

Direct claims in Danish construction law

Professor Vibe Ulfbeck

KØBENHAVNS UNIVERSITET



General theory on direct claims

- The problem of privity of contract
- Direct claims can be based on subrogation (C steps into the shoes of B in a claim against A). Sometimes 'double limitation'

OR

- Tort based claim: C' claim against A is not limited by any of the contracts. Limited to instances of gross negligence or intent (?).

Central case law on direct claims in construction law

T:BB 2014.531 VBA (The Bubbledeck case, arbitration):

- Limitations of liability in both contracts
- Owner had direct against the sub advisor, setting aside limitations
- Professional errors of 'such character' that this was justified.
- *No gross negligence*

U 2014.2042 H:

- Arbitration clauses in both contracts
- Direct claim with respect of these clauses

- Confusing decisions?

The AB18 system, § 8

Section 4:

Direct claim if B is insolvent and 'the same' non-conformity between A and B as between B and C.

Section 5:

- 1) A direct claim is subject to limitations in both contracts
- 2) A direct claim is also subject to rules on dispute resolution in section J
- 3) The owner waives the right to base a direct claim on tort law
- 4) 1) and 3) do not apply in case of gross negligence or intent

Section 6:

- The above rules also apply if a sub contractor employs a subcontractor to carry out the work

The problem with third party effects

- AB is only a contract – only applies between the parties to the contract
- Technique: § 8, section 3, 3rd point:
- On request, the owner must send documentation that:
 - The subcontractor acknowledges that the owner is entitled to make direct claims according to section 4 and 5
 - That the subcontractor acknowledges that § 8 applies, also if he employs a sub.
- The model essentially relies on third party beneficiary theory
 - A contract can grant *rights* to third parties but not impose *obligations* on them

Idea

- A (the sub) - in the contract with B (the constructor) – gives C (the owner) the right to make direct claims against A with respect of contractual limitations in both contracts
- C - in the contract with B - gives A the right to reject tort law based claims from C

Three different scenarios

- AB18 is adopted in all three contracts
 - The system might work (?)
- AB18 is only adopted between the Owner (C) and the constructor (B)
 - C must refrain from making direct tort claims but has not been ensured a right to make a contractually based claim against A
- AB18 is only adopted between the constructor (B) and the sub (A)
 - C has a right to make a contractually based direct claim against A but retains a right to make a tort claim if that is more beneficial
- ... let's hope AB18 will be adopted throughout...

How will it work? Three concerns (at least)

I. The double limitation

- What is a 'limitation'?
 - Financial limitations (no liability for indirect loss, 53, subcl. 2), complaint deadlines and formal requirements (ex.§ 49, subcl. (unless gross negligence)), right to avoid economic sanctions by rectifying (§ 50, § 52)?
- Exception: gross negligence/intent
 - Does it make sense with regard to all limitations?
 - The concept of 'gross negligence'
 - What does it mean? - revisiting the Bubble deck case

I

Tort based claims:

- Can the owner waive the right to rely on tort, not knowing who the sub is?
 -
 - Third party beneficiary law on this??

III. How to get onboard the subs of the subs... ??



Some conclusions

