - Threshold for minimum claim amount?
- Analysis of the contractual regulations: escalation procedure to be run through before law suit can be started?

Analysis of the Pre-Litigation Measures I

Management or Stakeholder Based Solutions

- Mandated upper management meetings
- Dispute escalation ladder
- Project dispute resolution committee
- Dispute resolution contingency fund

Analysis of the Pre-Litigation Measures II

Third Party Based Solutions

- Engineer's decision
- Standing dispute resolution board
- Mediation

Analysis of the Pre-Litigation Measures III

- Are Decisions Binding?
 - Under a certain predefined amount?
 - Until dispute contingency fund exhausted?
 - Temporary for cash flow but subject to later challenge?
- Timing – before or after retention of outside counsel?

Influencing Factors In-House

- Availability of Internal Resources:
Technical, commercial and legal, claim manager, quantity surveyor, scheduler
- Law System (Discovery?)
- Facts and Burden of Proof
- Time and Cost Calculation (incl. Interest)
- Aim / Strategy

DECISION

Choice of the External Counsel:

Who fits best to achieve the aim - resultant from the analysis

Arbitration

Possible approaches for a more efficient process

