CMS
law·tax·future

Annual Review of English Construction Law Developments

An international perspective

September 2025

Contents

3 Introduction

5 Exclusion of liability for fraudulent breaches of contract

8 Interpreting caps on liability in construction contracts

12 When the tail wags: scope and design responsibility issues arising from contractual appendices

18 Challenging calls under on-demand securities: varying approaches to the fraud exception

22 Claims notification provisions in construction contracts

26 Waiver and estoppel defences to claims notification provisions

32 Protecting against estoppel and waiver defences: the effectiveness of "no-waiver" clauses

38 Termination for remediable and irremediable breaches

42 Arbitration update: the new SIAC rules

46 International English Law Construction Contacts

47 CMS Map

I simply consider this to be 'mandatory literature' for anyone interested in construction law.

General Counsel, Global Energy Company

CMS Law-Now™

Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.
www.cms-lawnow.com

Introduction

Welcome to the 2025 edition of our internationally focused *Annual Review of English Construction Law Developments*, covering developments from across the globe relevant to international projects governed by English law.

Last year's edition had a strong focus on exclusion and limitation clauses. This theme is continued in the present edition, with articles on excluding liability for fraud, the interpretation of caps on liability and claims notification provisions. We have also included an in-depth look at when English law will consider claims notification clauses to have been waived by an employer, as well as the effectiveness of "no-waiver" clauses in preventing such arguments.

It has been a number of years since we have covered developments in relation to the enforcement of on-demand bonds and guarantees. This year's edition reviews two interesting cases from Qatar and Singapore dealing with the fraud exception under English law principles.

Another issue which we have reported on in past editions of this *Annual Review* is the extent to which appendices to a construction contract, such as specifications and tender documentation, can affect the design obligations accepted by a contractor. In this year's edition, we report on two recent cases where attempts use the appendices in this way were repelled and contrast these with previous cases in which similar attempts have been successful.

Rounding out this year's edition is an article considering the difference between "remediable" and "irremediable" breaches of contract and an overview of the new SIAC rules of arbitration which are now in force.

As always, we hope you find this publication useful and we welcome any comments or feedback you may have. Should you wish to receive more frequent updates throughout the coming year, or for briefer summaries of developments earlier this year, please sign up for our Law-Now service at www.law-now.com and select "Construction" as your chosen area of law.

David Parton
Partner, Head of Construction
T +44 20 7524 6873
E david.parton@cms-cmno.com

Steven Williams
Partner, Co-Head of Infrastructure Construction and Energy (ICE) Disputes
T +44 20 7524 6713
E steven.williams@cms-cmno.com

Adrian Bell
Partner, Co-Head of Infrastructure Construction and Energy (ICE) Disputes
T +44 20 7367 3558
E adrian.bell@cms-cmno.com

Exclusion of liability for fraudulent breaches of contract

Limitations and exclusions of liability are commonly included in international construction contracts. Without express qualifications, questions can arise over whether such clauses cover liability for fraud, wilful misconduct or intentional and/or repudiatory breaches of contract. Recent English caselaw has tended to give such clauses a broad and natural meaning, allowing them to cover deliberate breaches even where repudiatory. An English decision in 2024 has continued this trend, finding that fraudulent breaches of contract were also covered by such a clause.

Excluding liability for fraud or wilful misconduct

Generally speaking, the seriousness of a breach of contract does not prevent a clause which would otherwise exclude or limit liability for that breach from taking effect. In the well-known *Suisse Atlantique* and *Photo Production* cases, the House of Lords rejected the so-called "doctrine of fundamental breach" which would disable a party from relying on an exclusion clause where a contract had been brought to an end as a result of a fundamental breach of contract, such as by repudiation. Whether an exclusion clause was to be applied to any given breach of contract was held to be purely a matter of contractual interpretation. Although as Lord Wilberforce noted in *Suisse Atlantique*, the usual rules of contractual interpretation meant *"the more radical the breach the clearer must the language be if it is to be covered"*.

In the *Photo Production* case, an employee of a security firm was found to have deliberately lit a fire which caused the destruction of a factory that the firm had been engaged to patrol. The contract contained a clause which stated that *"under no circumstances shall [the firm] be responsible for any injurious act or default by any employee of the [firm] unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the [firm]."* This clause was sufficient to exclude liability for the wilful misconduct of the firm's employees.

In *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*, the House of Lords considered the more extreme case of alleged fraud by an insurance broker. The clause in that case stated that the insured would have *"no liability of any nature"* for any information provided by third parties, including the broker. As a matter of interpretation, the majority of the House found that this generally worded clause was insufficient to exclude the broker's fraud and that such an exclusion would need to be expressed *"in clear and unmistakeable terms on the face of the contract"* (per Lord Bingham of Cornhill).

The House of Lords reserved the question as to whether, as a matter of public policy, a suitably worded clause could exclude liability for the fraud of an agent in procuring a contract. Lord Hoffman noted that there was *"no doubt that a party cannot contract that he shall not be liable for his own fraud"* but that *"whether he can contract that he should not be liable for his agent's fraud is less clear"*. Two of the Lords noted a potential distinction in this regard between the fraud of an agent inducing the making of the contract and fraud of an agent in the performance of a valid contract – for example, a clause in a contract of carriage excluding liability for theft of the goods in transit – with fraud in the performance of a contract being less objectionable on public policy grounds.

An English Technology and Construction Court decision last year has decided that a generally worded exclusion clause is capable of excluding liability for fraud by an agent and by a party itself in the performance of a contract (but not its inducement).

Innovate Pharmaceuticals Ltd v University of Portsmouth Higher Education Corporation

Innovate claimed damages from the University of Portsmouth ("**UoP**") arising out of a Research Agreement between the parties. Innovate developed a liquid form of aspirin called IP1867B (the "**Drug**") which it believed could be used as a brain tumour treatment. UoP were assisting with furthering the research and testing of the Drug.

The Research Agreement contained the following exclusion and limitation of liability clause:

"11.4 Except as provided in clause 11.5 the University is not liable to the Funders because of any representation (unless fraudulent), or any warranty (express or implied), condition or other term, or any duty at common law, non-observance or non-performance of this Agreement, for … any loss of profits, business, contracts, opportunity, goodwill, revenues, anticipated savings, expenses, costs or other similar loss … and/or any indirect, special or consequential damages or losses (whether for loss of profits or otherwise).

11.5 The liability of a Party to another howsoever arising (including negligence) in respect of or attributable to any breach, non-observance or non-performance of this Agreement or any error or omission (except in the case of death or personal injury or fraudulent misrepresentation) shall be limited to £1 million."

The lead researcher at UoP published an academic paper in a renowned medical journal, which was alleged by Innovate to have been "infected by errors". It was Innovate's case that these errors were deliberate (and dishonest) manipulations of raw data, such that the results were commercially useless to them, and re-testing would have to be carried out. The journal ultimately retracted the paper due to concerns about its content and Innovate brought a claim for damages in excess of £100m.

In circumstances where the Court found that a large portion of the damages claimed by Innovate were for loss of profits, it had to determine whether the exclusion clause was applicable. Innovate's primary argument was that the exclusion clause could not apply, because the breach had occurred due to acts of a dishonest or fraudulent nature.

Liability for fraudulent breaches excluded

The TCC rejected Innovate's arguments and found that both clause 11.4 and 11.5 applied to fraudulent breaches of contract. After reviewing a number of previous authorities, the Court formulated the following principles which it considered to be *"well established"*:

"(1) Exclusion clauses mean what they say;

(2) It is a matter of construction rather than law as to whether liability for deliberate acts will be excluded;

(3) Limitation clauses are not regarded by the courts with the same hostility as exclusion and indemnity clauses;

(4) A contracting party cannot exclude liability for its own fraud in inducing a contract;

(5) As to whether a clause excludes liability for fraud in performance of a valid contract is a matter of construction of the commercial provisions and risk allocation;

(6) An exclusion or limitation clause is more likely to be construed as effective if it is excluding the liability for fraud of an agent or employee rather than the fraud of the contracting party itself;

(7) The words "howsoever arising" are capable of effecting an exclusion of liability for wilful default."

The Court applied the plain literal meaning of clause 11.4 to find that the exclusion of liability in respect of loss of profits was applicable to all claims (death and personal injury claims aside), except where the claim was based upon a fraudulent representation (i.e. a claim in the tort of deceit). This meant that *"loss of profits caused by a breach of contract not involving a representation is excluded even if that breach was committed fraudulently."* As Innovate had not advanced a case for fraudulent misrepresentation, its large loss of profit claim was excluded.

The Court reached a similar conclusion in relation to clause 11.5 so that claims for breaches of contract (whether fraudulent or not), insofar as they were not excluded by clause 11.4, would be capped at £1m save only for cases of fraudulent misrepresentation or those involving death or personal injury.

Conclusions and implications

This is a very significant decision as to the drafting of exclusion and limitation clauses in commercial contracts for a number of reasons:

— The Court's finding that fraudulent breaches of contract by employees or agents were covered by the clauses in question finds precedent in other cases, but stronger wording was used in those cases. Clause 11.4 contained no words of expansion such as *"howsoever arising"* or *"under no circumstances"* which would be indicative of an intention to catch all breaches of contract regardless of the intention with which they were committed. The Court's finding may therefore suggest that generally worded exclusion or limitation clauses will usually cover fraudulent breaches of contract by employees or agents.

— The Court's finding that fraudulent breaches of contract by a contracting party itself may be excluded or limited would appear to be unprecedented. A number of previous cases have stopped short of a finding that personal fraud in the performance of a contract can be excluded and it is unclear how the Court's finding is to be reconciled with judicial comments such as those in the *HIH* case that *"a party cannot contract that he shall not be liable for his own fraud"*.

— The Court's finding in this regard is all the more prominent for the fact that the wording of clause 11.4, as noted above, is entirely general without any words of expansion. By contrast, one previous case (*Regus (UK) Ltd v Epcot Solutions Ltd*) involved a similar exclusion clause, but with stronger language, providing that a party would not *"in any circumstances have any liability"* for loss of profits, business and the like. The use of such language was still, in the Court of Appeal's judgment, insufficient. Such generally worded clauses would not *"naturally be construed as purporting to exclude liability for fraud or wilful damage"*.

This case would appear to continue a broad trend among first instance decisions giving effect to generally worded exclusion or limitation clauses even where the breaches of contract in question were alleged to be intentional, repudiatory or fraudulent. Last year's edition of this Annual Review had considered a similar case dealing with intentional and/or repudiatory breaches of contract (at page 15).

The widespread use of generally worded limitation and exclusion clauses makes the outcome reached in these cases of considerable importance to commercial parties contracting under English law. Clauses which seek to specifically exclude liability for fraudulent breaches of contract are unlikely to be acceptable to most counter-parties. Yet without knowledge of the above case law, parties may assume that generally worded clauses will not be capable of extending to such breaches. Such an assumption is likely to be encouraged by the position taken in other well-known jurisdictions where liability for fraud is unable to be excluded on public policy grounds (see, for example, the statement of New York law in *Kalisch-Jarcho Inc v New York*).

Parties may now be best-advised in many circumstances to insist on carve-outs from exclusion and limitation clauses for intentional, repudiatory or fraudulent breaches of contract. The FIDIC 2nd Edition contracts contain a broad carve-out for liability *"in any case of fraud, deliberate default or reckless misconduct"*. The ENAA form is similar, excepting cases of *"criminal negligence or wilful misconduct"*, but the LOGIC construction form contains no carve-outs from its limitation of liability provisions.

In other sectors, the drafting of such carve-outs can reach high levels of sophistication, with specificity as to the precise degree of wilfulness required as well as the governance level at which the conduct must be present. These may provide a helpful starting point for parties negotiating international construction contracts who wish to address the risks posed by the caselaw noted above.

References:

Suisse Atlantique Societe d'Armement Maritime SA v N V Rotterdamsche Kolen Centrale [1967] 1 AC 63 ; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; *Kalisch-Jarcho Inc v New York*, 448 N.E.2d 413, 416 (NY 1983) ; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361; *Innovate Pharmaceuticals Ltd v University of Portsmouth Higher Education Corporation* [2024] EWHC 35.

Interpreting caps on liability in construction contracts

Liability caps are commonly used to regulate the overall risk profile of an international construction project. Despite their ubiquity, the drafting used to give effect to such caps is often unsophisticated and has only rarely been considered by the English Courts in a construction context. A Court of Appeal decision on this topic last year is therefore welcome. Whilst the case clarifies a number of points, it also leaves a large area of uncertainty. Careful thought to the drafting of such clauses remains essential, therefore, as we explain further below.

Caps on liability under international construction contracts

International construction contracts typically include an overall cap on a contractor's liability to the employer. The level of such caps are usually carefully negotiated between the parties and will often be of critical importance to the contractor. Liabilities exceeding the agreed cap may have the potential to affect the viability of the contractor's business. Consistently with this, contractors will often seek to ensure that any exclusions from an agreed cap are limited as far as is possible to liabilities which can be effectively insured against, such as indemnities against property damage, personal injury or death, or in respect of intentional wrongdoing such as fraud or breaches of intellectual property.

Given the commercial importance of caps on liability, the manner in which they are drafted in standard form contracts is surprisingly simple and unrefined. For example, the FIDIC 2nd edition states that:

> *"The total liability of the Contractor to the Employer under or in connection with the Contract, other than [various exclusions] shall not exceed the sum stated in the Contract Data or (if a sum is not so stated) the Accepted Contract Amount."* (Clause 1.15 in the Red and Yellow Books and clause 1.14 in the Silver Book)

Likewise, the ENAA 2023 edition, at clause 30.1(b):

> *"Except in cases of criminal negligence or wilful misconduct … the aggregate liability of the Contractor to the Employer, whether under the Contract, in tort or otherwise, shall not exceed the amount [specified in or by reference to the Contract Data, or] if such … sum is not so stated, the total Contract Price, provided that [various exclusions follow]."*

And also the LOGIC construction form, 3rd edition, at clause 36.1:

> *"… the CONTRACTOR's total cumulative liability to the COMPANY arising out of or related to the performance of the CONTRACT shall be limited to the sum specified in Appendix 1 to Section I – Form of Agreement or, in the absence of such sum the CONTRACT PRICE. [Various exclusions follow.]"*

A key ambiguity which arises from clauses drafted in this manner is the extent to which securities held by the employer and applied in satisfaction of a contractor's liabilities are to be taken as eroding the total cap on liability. Such securities can include set-offs, retention money, on-demand bonds and parent company guarantees. An English Court of Appeal decision decided last year provides some clarity on this question, while leaving a number of issues unresolved.

Topalsson GmbH v Rolls-Royce Motor Cars Ltd

Topalsson and Rolls-Royce entered into a software development contract with the following cap on liability:

> *"Subject to [exclusions], the total liability of either Party to the other under this Agreement shall be limited in aggregate for all claims no matter how arising to the amount of €5m (five million euros)."*

Rolls-Royce terminated the contract for delays by Topalsson and, subject to the cap, was found to be entitled to termination damages of €7,962,323. At the point of termination, Topalsson was found to be owed €794,759 for work carried out. At first instance, the TCC netted these two figures off before applying the cap, meaning that €5 million was awarded to Rolls-Royce.

Topalsson appealed, claiming that Rolls-Royce's entitlement to termination damages should have been capped at €5 million before Topalsson's debt was set-off – giving a reduced judgment of approximately €4.2 million.

The Court of Appeal agreed with Topalsson, noting that the words *"total liability"* suggested *"a totting up, not a netting off."* This was supported by the reference to liability *"of either Party"*, indicating that the liability of each party was to be subjected separately to the cap. The Court also considered that commercial common sense supported this interpretation, as otherwise the cap could be *"circumvented by the happenstance of set-off"*.

The Court also drew support from the only previous English case on this topic, *The Tojo Maru (No.1)*. In that case, salvors had caused damage to a ship during a salvage operation. The salvors were entitled to payment of £125,000 but had caused damage worth £331,767. However, the salvor's liability this damage was subject to a statutory cap of £10,725. The ship owners claimed that the damages claim could be set-off against the payment claim before applying the statutory cap (reducing the sum due to zero in that case). The Court of Appeal disagreed and found that the damages claim was to be capped prior to netting off and the salvors, therefore, were entitled to payment of £114,275. Lord Denning MR commented on the practical necessity for such a rule as follows:

> *"Suppose a laundry has a clause limiting their liability to 10s. for any article that was damaged or lost, and the customer agrees to it ... The laundry washes a lot of articles in one week at a charge of £2, but during the next week loses a shirt worth £3. It seems to me that the laundry ought to be paid £2 for the work done, and to be able to limit its liability for the shirt to 10s. Equity does not in that case require a set-off of the £3 against the £2, but only of the 10s. against the £2. Were it otherwise, the clause could be rendered useless by an adroit customer. The customer would only have to let his laundry bill fall into arrear, and he could get round the clause. I do not like these limitation clauses, but, if they are truly agreed between the parties-or provided by statute-we ought to give effect to them."*

The contract between Topalsson and Rolls-Royce also included a contractual interest clause which applied to the termination damages awarded to Rolls-Royce. The Court of Appeal considered that Topalsson's liability to pay interest did not fall within the cap. Among other things, the Court noted that *"clear words"* would be required for the contractual right to interest to be included within the cap. Such a result would also be contrary to commercial common sense as it would be a *"positive disincentive on Topalsson to pay the sums due when they fell due … It would provide Topalsson with an unjustified windfall… It would simply encourage non-payment of sums due and benefit the wrong-doer."*

What about on-demand performance securities?

A much earlier decision of the English Technology and Construction Court from 2013 (*Sabic UK Petrochemicals Ltd v Punj Lloyd Ltd*) provides an interesting contrast to the Court of Appeal's decision in *Topalsson*. It was also a termination for delay case with a liability cap as follows:

"Save [for certain exceptions] the aggregate liability of the Contractor under or in connection with the Contract (whether or not as result of the Contractor's negligence and whether in contract, tort, or otherwise at law) … shall not exceed 20% (twenty per cent) of the sum of the Contract Price …"

The contract permitted the employer, SABIC, to recover the difference between the *"total cost … reasonably incurred"* in completing the Works and the *"total that the … Works would have cost had they been completed*

by the Contractor (the Contract not having been terminated)".

Immediately upon termination, SABIC called on a performance bond for £13.5 million and an advance payment guarantee for £15 million. Taking these sums into account, and after completing the Works, it had incurred roughly £12 million more than it would have done had the Works been completed by the contractor. The 20% cap equated to approximately £31 million. The contractor claimed that the performance security recoveries of £28.5 million should also count towards the cap, meaning that the contractor's total liability for termination costs was approximately £40.5 million – and had therefore breached the cap by approximately £9.5 million.

The TCC rejected this argument, finding that neither of the performance security recoveries counted towards the cap. This was partly because SABIC's claim under the termination provisions was for the total balance or "extra-over" cost after the Works had been completed. The performance security recoveries avoided the incurring of cost, especially as they were received immediately and used to fund the completion of the Works. They did not, therefore, represent a separate liability to SABIC.

However, the court also found that the nature of the performance securities brought them outside of the cap. They were *"a form of proxy for primary performance by SCL"* and it was therefore wrong to *"assert that all of the expenditure on costs to complete the works was a 'loss' without taking account of the fact that provision had been made in advance to obviate that loss"*.

Conclusions and implications

The Court of Appeal's decision provides helpful clarity as to the operation of generally worded caps on liability, however it appears that *SABIC* was not cited to the Court. Reading the decisions together gives rise to a number of unresolved questions:

— The termination clause in *Topalsson* did not provide for a single balancing payment, but stated separate rights for Topalsson to be paid outstanding sums due and for Rolls-Royce to be paid the extra-over costs of completion. The decision in *SABIC* suggests that a different outcome might have applied if the clause provided for a single balancing payment which gave credit for outstanding amounts due to the contractor. However, such a minor change in drafting would then permit the cap to be circumvented in the manner which the Court of Appeal in *Topalsson* had sought to avoid.

— In a similar vein, many construction contracts have detailed interim and final payment provisions which provide for employer claims to be deducted in the calculation of amounts due to a contractor. The reasoning in *SABIC* may support arguments that such deductions do not represent actual liabilities of the contractor, as they are used only to calculate a single sum due in the same way that a balancing payment on termination gives rise to a single amount owed to an employer. The same circumvention concerns may then arise in relation to these provisions.

— The decision in *SABIC* means that a contractor's total exposure under a contract will change as performance securities lapse or are stepped down. For example, as an advance payment is gradually repaid or where lower value retention security is substituted for a performance bond upon completion or taking over. This would appear to be at tension with the Court of Appeal's comments as to the purpose of an overall cap on liability.

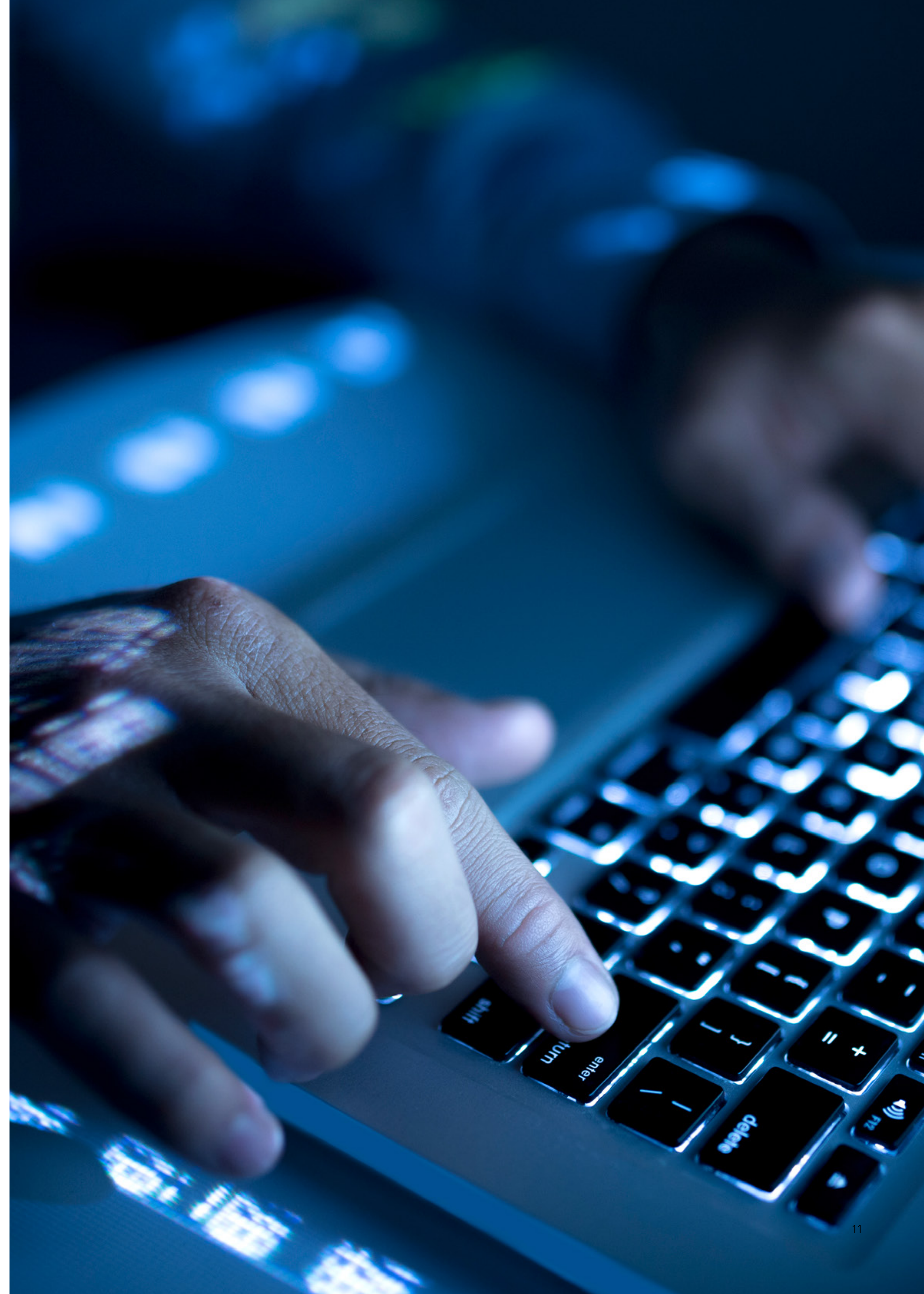
— It remains to be seen whether other forms of security, such as retention money or parent company guarantees, will be held to fall outside an overall cap on liability – as in *SABIC* – or within the cap – as in *Topalsson*.

It seems likely that such questions will require further attention from the Court of Appeal at some point in the future. In the meantime, parties should carefully consider the drafting of any caps on liability within their contracts so as to best protect their position in light of these decisions. Contractors may wish to include specific language making clear that all forms of security (including set-off) are to count toward the cap. Specific mention might also be made of interest claims and legal costs, although these are likely to be more contentious.

Employers, on the other hand, are likely to benefit from the standard form of any cap on liability, but would be well advised to ensure that any termination provisions provide for a single balancing payment and that the payment provisions allow for employer claims to be deducted as part of the valuation of amounts payable to the contractor.

References:

The Tojo Maru (No.1) [1969] 2 Lloyd's Rep 193; Sabic UK Petrochemicals Ltd v Punj Lloyd Ltd [2013] EWHC 2916 (TCC); Topalsson GmbH v Rolls-Royce Motor Cars Ltd [2024] EWCA Civ 1330.



When the tail wags: scope and design responsibility issues arising from contractual appendices

The past year has seen two decisions of the English Technology and Construction Court dealing with the impact of contractual appendices on a contractor's scope of work. Such appendices are often included within a contract without proper review or consideration. This may result in conflicts or inconsistencies between those appendices and the broader wording of the terms and conditions of the contract. In these two recent cases, arguments made by the contractor in reliance on such appendices were rejected, but we include in this article references to previous cases where such attempts have been successful.

Introduction

International construction contracts will usually include lengthy technical schedules setting out the work to be carried out under the contract. A FIDIC Yellow Book contract, for example, will usually include Employer's Requirements and Contractor's Proposals as separate appendices to the main contract terms. In the FIDIC Red Book, a Specification will be included as well as Contractor Proposals for any contractor design elements. In addition, pricing documentation is sometimes included to assist in the valuation of variations.

Appendices of these types are usually written in technical and commercial language and may not always be fully scrutinised by the parties' lawyers. However, as they are contractual documents, arguments may arise as to the extent of the scope of works or a contractor's design responsibility by reference to statements made in these appendices. For example, an Employer's Requirements document may indicate that the design has been progressed to a certain stage. Or a pricing document may indicate that certain items or contingencies have not been priced for. These statements may contradict general statements in the terms and conditions that the contractor is to take full design responsibility and/or to do everything necessary to complete the works. In some cases, an order of precedence or inconsistencies clause may not be sufficient to override the appendices.

In this article we consider two English Technology and Construction Court decisions from last year which consider these issues, contrasting them with an earlier decision where the tail (i.e. appendices) did manage to wag the dog.

Workman Properties Ltd v Adi Building and Refurbishment Ltd

Adi Building and Refurbishment Ltd ("**Adi**") agreed with Workman Properties Ltd ("**Workman**"), under the terms of a design and build contract, to carry out expansion works at Workman's dairy in Gloucestershire (the "**Contract**").

Differences arose between the parties regarding the scope of Adi's design responsibility under the Contract. The design responsibility provisions of the Contract included the following statements:

- Recital 3 stated that Adi had "*examined the Employer's Requirements*" and had agreed to "*accept full responsibility for any design contained in them*".
- Clause 2.17.1 provided that Adi was to be "*fully responsible in all respects of the design of the Works including all design work proposed by or on behalf of the Employer…forming part of the Employer's Requirements*".
- Paragraph 1.4 of the Employer's Requirements (the "**ERs**") stated that Adi would be fully responsible for "*the complete design, construction, completion, commissioning and defects rectification of the works*". The second half of paragraph 1.4 stated that "*significant design has been developed to date which has been taken to end of RIBA Stage 4…*". RIBA Stage 4 is the completion of the technical design stage i.e. the completion of "construction ready" designs, drawings and specifications.

A dispute concerning design liability was referred to adjudication and Adi submitted that the second half of paragraph 1.4 of the ERs amounted to a warranty from Workman that the design had been developed to the end of RIBA Stage 4 prior to the date of the Contract. Adi claimed that Workman was in breach of this warranty which would then entitle it to claim additional time, costs and/or loss and expense for the design works Adi carried out to develop the design up to RIBA Stage 4. The adjudicator upheld Adi's claim.

Workman brought proceedings in the English Technology and Construction Court to challenge the adjudicator's decision, claiming that Adi had taken full responsibility for the entirety of the design and consequently was not entitled to any time, costs and/or loss and expense as a result of any deficiencies with the design within the ERs.

The Court found in favour of Workman. The court observed that all of the relevant contract terms firmly pointed to Adi taking full responsibility for the entirety of the design, save for the second section of paragraph 1.4 of the ERs. In the Court's judgment the relevant question was:

> *"whether what is stated in [the] second [part] of paragraph 1.4 is so clear as to amount to a contractual warranty that the existing design had been completed in all respects up to stage 4 …, so that there was no need for the defendant to satisfy itself that this was indeed the case. In my judgment this involves treating the obligation to complete the existing design and to be fully responsible for the whole design as excluding all design work up to and including the end of [stage 4]. It also involves treating the further obligations to review and verify the existing design as being read instead as an obligation only to do so in relation to any design work actually completed where that was included within the design stages up to and including the end of [stage 4]. That would mean that the defendant had no obligation to satisfy itself that the design had in fact been completed to those stages or, thus, to satisfy itself that it could safely, as design and build contractor, proceed straight to construction stage without checking that the existing design was sufficient and adequate for that purpose."*

The Court concluded that the words used in the second section of paragraph 1.4 were *"nowhere near sufficient"* to require the unequivocal provisions noted above to be read as *"so heavily qualified"*. That was particularly the case where those provisions were bespoke amendments that imposed far greater design responsibility on Adi than the unamended provisions of the standard form used by the parties (the JCT Design and Build Contract in common use in the UK).

One difficulty with the Court's reasoning quoted above is that treating the second part of paragraph 1.4 as an enforceable warranty does not necessarily require the other design obligations to be qualified. There is no logical contradiction between a contractor taking full design responsibility, including for the Stage 4 design in this case, but yet having the benefit of a warranty from the employer that the design had reached a certain stage. The effect of this warranty would be to give the contractor a right to compensation and an extension of time if the existing design did not satisfy the warranty. However, if the contractor failed to check that the existing design had met Stage 4, it would remain in breach of its design responsibilities and would incur liability for any consequences that followed (e.g. if the work when completed was defective or not fit for purpose). The prospect of both a warranty and full design responsibility coexisting in this way does not appear to have been considered by the Court.

BNP Paribas Depository Services Ltd v Briggs & Forrester Engineering Services Ltd

This case also concerned an amended JCT Design and Build contract where part of the scope of work included the removal of asbestos within an existing structure. An asbestos survey obtained by the employer and a quotation from a specialist asbestos removal sub-contractor were included as contract documents. The Contractor's Proposals included an amount for asbestos removal which had been taken from the sub-contractor's quotation, as did a separate breakdown of the contract price included within the contract.

The contractor argued that its scope of work was limited to the asbestos shown in the survey and covered by the sub-contractor's quotation. Upon the discovery of additional asbestos, the contractor refused to proceed without a variation instruction, which the employer refused to give. This *impasse* ultimately led to the termination of the contract.

The employer relied on Clause 2.40 of the contract, which defined certain risks accepted by the contractor as follows:

> *"1. The Contractor has had an opportunity to inspect the physical conditions … and all other conditions of or affecting the site and shall be deemed to have fully acquainted himself with the same and to have obtained all necessary information as to risks, contingencies and all other circumstances which may influence or affect the execution of the Works.*
>
> *2. Any information prepared by or on behalf of the Employer (including any survey, report or document) relating in whole or in part to the physical conditions … and other conditions of or affecting the site is provided for information only. The Employer and the Employer's Persons make no representation or warranty as to accuracy or completeness of any such information or for any representation or statement contained therein whether made by the Employer or the Employer's Persons for misrepresentation or misstatement whether made negligently or otherwise in respect of such information.*
>
> *3. No failure on the part of the Contractor to discover or foresee any physical conditions and/or other conditions affecting the site and/or any risks, contingencies or other circumstances whatsoever referred to in Clause 2.40.1 (whether the same ought reasonably to have been discovered or foreseen or not) shall entitle the Contractor to an adjustment of the Contract Sum or an adjustment of the Date for Completion of the Works or any Section thereof."*

The employer also relied on the Employer's Requirements appended to the contract, as well as a Preliminaries schedule and a specification document, which referred to the removal of asbestos in broad terms as follows:

> *"Asbestos Removal Works. The scope of asbestos removal works includes, but is not limited to, the phased removal and disposal of all asbestos containing material identified in a safe and compliant way.*
>
> *…*
>
> *The works shall include but not be limited to: … Removal under controlled conditions of all works related to asbestos containing materials and all asbestos containing materials.*
>
> *…*
>
> *It is also believed the ductwork is contaminated with asbestos in areas. It is the contractor's responsibility to assess the ductwork and its routes to determine whether it can be re-used or amended. … Further Analysis should include but not be limited to: ... On-site inspection; Asbestos Surveys"*

The matter came before the English Technology and Construction Court which concluded that the contractor's scope of work was not limited to the asbestos which had been quoted for. The contractor was responsible for the removal of all asbestos necessary for the completion of the work without any addition to the Contract Sum. The Court placed particular reliance on the risk allocation effected by clause 2.40:

> *"the design and build contract makes it plain beyond serious argument that the design and build obligation and the risk in relation to the scope of the works necessary to provide the complete stair pressurisation installation, including the need to survey for ACM to the extent necessary and to undertake any [asbestos removal works] to the extent necessary, lies firmly on B&F. …*
>
> *In particular, there is clause 2.40 … which is, I have said, a bespoke clause introduced by the schedule of amendments. Mr Frampton advanced a number of submissions with a view to nullifying its impact, none of which in my judgment can succeed."*

The Court also relied on the fact that the passages quoted above from the Employer's Requirements specifically noted that the asbestos removal work was *"not limited to"* the descriptions of them in those passages.

The survey report and sub-contractor quotation relied upon by the contractor were insufficient to show that the parties had intended that these indications of full responsibility elsewhere in the contract were not to apply to the asbestos removal works. In the Court's judgment, the contractor:

> *"would need to be able to point to some clear indication from the terms of the contract or from the relevant admissible factual matrix that the inclusion of the [survey and sub-contractor quotation] within the contract documents demonstrated a clear and unqualified agreement between the parties, by way of derogation from the clear terms of the other contract documents as to [the contractor's] complete responsibility for the design and the construction of the whole pressurisation system, including all necessary [asbestos removal works], that there was a specific contractual carve-out for the [asbestos removal works], so that any works above and beyond those expressly contained within the [quotation] were exempted from the otherwise wide-ranging design and build obligation."*

Although the court in this case, and in *Workman Properties*, was able to repel the attempts at reducing the scope of a contractor's responsibilities by reference to contractual appendices, such arguments should not be underestimated. An earlier Technology and Construction Court case from 2018 provides an example of how such arguments can be successful.

Clancy Docwra Limited v E.ON Energy Solutions Limited

E.ON Energy Solutions Limited ("**E.ON**") engaged Clancy Docwra Limited ("**CDL**") as a sub-contractor to excavate trenches and install heat network pipework in London. E.ON were contracted to install an underground district heat network using the by-product heat of its locally based Combined Heat and Power Plant. During the work, CDL encountered adverse ground conditions (consisting of underground brick walls and brick rubble) and, later, a concrete heading which obstructed the proposed route for the pipework. E.ON instructed CDL to investigate the heading and to identify its contents and/or a route around it. A dispute subsequently arose as to whether CDL bore the risk of adverse ground conditions and whether it was entitled to be paid additional sums by E.ON for the work required to overcome such conditions.

The sub-contract between the parties was based on a standard JCT form in common use in the UK. E.ON relied on bespoke amendments to the sub-contract, similar to clause 2.40 in the *BNP Paribas* case, which sought to pass the risk of ground conditions to CDL as follows:

> *"2.1.7 The Sub-Contractor shall be deemed to have inspected and examined the site and its surroundings and to have satisfied himself before the date of the Sub-Contract as to the nature of the ground, the sub-surface and sub-soil; the form and nature of the site; the extent, nature and difficulty of the Sub-Contract Works; …. and in general to have obtained for himself all necessary information as to risks, contingencies and all other circumstances influencing of (sic) affecting the Sub-Contract Works.*
>
> *2.1.8 Notwithstanding any other provision of this Sub-Contract, the Sub-Contractor shall not be entitled to any extension of time or to any additional payment, damages, or direct loss and/or expense on the grounds of any misunderstanding or misinterpretation of any matter set out in clause 2.1.7, or his failure to discover or foresee any risk, contingency or other circumstance (including, without limitation, the existence of any adverse physical conditions or artificial obstructions) influencing or affecting the Sub-Contract Works."*

CDL relied on tender documentation which had been appended to the sub-contract as *"Numbered Documents"* and which showed that the tender had been based on a clear corridor for the pipework and did not allow for the breaking out of rock or dealing with obstructions. The "Sub-Contract Works" were defined in the sub-contract as *"the works referred to in the Sub-Contract Agreement and described in the Numbered Documents"*.

E.ON in turn relied on a priorities clause in the sub-contract which stated, *"if there is any inconsistency between the Sub-Contract Documents (other than the Numbered Documents) and the Numbered Documents […] those Sub-Contract Documents shall prevail"*. E. ON argued that the ground conditions clauses quoted above had priority over the tender documents relied on by CDL.

The Technology and Construction Court agreed that the scope of the *"Sub-Contract Works"* was to be judged by reference to the tender documents appended to the sub-contract. Accordingly, CDL's initial scope of works *"did not include the matters that were specifically excluded by them from their scope of works as set out in their tender submissions …"*.

The ground conditions clauses in the contract applied to CDL's agreed scope of works and did not have the effect of extending that scope. These clauses could not be interpreted as a warranty by CDL that it had satisfied itself that obstructions or other ground conditions risks would not arise or that it agreed to bear the risk of such conditions. That, *"would have the effect that clause 2.1.7 allocated to CDL the risk of carrying out work which CDL had expressly excluded from the Sub-Contract Works: it would have the effect of meaning that CDL had satisfied themselves in respect of the site for the purposes of carrying out works that were not part of the Sub-Contract Works. And that would not make sense."*

Conclusions and implications

These cases show the need for care to be taken where commercial or technical documents are appended to a construction contract. The *Workman Properties* case highlights the risk that statements made by employers in such appendices as to the stage to which the design has been progressed, or indeed any other matter relating to the works, may be relied upon by contractors as contractual warranties which either qualify the contractor's overall responsibilities under the contract or which, if not qualifying those responsibilities, provide the contractor with the ability to claim additional time or cost.

Employers would be well advised to remove such references or, if they cannot be removed, to qualify them subjectively (e.g. that the employer "understands" the design to have reached a certain stage) or with an express caveat that the employer gives no assurances as to the progress of the design. Order of precedence clauses will also be important to confirm that the contract conditions take priority over other contract documents. Contractors who wish to rely on such statements in the contractual appendices would be well advised to qualify any bespoke provisions which seek to impose full responsibility for completing the works.

The *BNP Paribas* and *Clancy Docwra* show the different results which can arise where commercial documents are appended to a construction contracts. On the one hand, such documents can be said to be in conflict with more general statements of the contractor's responsibilities in the terms and conditions, or at least to be an insufficient indication that a qualification to the contractor's general responsibilities was intended. On the other hand, definitions of such fundamental terms as the "Works" may allow these commercial documents to influence the scope of the work to be carried out and thereby avoid the effect of any deeming provisions or order of precedence clauses.

These decisions also bear resemblance to the *MJ Hojgaard* litigation determined by the UK Supreme Court in 2017. That case also involved the court giving effect to appendices to a contract in circumstances which were argued to be surprising and unexpected. A fitness for purpose obligation was found have been imposed by an appendix, despite the terms and conditions of the contract only referring to an obligation of reasonable skill and care.

The temptation in many projects, due to time or cost constraints, is for such appendices to be included without detailed review or consideration. The use of a priorities clause is unlikely to fully protect against the risks which arise in such circumstances, nor are clauses which deem the contractor to be responsible for unforeseen circumstances. As these cases show, it is of great importance that technical/commercial teams involved in contract negotiations pay close attention to the wording of any appendices, in addition to a party's legal team.

References:

MT Hojgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd [2017] UKSC 59; *Clancy Docwra Limited V E.ON Energy Solutions Limited* [2018] EWHC 3124 (TCC); *Workman Properties Ltd v Adi Building And Refurbishment Ltd* [2024] EWHC 2627 (TCC); *BNP Paribas Depository Services Ltd v Briggs & Forrester Engineering Services Ltd* [2024] EWHC 2903 (TCC).

Challenging calls under on-demand securities: varying approaches to the fraud exception

English law takes a robust approach to enforcement of on-demand securities and will only injunct demands alleged to be fraudulent in the clearest of cases. Two cases from Qatar and Singapore in the past year have considered interesting aspects of the fraud exception under English law. The first considers how prior statements of the beneficiary can be used to establish fraud and the second considers whether recklessness can be sufficient evidence of fraud.

The fraud exception

English law allows only very limited grounds on which to challenge calls under on-demand securities issued by banks or other financial institutions (referred to generally in this article as "sureties"). Such instruments are said to be *"the lifeblood of international commerce"* (*RD Harbottle v National Westminster Bank*). Where a valid demand has been made and there are no conditions in the underlying contract preventing a demand, a clear case of fraud will need to be shown if the procuring party is to prevent payment under such an instrument.

The requirements imposed by the English courts for the granting of interim relief in such cases are particularly high. A merely arguable case of fraud is not sufficient. Rather, it must be *"clearly established … that the only realistic inference is … that the beneficiary could not honestly have believed in the validity of its demands"* (*Alternative Power Solution Ltd v Central Electricity Board*). The surety must also have had knowledge of the fraud at the time of the demand and the balance of convenience must favour an injunction preventing the surety from making payment.

Given the strictness of the fraud exception under English law, it is no surprise that examples of its successful invocation are seldom seen. In this article we consider two cases on the fraud exception decided last year, both of which were successful. The cases concern two separate aspects of the fraud exception as follows:

1. Proving fraud by reliance on prior statements of the beneficiary.

2. Whether a beneficiary's recklessness is sufficient for the fraud exception to apply.

Prior statements of the beneficiary

Given the difficulties in proving fraud to the required standard, those rare cases where the fraud exception has been upheld under English law often involve statements by the beneficiary directly undermining its ability to make a call under the instrument in question. In *HLC Engenharia E Gestao de Projectos SA v ABN Amro Bank NV*, the fraud exception was satisfied where a performance bond assignee had called the bond notwithstanding the original beneficiary had written stating that it did not consider the contractor to be in default and that a call under the bond was not justified. Similarly, in *Tetronics (International) Ltd v HSBC Bank Plc* an additional on-demand guarantee was issued on the faith of beneficiary assurances that it was not aware of any circumstances giving rise to a demand under the guarantee. A demand for the full amount of the guarantee made less than two months later was found to be fraudulent in the face of such assurances.

A recent decision from the Qatar International Court (the "**QIC**") provides a further example of the fraud exception being upheld on the basis of contradictory statements from the beneficiary. The English law principles noted above have been accepted by the QIC as providing the *"best source of law"* for the fraud exception under Qatar Financial Centre ("**QFC**") Law: *Obayashi Qatar LLC v Qatar First Bank LLC* and *Leonardo SpA v Doha Bank Assurance Company LLC*.

In *Thales QFZ LLC v Aljaber Engineering WLL*, Thales QFZ LLC ("**Thales**") was sub-contracted by Aljaber Engineering WLL ("**Aljaber**") to install security systems for the New Hamad Port Project, which Aljaber was carrying out for the State of Qatar. Pursuant to the terms of the sub-contract, Thales procured an on-demand Performance Guarantee (the "**Guarantee**") from BNP Paribas in favour of Aljaber for 10% of the sub-contract price.

The parties fell into dispute part-way through the works over payments claimed by Thales. Thales suspended work and eventually purported to terminate the sub-contract on 20 February 2023. It subsequently commenced proceedings before the QIC, arguing that the sub-contract had been validly terminated and claiming payment of monies owed upon termination. Aljaber filed a Defence and Counterclaim in the proceedings on 3 November 2024, denying any entitlement to payment and disputing that the sub-contract had been validly terminated. Aljaber requested an order that Thales be compelled to maintain the Guarantee until completion of the sub-contract works and their acceptance by Qatar.

Four days prior to filing its Defence and Counterclaim, on 29 October 2024, Aljaber demanded payment of the full Guarantee amount from BNP Paribas. Its demand asserted that Thales was *"in breach of its obligations under the underlying relationship as it has failed to perform the works under the contract. As a result, the contract has been terminated"*.

Thales applied to the QIC for an urgent interim injunction, relying on Aljaber's Defence and Counterclaim to show that its demand was fraudulent. The injunction was granted initially on an *ex parte* or "without notice" basis, and then subsequently maintained at a return hearing with both parties present.

The court relied on the fact that the Defence and Counterclaim asserted the sub-contract <u>had not</u> been terminated and claimed that the Guarantee be maintained until completion of the works, whereas the basis of the demand issued four days earlier was that the sub-contract <u>had</u> been terminated. The court also relied on the long delay between Thales' purported termination and the demand. That a demand was only made after Thales had commenced proceedings indicated, in the court's view, it had been pressed merely to gain a tactical advantage in the litigation. These facts *"justified the inference, at least on a prima facie basis, that the author of the letter of demand must have known that the allegation that the subcontract had been terminated was untrue."*

Aljaber did not submit any evidence at the return hearing and did not attempt to explain how the demand had been made honestly. Instead, it relied only on legal arguments, which the court rejected. The absence of any explanation from Aljaber meant, in the court's judgment, that the fraudulent nature of the demand *"had been established as a fact"*.

Although the court cited the *Leonardo* and *Obayashi* cases, which in turn reflect the English law position, the court's application of the fraud exception seems to have been reasonably broadbrushed.As noted earlier, the English law requirement is that the only realistic inference from the facts is that the beneficiary could not have honestly believed in its demand. This inference must also be "clearly established" at the interim hearing. Absent any mention of an inference of fraud being the only realistic option, it is unclear whether the QIC judge in this case had these requirements in mind. The judge appears also to have been applying a prima facie standard of proof initially, although the matter was later said to be established in the absence of an explanation by Aljaber.

One point not considered in the judgment is the materiality of Aljaber's statement in the demand that

the sub-contract had been terminated. The terms of the Guarantee are not quoted in the judgments, but there is no suggestion that the Guarantee required Aljaber to allege termination in any demand under the Guarantee. On one view, Aljaber could be expected to have a large claim against Thales regardless of whether the contract had been terminated (given that Thales had left site). As noted by the English Court of Appeal in *NIDCO v Santander*, *"It cannot be fraudulent to make a demand one is entitled to make."* Aljaber might therefore have sought to argue that the alleged fraud only pertained to its statement about the termination of the sub-contract, which was not something which could affect its entitlement to make a demand under the Guarantee.

More generally, this case shows that challenges to calls under on-demand securities on grounds of fraud are most likely to succeed where a party is able to evidence statements made by the beneficiary inconsistent with its demand. Such evidence can provide a platform for a without notice application to be brought, putting the beneficiary on the back foot and effectively forcing it to explain its demand.

Is recklessness sufficient?

A recent Singaporean Court of Appeal decision has considered whether the fraud exception applicable to on-demand securities and letters of credit should include fraud arising from recklessness. Singaporean law adopts the English law approach to the fraud exception, whilst also allowing other grounds for challenging calls under such instruments.

In *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd*, a Singapore company in the business of oil trading, bunkering and supply chain services ("**Winson**") entered into a circular trade arrangements for the sale of gasoil. Two shipments of gasoil were to be sold by Hin Leong Trading (Pte) Ltd ("**Hin Leong**") to Trafigura Pte Ltd ("**Trafigura**"), Trafigura to Winson, and back from Winson to Hin Leong ("**Winson-Hin Leong Sale**"). In respect of the Winson-Hin Leong Sale, Hin Leong made applications to two banks ("**SCB**" and "**OCBC**") for letters of credits to be issued in favour of Winson to finance Hin Leong's purchase of each of the two shipments of gas oil from Winson. SCB and OCBC issued separate letters of credit to Winson. Winson made its first presentation to OCBC under a Letter of Indemnity ("**LOI**") for a cargo shipment on the "Ocean Voyager" and its first presentation to SCB under an LOI for a cargo shipment on the "Ocean Taipan".

Hin Leong had encountered financial difficulties and shortly after Winson's first presentation, OCBC received information on an all-lenders telephone conference that Hin Leong's inventory did not include cargo on either the Ocean Voyager or the Ocean Taipan. OCBC proceeded to reject Winson's first presentation on the basis that no physical cargo was shipped on the Ocean Voyager.

The next day, Winson made its second presentation to OCBC for the Ocean Taipan instead, and explained that the second presentation for a different vessel was due to an internal mix-up, and that revisions had been made to rectify this mix-up. On that same day, Winson made its second presentation to SCB, this time for the Ocean Voyager. Both OCBC and SCB refused to pay under the letters of credit, contending that no cargo of gasoil pursuant to the LOIs were shipped in respect of the Winson-Hin Leong Sale, and that the copy non-negotiable Bills of Lading submitted by Winson which purportedly evidenced such shipments were forgeries.

The case against Winson was not one of direct fraud (i.e. that it knew its demands to be false), but that in view of the number of "red flags" raised by the circumstances surrounding the transaction, the demand was made recklessly. This case was made in reliance on the third category of fraud in the well known test for common law fraud set out in *Derry v Peek* i.e. that *"fraud is proved when it is shewn that a false representation has been made (a) knowingly, or (b) without belief in its truth, or (c) recklessly, careless whether it be true or false."*

Winson accepted that its presentations contained a number of false representations but denied recklessness and claimed it had an honest belief in its demands, principally by reference to the fact that it had already paid Trafigura for the shipments. Winson also relied on the recent decision of the Singapore International Commercial Court in *Credit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd*, where the recklessness had been held not to be sufficient to challenge demands under letters of credit. In that case, the court noted that:

> *"Dishonesty is the key to the fraud exception to the obligation to pay under letters of credit and a presentation, said to be recklessly made without investigation by the beneficiary of the circumstances underlying the representation, or of the circumstances of the underlying transaction, cannot vitiate the presentation. Whilst an absence of belief in the truth of a representation, in the sense of not caring whether it is true or false, will suffice for deceit, there is no duty of care owed by a beneficiary to the bank when presenting documents to an issuing bank … and a failure, even a reckless failure to ascertain the truth of representations, which are made in the honest belief that they are true, will not amount to fraud for the purposes of non-payment under a letter of credit."*

OCBC and SCB's fraud challenge was upheld at first instance and again on appeal to the Singaporean Court of Appeal. Both courts found that various irregularities in the underlying transactions raised "red flags" which Winson took no steps to investigate or clarify. Winson's *"abject indifference"* to the truth of its presentation meant that it was reckless and did not honestly believe in the truth of its representations.

The Court of Appeal confirmed that recklessness within the third category of *Derry v Peek* is sufficient for the purpose of challenging a demand under a letter of credit or on-demand guarantee. The Court therefore disagreed with the passage quoted above from *Credit Agricole*. In the Court's judgment, that passage failed to understand the distinction between objective recklessness and subjective recklessness: objective recklessness is akin to negligence and does not apply under on-demand securities because a beneficiary owes no duty of care to the surety. Subjective recklessness refers to indifference to a risk of which the beneficiary is actually aware of. Accordingly:

> *"subjective recklessness in the Derry v Peek sense is different from objective recklessness. It is neither synonymous with negligence, nor is it founded on any duty of care. Instead, subjective recklessness is only made out where there is an actual indifference to the risk of which the defendant is actually conscious. And when subjective recklessness has been made out, we disagree that there can be any 'honest belief that the [representations were] true'"*

As the Court also noted, recklessness of this nature is in many ways a means of proving the second category of fraud from *Derry v Peak*: *"If the beneficiary was indifferent to the truth of the representations contained in the documents, he could not possibly have an honest belief that they were true."* Accordingly, where direct evidence as to the beneficiary's state of mind is not available, circumstantial evidence of "red flags" which were ignored by a beneficiary provides an alternative means of establishing fraud.

One point not addressed by the Court is the requirement for the sureties to have had notice of the fraud at the time the demands were made. This does not pose a problem where the sureties are relying on prior statements or communications by the beneficiary itself as in the *Thales* case discussed above. However, the position would appear to be more difficult for a case based on recklessness. For example, the judgments in this case go into great detail as to the circumstances of the transactions and various communications and statements made by the parties during the relevant periods. The sureties would have been aware of very little of this at the point the presentations were made. Their knowledge at that point appears to have been limited to the discovery that Hin Leong's inventory did not include cargo on either the Ocean Voyager or the Ocean Taipan. However, this in itself would not have been enough to establish recklessness.

English courts will permit evidence of fraud arising after the demand to be relied upon in disputes between the beneficiary and the surety, but only on the basis of a counter-claim by the surety for fraudulent misrepresentation which can be set-off against the bond claim. However, in order not to dilute the effectiveness of on-demand bonds, the fraud on which such a counter-claim is based needs to be clearly evidenced at the time of the relevant hearing. Although this poses no issue where a full trial is held, claims by beneficiaries are usually heard on a summary judgment basis, meaning that sureties can come under significant pressure to provide sufficiently cogent evidence of fraud ahead of a summary judgment hearing. The difficulties of doing so are likely to be increased if recklessness is relied on as proof of fraud due to the much more complex factual issues which such a case gives rise to.

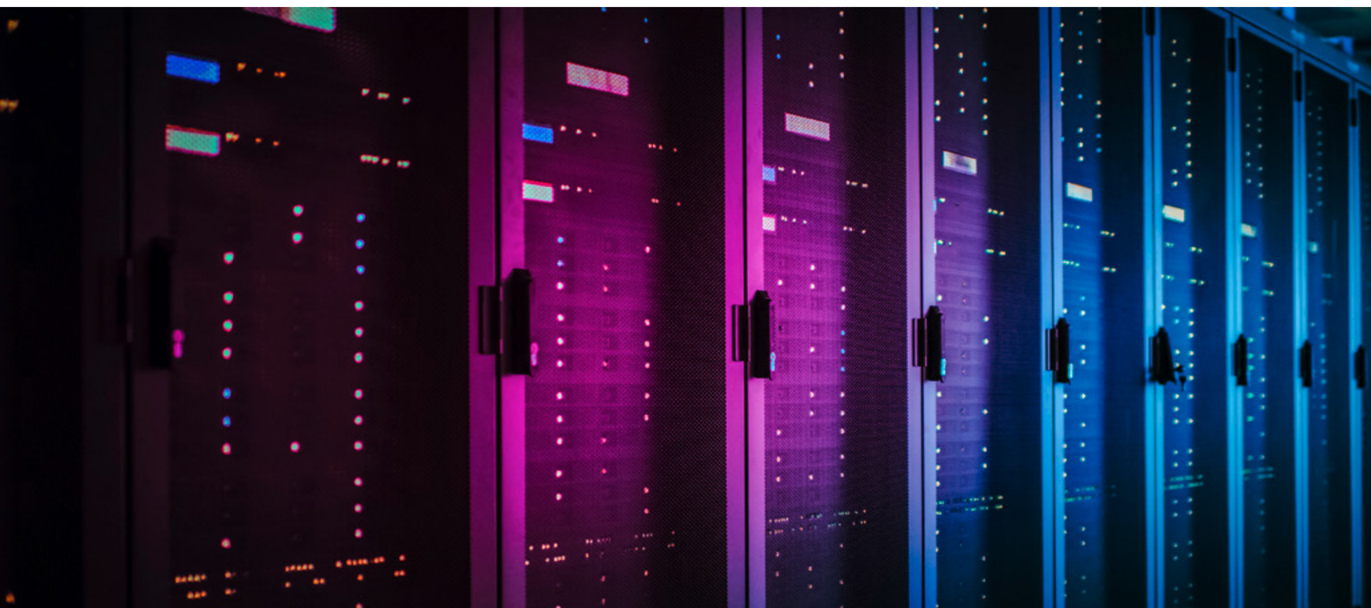
Conclusion

The above cases show the difficulties which can arise in cases where calls under on-demand securities are suspected to have been made fraudulently. The approach to such challenges required by English law is complex and may not always be applied perfectly in any given case. Accurate and strategic legal advice taken at an early stage is crucial in such scenarios.

It remains to be seen whether the English courts will follow the Singaporean Court of Appeal's inclusion of recklessness within the categories of fraud permitted for challenges to such a claim. Whilst the success of a recklessness defence is likely to meet both factual and procedural challenges, it may be the only effective means of challenge in some cases for sureties who are faced with insolvent clients and strong suspicions as to the legitimacy of the underlying transactions and/or the demands made against them.

References:

RD Harbottle v National Westminster Bank [1978] QB 146; *HLC Engenharia E Gestao de Projectos SA v ABN Amro Bank NV* [2005] EWHC 2074; *Alternative Power Solution Ltd v Central Electricity Board (Mauritius)* [2014] UKPC 31; *National Infrastructure Development Company Ltd v Banco Santander S.A.* [2017] EWCA Civ 27; *Tetronics (International) Ltd v HSBC Bank Plc* [2018] EWHC 201 (TCC); *Leonardo SpA v Doha Bank Assurance Company LLC* [2019] QIC (F) 6; *Obayashi Qatar LLC v Qatar First Bank LLC* [2020] QIC(F) 5; *Credit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1; *Thales QFZ LLC v Aljaber Engineering WLL* [2024] QIC(F) 53; *Thales QFZ LLC v Aljaber Engineering WLL* [2024] QIC(F) 55; *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2024] 1 SLR 1052; [2024] SGCA 31.



Claims notification provisions in construction contracts

An English Technology and Construction Court decision last year, affirmed by the Court of Appeal this year, has considered the effect of a claims notification provision using "if … then" language. These decisions provide guidance as to when such clauses will amount to conditions precedent without express words stating that entitlements will be lost or that notification is a condition precedent to entitlement. The judgment also demonstrates the need for care in the drafting of such clauses, as the natural meaning of the words used may be sufficient to give rise to strict condition precedents where parties may have otherwise thought stronger language was required.

Claims notification provisions in international construction contracts

Claims notification provisions are commonly included in international construction contracts. Claims by contractors for extensions of time or additional payment may be required to be notified within a certain period of time and similar provisions are sometimes applied to employers.

Whether non-compliance with such provisions will bar the recovery of claims will depend heavily on the words used. At one end of the spectrum, a clause may state expressly that compliance is a condition precedent to entitlement. An example is clause 20.1 of the FIDIC 1st edition contracts, which state expressly that *"the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim"* where a timely notice of claim is not given. A recent example of the FIDIC 1st edition time-bar being enforced is *Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC*, which we reported on in last year's edition of this Annual Review.

Similar express conditions precedent appear in the FIDIC 2nd edition and the ENAA form, although the FIDIC 2nd edition has introduced the prospect that non-compliance may be excused by the Engineer (see, for example, clause 20.2.5 of the Yellow Book). Other international forms are not always as clear. For example, the LOGIC construction form (3rd edition) provides relief from force majeure events *"which [have] been notified in accordance with Clause 14.3"*, but does not indicate whether the failure to notify, or to notify in time, will invalidate a force majeure claim.

Where express condition precedent wording is not present, the English courts have looked to other indications in the wording of the clause to ascertain whether a condition precedent was intended. Clauses merely using obligatory language, such as "shall", to require notification but without specifying consequences for non-compliance (like the LOGIC clause just mentioned) are usually not treated as conditions precedent. See for example, *Scottish Power UK plc v BP Exploration Operating Co Ltd*, where the English Commercial Court found such wording created a contractual duty but did not bar substantive claims.

Other clauses, whilst not stating expressly that they are conditions precedent, may nevertheless use conditional language. For example, the *"provided that"* wording used in the loss and expense provisions of the older JCT forms (an English domestic construction contract form) was held to be a condition precedent in *WW Gear Construction Ltd v McGee Group Ltd*. The JCT has recently replaced the words *"provided that"* with *"subject to"*, but this wording was also found to create a condition precedent in *FES Ltd v HFD Construction Group Ltd*.

Less clear is the effect of clauses which use "if … then" type formulations. An example is clause 2.21 of the JCT's design and build sub-contract form which provides that *"if the Contractor gives [a notice of non-completion] to the Sub-Contractor within a reasonable time of the expiry of the period or periods [for completion], the Sub-Contractor shall pay or allow to the Contractor the amount of any direct loss and/or expense suffered or incurred by the Contractor and caused by that failure"*. In *Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd*, a judge of the English Technology and Construction Court noted that the wording of clause 2.21 *"suggests that it is not … a condition precedent"*, but the question was not considered in any detail.

A decision of the Technology and Construction Court decision last year has considered "if … then" type clauses in more detail. The issue was also considered on appeal earlier this year. In what follows we confine ourselves to the Court of Appeal's decision.

Disclosure and Barring Service v Tata Consultancy Services Ltd

The Disclosure and Barring Service ("**DBS**") engaged Tata Consultancy Services Ltd ("**Tata**") to build a digital platform to streamline DBS's criminal record checks process. The project was heavily delayed.

Tata brought a claim against DBS for approximately £125 million. DBS defended the claim and counterclaimed for over £100 million. DBS claimed delay damages from Tata, who contested the claim on various grounds, including that the contract between the parties required DBS to promptly issue a Non-Conformance Report ("**NCR**") to Tata before the right to claim delay damages arose.

The relevant clauses read as follows:

> *"6.1 If a Deliverable does not satisfy the Acceptance Test Success Criteria and/or a Milestone is not Achieved due to the CONTRACTOR's Default, the AUTHORITY shall promptly issue a Non-conformance Report to the CONTRACTOR categorising the Test Issues as described in the Testing Procedures or setting out in detail the non-conformities of the Deliverable where no Testing has taken place, including any other reasons for the relevant Milestone not being Achieved and the consequential impact on any other Milestones. The AUTHORITY will then have the options set out in clause 6.2.*
>
> *6.2 The AUTHORITY may at its discretion … choose to:*
>
> *6.2.1 issue a Milestone Achievement Certificate conditional on the remediation of the Test Issues, or the non-conformities of the Deliverable where no testing has taken place, in accordance with an agreed Correction Plan; and/or*
>
> *6.2.2 if the Test Issue is a Material Test Issue, refuse to issue a conditional Milestone Achievement Certificate as specified in clause 6.2.1 then escalate the matter in accordance with the Dispute Resolution Procedure and if the matter cannot be resolved exercise any right it may have under clause 55.1 (Termination for Cause by the AUTHORITY); and/or*
>
> *6.2.3 require the payment of Delay Payments …"*

Tata argued that DBS's entitlement to recover Delay Payments pursuant to clause 6.2 was conditional on DBS's compliance with the obligation in clause 6.1 to provide an NCR. DBS pointed to the extension of time provisions of the contract, which contained strict claims notification provisions which were expressly stated to be conditions precedent, to argue that clause 6.1 could not have been intended to have the same effect.

At first instance the Technology and Construction Court held that clause 6.1 was a condition precedent and that, in the absence of an NCR, DBS's claim for Delay Payments failed. The Court of Appeal agreed and dismissed the appeal.

Lord Justice Coulson (on appeal) found that the "*if .., then ..*" structure in clause 6.1 was clearly intended to be conditional and that the steps in clause 6.1 were required to be fulfilled before the options in clause 6.2 could be exercised. He emphasised the fact that the clause covered not only delays to milestones but also a failure to pass acceptance tests, and that an NCR was necessary for the application of some of the options provided under clause 6.2.

DBS had contended that the comma immediately preceding the reference to an NCR indicated that the provision of the NCR was not part of the "*if … then*" structure within clause 6.1, and thus not a condition precedent. The Court disagreed, with Lewison LJ noting that the comma merely served to break up the sentence given its length of approximately 13 lines in the original text. In his view, this reading was:

"reinforced by the fact that the opening part of clause 6.1 is split into two sentences. That, to my mind, emphasises the point that the first sentence must be satisfied before the second sentence takes effect. The word "then" also has a temporal connotation, namely that the steps in the first sentence must be taken before the second sentence takes effect."

The Court also rejected the contention that the absence of a rigid deadline for delivering an NCR suggested that the requirement was not intended to be a condition precedent. In the Court's judgment, the term "*promptly*" carried adequate certainty. This was supported by previous cases where requirements to notify "as soon as possible" and "within a reasonable time" had been held to be conditions precedent.

However, in an important qualification, Lewison LJ noted that a notice which was issued late (i.e. not *"promptly"*) may nonetheless have satisfied the condition precedent:

"I consider that there is considerable force in the proposition that until a Non-conformance Report is given the clause cannot be relied on; but once it has been served, it can be. If further damage occurs because the Non-conformance Report, although served, has not been served promptly, then that can be compensated in damages."

There was no need to make a ruling on this point as DBS had not issued an NCR at all.

Conclusions and implications

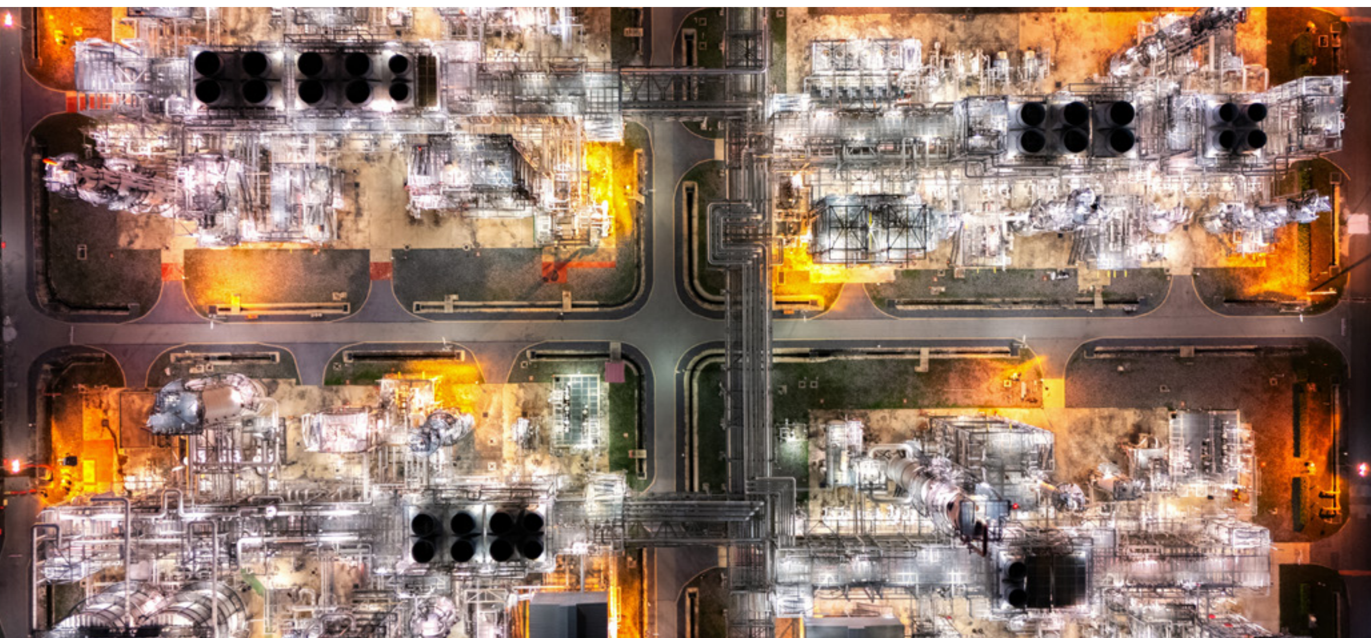
This is a significant Court of Appeal decision which provides guidance as to the interpretation of claims notification provisions using "if … then" language. The Court's decision indicates that clauses framed in these terms are likely to be construed as giving rise to conditions precedent. The Court's judgment reflects the modern approach to such clauses, giving effect to the natural meaning of the language used by the parties, and underscores the importance of drafting notification provisions with precision.

Notification clauses are not interpreted in isolation but are considered within the wider context of the contract as a whole. Their construction may be influenced by the surrounding obligations, the overall structure of the agreement, and the underlying commercial purpose. While it is not essential for a condition precedent to specify an exact timeframe for compliance, the inclusion of deadlines may serve to reinforce the conditional nature of the provision.

At first glance the Court's decision may seem significantly more liberal than that adopted in previous cases, given the use of express condition precedent language elsewhere in the contract and the non-condition precedent finding on a similar "if … then" clause in *Yuanda*. However, the qualification expressed by Lewison LJ suggests that the case does not extend beyond the requirement that the relevant document or notice must actually be submitted as a condition precedent to entitlement. The much more common question of whether a notice can be validly served late under such a clause will need to await further judicial consideration in the future.

References:

WW Gear Construction Ltd v McGee Group Ltd [2010] EWHC 1460 (TCC); *Scottish Power UK Plc v BP Exploration Operating Company Ltd* [2015] EWHC 2658 (Comm); *Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd* [2020] EWHC 468 (TCC); *Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC* [2022] DIFC CA 016; *FES Ltd v HFD Construction Group Ltd* [2024] CSIH 37; *Disclosure and Barring Service v Tata Consultancy Services Ltd* [2025] EWCA Civ 380.



Waiver and estoppel defences to claims notification provisions

Whilst claims notification clauses may be found in law to be conditions precedent to entitlement, they may not in practice be operated during the course of the works under a construction contract. Late claims may be submitted, negotiated and agreed without any objection being taken. In this article we provide an overview of English law's approach to waiver in such circumstances, including an interesting case last year upholding a waiver argument based on events post-dating non-compliance with the notification clause.

Waiver and estoppel under English law

Proving that a claims notification provision is a condition precedent may not provide an employer with a final answer to contractor claims. Such clauses may be overlooked until a dispute escalates and legal advice is sought. The contractor may then claim that the condition precedent has been waived by the employer.

Under English law, the concept of waiver can arise in a number of different ways. It can be used to refer to a waiver by agreement, where the parties by words or conduct are taken to have amended their contract. It can also refer to the doctrine of election, where a party is forced to choose between two inconsistent legal remedies (such as termination and affirmation where a contract has been repudiated). The election of one remedy is sometimes said to have waived the alternative remedy. In the context of claims notification provisions, however, waiver usually refers to the English law doctrine of estoppel which prevent parties from denying a certain state of affairs which their words of conduct have led the other party to rely on and which it would be inequitable for them to deny.

The most relevant forms of estoppel in this context are promissory estoppel and estoppel by convention. Broadly speaking the requirements of promissory estoppel are as follows (see, for example, *Ministry of Defence v Scott Wilson Kirkpatrick & Partners*):

1. There is a clear and unambiguous promise or representation, whether by words or conduct, that a party would not enforce its strict legal rights e.g. that an employer would not rely on a breach of a claims notification clause to defeat a contractor's claim.
2. The circumstances were such that the contractor, in this example, would naturally and did in fact rely on or conduct its affairs on the basis of such promise or representation.
3. It would be inequitable or unconscionable for the employer to go back on the promise or representation.

Estoppel by convention is similar, but instead of a clear and unambiguous promise or representation, a common assumption or understanding is relied upon. A number of requirements must be established for this common assumption to justify an estoppel (see *Tinkler v Revenue and Customs*):

1. There must be a common assumption shared by both parties or an assumption made by one party and acquiesced in by the other e.g. that the claims notification clause would not be relied upon to defeat claims by the contractor.
2. There must be some communication or conduct which "crosses the line" between the two parties which is sufficient to manifest their sharing of or assent to the assumption.
3. The contractor, in this example, must know that the employer shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge – and not act merely on its own view of the matter.
4. The words or conduct of the employer must, objectively, show an intention or expectation that the contractor will be so strengthened or influenced in its reliance on the common assumption so that one can say that it has assumed some element of responsibility for the contractor's reliance on the common assumption.
5. It must be inequitable or unconscionable for the employer to depart from the common assumption.

Whichever form of estoppel is advanced, it is important to distinguish between situations where the employer's words or conduct have preceded, and are said to have caused, the contractor's non-compliance with the claims notification clause, from those situations where the employer's words or conduct follows the non-compliance. Where the employer's words or conduct precede the non-compliance, reliance and unconscionability are more likely to present. It will often be unconscionable for an employer to rely on non-compliance with a claims notification clause as providing a defence to a contractor claim where the employer's own words or conduct encouraged the non-compliance.

The causative impact of the employer's words or conduct remains important in such cases, however. In *Scandinavian Trading Tanker Co v Flota Petrolera Ecuatoriana*, a charterparty permitted the owners the right to withdraw the subject vessel immediately if payment of the monthly hire was not made on time. Over the course of two years payments were made without any consistent pattern, sometimes paid on time and sometimes paid one to three days late. When a subsequent payment was not made on time, the owners immediately served notice withdrawing the vessel. The charterers claimed that the owners were estopped from doing so due to their previous conduct in accepting late payments over the past two years. The court rejected the estoppel on the grounds that the owner's conduct had not unequivocally represented that the right of withdrawal would not be exercised, but also because the evidence showed that the owner's previous acceptance of late payment had played no part in the charterer's failure to pay on time. The real reason was that the person responsible for payment within the charterer was under the misapprehension that the owner could not exercise its right to withdraw until at least 10 days after the payment became overdue.

Cases where the employer's words or conduct follow the contractor's non-compliance raise more difficult questions of reliance and unconscionability. As the employer's words or conduct cannot be said to have caused the non-compliance, the question of why it is inequitable for the employer to rely on the contractor's non-compliance becomes more difficult to answer. An interesting example is *The Post Chaser*. That case concerned a sale of goods contract which required the sellers to give a declaration of shipment to the buyers as soon as possible after the sailing of the vessel on which the goods were to be carried. The sellers did not give such a declaration for more than a month after the ship had sailed. The buyers did not immediately challenge the late declaration or reserve their rights, but instead requested shipping documents. Their sub-buyers rejected the documents two days later, prompting the buyers also to reject the documents and cancel the sale.

The court found that the failure to make a declaration as soon as possible entitled the buyers to cancel. The sellers claimed that the buyers conduct in requesting documents amounted to a waiver of this right. The court agreed that such action was a sufficiently unequivocal representation that the buyers did not intend to exercise their right of cancellation. The court also agreed that, although the seller had not acted to its detriment in reliance on this representation, it had conducted its affairs on the basis of the representation by sending the documents to the sellers. However, in the court's

judgment, an estoppel was not established due to the absence of any injustice to the sellers:

"Now on these simple facts, although it is plain that the sellers did actively rely on the buyers' representation, and did conduct their affairs in reliance on it, by presenting the documents, I cannot see anything which would render it inequitable for the buyers thereafter to enforce their legal right to reject the documents. In particular, having regard to the very short time which elapsed between the date of the representation and the date of presentation of the documents on the one hand and the date of rejection on the other hand, I cannot see that, in the absence of any evidence that the sellers' position had been prejudiced by reason of their action in reliance on the representation, it is possible to infer that they suffered any such prejudice. In these circumstances, a necessary element for the application of the doctrine of equitable estoppel is lacking …"

To similar effect is *Ministry of Defence v Scott Wilson Kirkpatrick & Partners*. In that case, a contractor who had refurbished a dockyard roof was sued when part of the roof blew off in high winds. The parties agreed that the 4 inch nail fixings for the roof did not meet the contractual requirements, but the contractor claimed that the clerk of works appointed by the employer had agreed to the fixings. The employer was therefore said to have waived the contractual requirements. The English Court of Appeal found that the evidence did not support a sufficiently unequivocal representation by the clerk of works and, in any event, there was no reliance by the contractor, who had intended to use 4 inch nails all along. However, even if these difficulties could be surmounted, the Court noted that it would not have been inequitable for the employer to rely on the original contractual requirements:

"[The contractor has] not, I consider, shown that any representation by words or conduct by [the clerk of works] and any reliance thereon by [the contractor] were such as to make it inequitable for the [employer] to hold [the contractor] to their primary contractual responsibilities in respect of the use of the 4" nails to fix the purlins. [They] were the main contractors. They accepted strict contractual duties, including a duty to devise a means of fixing the purlins to the frames which was "workmanlike" and ensured that they were "well fixed as existing". To treat the informal conversations found to have occurred … as being capable of transferring the responsibility for the adequacy of the fixings and the risk of their catastrophic failure from [the contractor] to the [employer] would involve too facile and ready an abrogation of those duties."

With the above in mind, a decision of the English Technology and Construction Court last year provides an interesting and rare example of a waiver argument being upheld due to events post-dating non-compliance.

Disclosure and Barring Service v Tata Consultancy Services Ltd

As noted in the previous article, the Disclosure and Barring Service ("**DBS**") engaged Tata Consultancy Services Ltd ("**Tata**") to build a digital platform to streamline DBS's criminal record checks process. Various delays arose which Tata claimed to be DBS' responsibility and for which it sought compensation. Arguments arose as to whether Tata had properly notified the delays under clause 5 of the contract, which provided relevantly as follows:

"5. IMPLEMENTATION DELAYS - GENERAL PROVISIONS

5.1 If, at any time, the CONTRACTOR becomes aware that it will not (or is unlikely to) Achieve any Milestone by the relevant Milestone Date it shall as soon as reasonably practicable notify the AUTHORITY of the fact of the Delay or potential Delay and summarise the reasons for it.

5.2 The CONTRACTOR shall then submit a draft Exception Report to the AUTHORITY for its approval not later than five (5) Working Days (or such other period as the AUTHORITY may permit and notify to the CONTRACTOR in writing) after the initial notification under clause 5.1.

5.3 The draft Exception Report shall give the AUTHORITY full details in writing of:

5.3.1 the reasons for the Delay;

5.3.2 the actions being taken to avoid or mitigate the Delay;

5.3.3 the consequences of the Delay;

5.3.4 if the CONTRACTOR claims that the Delay is due to an AUTHORITY Cause, the reason for making that claim.

…

5.6 Where the CONTRACTOR considers that a Delay is being caused or contributed to by an AUTHORITY Cause the AUTHORITY shall not be liable to compensate the CONTRACTOR for Delays to which clauses 7 or 8 apply unless the CONTRACTOR has fulfilled its obligations set out in, and in accordance with, clauses 5.1, 5.2 and 5.3."

The court found that clause 5.6 was a condition precedent to Tata's claims for compensation for delay, whether under the express terms of contract or at common law for damages. As Tata had not submitted any draft Exception Report in accordance with clauses 5.2 and 5.3, its claim for compensation would fail unless the need for a report had been waived by DBS.

Delays were initially notified by Tata in a letter dated 25 July 2016. This notification was given expressly under clause 5.1 and noted that Tata was then unable to determine the detailed consequences of the delay and that accordingly: *"TCS is unable to provide a draft Exception Report within the stated 5 Working Days from the date of this letter and requests DBS' permission for an extension."*

DBS' response to this notification was sent on 2 August 2016, which was already beyond the 5 working day period stipulated by clause 5.2. The response did not address the extension request but merely responded to Tata's request for further information to allow Tata to re-programme the works.

Thereafter, a period of discussion and negotiation took place culminating in the submission of a draft Exception Report by Tata in March 2017. The draft Exception Report noted that DBS had *"never formally responded to our request in that letter for an extension within which to submit an Exception Report"*.

The discussions and negotiations during this period fell into two categories. The first was a joint exercise in re-programming of the works to account for the delays. This was necessary for the submission of a draft Exception Report and also to inform commercial discussions over cost and responsibility for the delays, which was the second category of discussions.

The court rejected an initial submission by Tata that the DBS response of 2 August 2016 was an express agreement to Tata's request for an extension of time in its 25 July 2016 letter. The response was too ambiguous to amount to an agreed extension of the 5 working day period.

However, the court found that the discussions and negotiations which followed these letters up until the submission of the draft Exception Report in March 2017 were sufficient to give rise to an estoppel by convention waiving the time-bar. In the court's judgment, these discussions and negotiations had proceeded on the basis that the 5 working day period was not applicable and that Tata's ability to claim remained unaffected. When these facts were applied to the test for an estoppel:

"it is clear that the parties were subjectively in agreement. It is objectively obvious that TCS considered that it had had a de facto extension to provide the Exception Report, notwithstanding the absence of a formal response to their request, because of the way DBS was conducting itself in discussions and negotiations. It is also clear, on DBS's own evidence, that it also considered that the 5 Working

Day requirement had 'fallen by the wayside'. It would have been obvious to DBS that TCS was engaging in the project in a way, to DBS's benefit, that it may not have done faced with a denial of entitlement to compensation based on the 5 Working Day point. … In these circumstances, DBS is now estopped from arguing that TCS has no entitlement to compensation for delay on account of its failure to comply with Clause 5.3."

Somewhat surprisingly, there is no mention of unconscionability in the court's reasoning or whether it would be inequitable for DBS to rely on the condition precedent in clause 5.6. One may, however, find reasons which might have justified such a conclusion in the court's description of Tata's reliance on the common assumption:

"In reliance on DBS's conduct, TCS expended resources, committed to negotiating a commercial deal, and acted to its detriment further in that, as TCS submits, it was denied the opportunity to decide how it might respond faced with continuing and accruing costs that, contrary to its belief, DBS had no intention of paying because of a technical notice point."

The court therefore appears to have been sympathetic to the time and cost incurred by Tata in reliance on the common assumption that the 5 working day time period did not apply. Tata's costs in this regard were not identified, but can be expected to be much less than the £2.4m it was ultimately awarded in delay costs (of a total of £32.4m claimed for). A question therefore arises as to the equity and proportionality of depriving DBS of a defence worth approximately £2.4m as a response to detrimental reliance by Tata which seems unlikely to have exceeded a tenth of that amount.

This raises an active and unsettled aspect of the English law as to estoppel. Whilst it is clear that the estoppels are intended to protect against injustice and unconscionability, and are not intended to be a substitute for contractual obligations, the extent to which an estoppel will protect an expectation interest, rather than mere reliance loss, remains uncertain.

One formulation which has often been quoted is that the court must decide upon the *"minimum equity to do justice"* between the parties (*Crabb v Arun District Council*). However, in *Guest v Guest* the Supreme Court (the UK's highest court) recently clarified that in cases of proprietary estoppel this formulation should not be taken as requiring the detriment to valued and paid to the exclusion of ordering the transfer of the expected proprietary rights. Whilst the overriding principle remained justice and equity, this could not be reduced – in cases of proprietary estoppel – to the mere compensation of detriment. Instead, enforcement of the promised rights would be the ordinary remedy, save where such rights were out of all proportion to the detriment incurred.

Whether such an approach is to be applied in commercial cases involving other forms of estoppel is an open question. As noted in the Supreme Court's decision, proprietary estoppel claims are usually deeply personal, involving promises of land in return for many years of personal service and investment. It is not difficult to see why considerations of equity and unconscionability go beyond a simple valuation of detriment in such cases. In arms-length commercial cases, however, such elements are lacking and financial considerations may be the sum total of the equities to be weighed.

One example not dissimilar to the facts in *Tata* is *McGoldrick v Gilmore*. In that case, the claimant was injured on a building site and wished to claim against the owners. The claimant had been employed by the contractor, with whom he was on friendly terms. The claimant's solicitors wrote to the contractor indicating that the claimant did not intend to claim against the contractor in relation to the accident and, in view of that confirmation, requested the contractor to provide a witness statement. A witness statement was subsequently provided by the contractor. The claimant later had a change of heart and claimed against the contractor.

The contractor claimed that the claimant was estopped from claiming against him due to his initial assurances that the contractor would not be sued, which the contractor had relied on by providing a witness statement. The claimed estoppel was rejected by the Northern Irish Court of Appeal on the basis that *"it would not be inequitable to allow the action to proceed against [the contractor], subject to the terms … that the plaintiff is not to be entitled to make any use of the statement made by the [contractor] or the attendance notes made by his solicitors on the [contractor's] visit to their offices."*

In a similar way, it may have been open to the court in *Tata* to allow DBS to rely on the condition precedent in clause 5.6, subject to terms that it compensate Tata for the time and cost incurred in the discussions and negotiations leading to the submission of the draft Exception Report in March 2017. Given that the conduct of DBS relied upon had no part in causing Tata not to comply with the original 5 working day deadline, it might be said that the *"minimum equity to do justice"* between the parties did not extend to reviving the whole of Tata's claims which had already become barred prior to the common assumption relied upon.

Conclusions

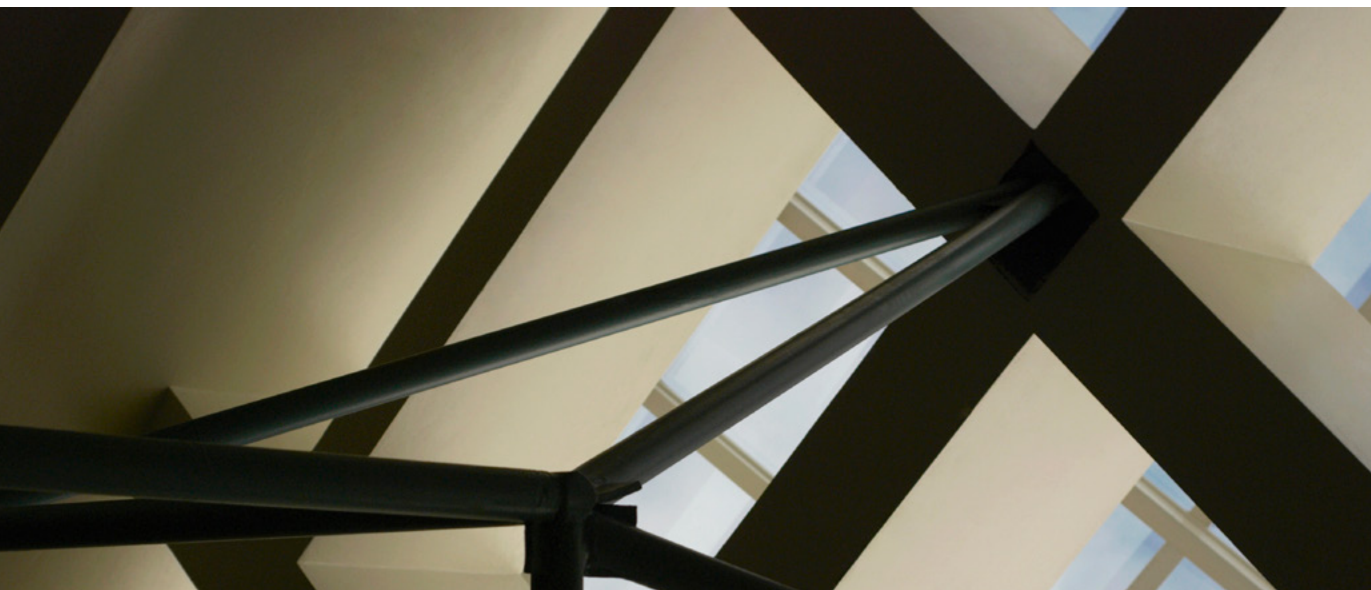
The present case bears resemblance to a Scottish decision from 2010 in which a claims notification time-bar had been held to have been waived after non-compliance had taken place (*City Inn Ltd v Shepherd Comstruction Ltd*). This again was based on subsequent discussions and negotiations in which the time-bar was not mentioned by the employer or its agent. No consideration was given as to whether it would be inequitable or unconscionable for the employer to rely on the time-bar, although Scots law differs from English law in this respect in that whilst a requirement for unconscionability applies to personal bar (the rough equivalent of the English concept of estoppel), there is no such requirement for waiver (see *James Howden & Co Ltd v Taylor Woodrow Property Co Ltd*).

The conclusion reached in *Tata* poses significant risks to employers in that valuable time-bar defences may be lost if the project team do not raise the application of the time-bar and instead proceed to discuss and negotiate a contractor's claim on the merits. Whilst some detriment to the contractor is likely to be required in such cases, English law is presently unclear as to the extent of detriment which is needed before an employer will be deprived of its ability to rely on a time-bar. It may be the case, as appears to have been the position in *Tata*, that the time and cost incurred in discussing and negotiating the claim with the project team is sufficient.

Employers wishing to avoid this risk can take a number of precautions. Firstly, the project team should make a practice of including an express reservation of rights in its response to any claim notification which falls outside the contractual time period. The project team may then seek to discuss and negotiate the claim as normal subject to this reservation of rights. Secondly, the employer can include a "no waiver" clause in its construction contracts. The next article in this publication provides an update on the strict approach now being taken to such clauses by the English courts in the aftermath of the Supreme Court's decision in *Rock Advertising*.

References:

Crabb v Arun District Council [1976] Ch 179; *Scandinavian Trading Tanker Co v Flota Petrolera Ecuatoriana* [1980] QB 529; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1982] 1 All ER 19; *James Howden & Co Ltd v Taylor Woodrow Property Co Ltd* [1998] SC 853; *Ministry of Defence v Scott Wilson Kirkpatrick & Partners* [2000] BLR 20; *McGoldrick v Gilmore* [2001] NICA 53; *City Inn Ltd v Shepherd Comstruction Ltd* [2010] CSIH 68; *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24; *Tinkler v Revenue and Customs* [2021] UKSC 39; *Tata Consultancy Services Ltd v Disclosure and Barring Service* [2024] EWHC 1185 (TCC).



Protecting against estoppel and waiver defences: the effectiveness of "no-waiver" clauses

Since a Supreme Court decision in 2018, English law in relation to clauses which aim to protect against estoppel and waiver defences has undergone significant development. Such clauses, if drafted appropriately, can provide a complete answer to the types of waiver defences discussed in the previous article. In what follows, we provide a detailed overview of this developing area of law, including a number of cases decided over the past year.

Introduction

Large international construction contracts are typically administered for employers and contractors alike by project managers or engineers within defined project teams. In a FIDIC context, these positions are occupied by the Engineer and the Contractor's Representative (and any of their delegates or assistants). Throughout the course of a project, these personnel will discuss a broad range of issues, including technical matters, financial details and the legal merits of particular positions adopted by either party. As they are appointed by the parties and given responsibility for the management of such issues, these personnel will usually have authority to conclude agreements on behalf of the parties or to make statements which have legal effect under the relevant construction contract. Given that project level discussions often take place informally, risks arise that agreements or statements may be made without proper consideration or without prior approval of senior management. Or, as discussed in the previous article, the project team may overlook defences available to an employer resulting in arguments that those defences have been waived. So called "no oral modification clauses" ("NOM clauses" for short) and "no-waiver" clauses are often included within construction contracts to protect against these risks.

NOM clauses will typically seek to preclude the making of variations or amendments to a contract unless certain formalities are followed. A popular form is to require that any amendment be "in writing and signed by the parties". "No-waiver" clauses are similar and will usually seek to preclude informal waivers of rights by stating that any waiver must be in writing and signed by the party concerned. In a construction context, NOM clauses are often drafted to preclude payment for varied or additional work unless agreed or instructed in writing by the employer or the employer's engineer or architect.

The effectiveness of these clauses has long been questioned on the basis that freedom of contract requires that parties be able to make new contracts through whatever means they choose and they cannot therefore put beyond their power their ability to do so in the future. Others argue that by giving effect to them the courts are upholding an exercise of the parties' freedom of contract. In 2018, this debate was decisively determined in favour of upholding such clauses by the UK Supreme Court (the UK's highest court) in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*. As noted in the 2022 edition of this *Annual Review*, different positions have been taken in other jurisdictions, with a full panel of the Singapore Court of Appeal having declined to follow *Rock Advertising* (in *Siang v Hau*). In this article we take a closer look at how the *Rock Advertising* decision has been applied by the English courts to "no-waiver" clauses.

Rock Advertising: a recap

Rock Advertising involved a licence agreement for office space for a fixed term of 12 months. The licence contained a NOM clause in the following terms: *"All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect."*

Six months later, the director of the licensee (Rock Advertising) had a telephone conversation with a credit controller from the licensor (MWB) about payment arrears. The court at first instance found that, during this conversation, a variation to the payment schedule was agreed. However, MWB treated the variation as merely a proposal and ultimately rejected the varied schedule. It then proceeded to lock Rock Advertising out of the premises for failure to pay the arrears and terminated the licence.

The Supreme Court upheld MWB's position, finding that the NOM clause was effective against the oral agreement relied on by Rock Advertising. The Court disagreed that the making of such an oral agreement implicitly dispensed with the NOM clause:

> *"What the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause. It is simply the situation to which the clause applies. … The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open."*

The Court also considered the potential for injustice to arise where oral agreements in contravention of an anti-variation clause have been acted upon by the parties who then find themselves unable to enforce the agreement. The Court left open whether the doctrine of estoppel might assist a party in such circumstances, although at the same time identifying a number of difficulties lying in the path of such an argument:

> *"In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself …"*

"No-waiver" clauses

One of the first English cases to apply *Rock Advertising* to a "no-waiver" clause was *Sumitomo Mitsui Banking Corporation Europe Ltd v Euler Hermes Europe SA (Nv)*. *Sumitomo* concerned a PFI waste treatment project in Derby, England. The construction sub-contractor provided a performance bond and retention bond to the SPV project company, which fulfils a main contractor role under a PFI contract structure ("**ProjCo**"). ProjCo assigned its rights to the bonds to a security trustee under the terms of a debenture agreement. The performance bond permitted such an assignment subject to the *"assignee confirming to the Bondsman in writing its acceptance of the Employer's repayment obligation pursuant to clause 8"*. Clause 8 obliged ProjCo to repay to the Bondsman any amounts found by a court to have been overpaid under the bond.

The security trustee sent a Notice of Assignment to the Bondsman, but did not confirm its acceptance of the repayment obligation in clause 8. The Bondsman signed a duplicate of the notice noting: *"We acknowledge receipt of the notice of assignment of which this is a copy and confirm each of the matters referred to in the notice of assignment."*

The security trustee subsequently claimed under the performance bond and the Bondsman argued that there had been no valid assignment due to the failure to confirm acceptance of the repayment obligation under clause 8. The security trustee claimed this requirement

had been waived by the Bondsman's acceptance of the Notice of Assignment. The Bondsman relied on a "no-waiver" clause in the Performance Bond as follows:

> *"12. Non-Waiver*
>
> *12.1 No failure or delay by either party in exercising any right or remedy under this Bond shall operate as a waiver; nor shall any single or partial exercise or waiver of any right or remedy preclude the exercise of any other right or remedy, unless a waiver is given in writing by that party.*
>
> *12.2 No waiver under clause 12.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Bond unless (and then only to the extent) expressly stated in that waiver."*

The court interpreted clause 12.2 as requiring a waiver to expressly identify the past or future default or breach being waived, or the particular terms being amended, deleted or added to. The Bondsman's acceptance of the Notice of Assignment did not contain such an express waiver and clause 12.2 had not therefore been fulfilled. The Supreme Court's decision in *Rock Advertising* required such terms to be given effect to and the assignment was, therefore, invalid.

Similarly, in *GPP Big Field LLP v Solar EPC Solutions SL*, a "no-waiver" clause stated that contractual rights *"may be waived only in writing and specifically"*. GPP had entered into five EPC contracts with a contractor for the construction of solar power generation plants at various locations in the UK. The projects ran into problems and GPP claimed for delay related losses (among other things).

The EPC contracts all contained liquidated damages provisions covering delays in commissioning ("**LDs**"). These stated that the liquidated damages amounts *"shall be paid in the way that the amount of the [LDs], as accrued up to the date of the next invoice of the Contractor …, shall be deducted from said invoice"*. The contractor argued that this was a mandatory mechanism for the recovery of LDs and that, by failing to deduct LDs from invoices, GPP had waived its entitlement to the LDs. Applying *Rock Advertising*, the English Commercial Court found that any such waiver was precluded by the "no-waiver" clause.

Two more recent cases over the past year have clarified the scope of particular forms of "no-waiver" clause. In *URE Energy Ltd v Notting Hill Genesis*, the "no-waiver" clause provided that: *"No delay or omission by either party in exercising any right, power or remedy under this Contract shall be construed as a waiver of such right, power or remedy…"*. The English Commercial Court held that in applying *Rock Advertising*, such a clause only applied to *"the negative sin of omission, i.e., pure delay or omission, and did not preclude reliance on positive acts such as a demand for contractual performance from a counterparty"*.

URE Energy Ltd ("**URE**") had submitted a successful bid to a local housing association for a long term 25 year contract for the supply of low cost electricity from renewable sources (the "**PPA**"). The lengthy contract term was needed to underwrite the construction of a 5 megawatt solar farm from which the electricity would be supplied. The parties were not in a position to execute the PPA immediately and entered into a 4-year short-term contract whilst the PPA was being negotiated. Neither party was obliged to enter into the PPA at this stage.

Approximately 9 months later, the housing association was amalgamated with another association (together, "**Genesis**"). This gave URE a right to terminate the short-term contract, but instead it continued to supply electricity under it. URE also continued to pursue negotiations over the PPA and to exercise a right of access for the installation of smart-meters. A further six months later, Genesis advised URE that it no longer intended to proceed with a long-term PPA. URE then sought to terminate due to the amalgamation. Genesis contended that URE had waived the right to terminate by its continued performance of the contract.

In the Court's view, URE's conduct after the amalgamation was sufficient to amount to a waiver notwithstanding the "no-waiver" clause quoted above. Whilst the mere continued supply of electricity may not have been sufficient, *"positively calling upon [Genesis] to co-operate in relation to the AMR rollout and continuing to negotiate for the [PPA] was sufficient positive conduct to amount in principle to … a waiver notwithstanding [the "no-waiver"] clause"*.

The drafting of the "no-waiver" clause in *Barclays Bank PLC v VEB.RF* was cast in broader terms as follows:

> *"(b)* ***Amendments****. No amendment, modification or waiver in respect of this Agreement will be effective unless in writing (including a writing evidenced by a facsimile transmission) and executed by each of the parties or confirmed by an exchange of telexes or electronic messages on an electronic messaging system."*

The defendant in that case argued that the requirement that a waiver be *"executed by each of the parties"* meant the clause was limited to waiver by agreement and not to unilateral waivers resulting from the words or conduct of one party. The English Commercial Court was unpersuaded by this interpretation:

> *"I do not see why in principle the parties' agreement should not be given effect to as a starting point – that is that it was agreed between the parties that no waiver that would be effective unless (a) it was in writing and (b) executed by each of the parties. … There was no reason why the parties should not adopt [Rock Advertising] in relation to waivers, if that is what they chose to do. … Such a provision avoids any attempt to undermine the written agreement, it avoids a dispute as to the scope of any waiver and it makes it easier to give effect to internal rules concerning the modification of contracts."*

Waiving the "no-waiver" clause?

As noted above, *Rock Advertising* leaves open the prospect of a NOM clause being waived through the doctrine of estoppel. However, more is required than mere evidence of the informal variation itself. At the very least, *"there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality"*.

The same requirement has consistently been found to apply to "no-waiver" clauses. For example, in *Sumitomo*, the English Commercial Court noted:

> *"While I accept … that a non-waiver clause can itself be waived, it would appear to me to be inconsistent with the recognition in Rock Advertising that party autonomy operates up to the conclusion of the contract and thereafter only to the extent that the contract allows to find that any conduct which would amount to a waiver of the original right also amounts to a waiver of the non-waiver clause. In my judgment there would have to be something which showed that there was not only a waiver but a waiver of the non-waiver clause. An analogy may be drawn which what was said … in Rock Advertising about estoppels …. Applying that reasoning and language to an alleged waiver, it appears to me that if it is said that waiver prevents reliance on a no waiver clause there would have to be something which indicated that the waiver was effective notwithstanding its noncompliance with the non-waiver clause and something more would be required for this purpose than what might otherwise simply constitute a waiver of the original right itself."*

Most recently, in the *Barclays Bank* case referred to above, the English Commercial Court noted that:

> *"for the defendant to succeed in its waiver claim it would have to show that the claimant had unequivocally represented that what is alleged to be a waiver was valid notwithstanding its informality and*

would have to do so by reference to something more than what is alleged to constitute the waiver."

It is worth recalling that conduct which is alleged to constitute a waiver will itself need to be unequivocal. Circumstances in which a "no-waiver" clause can be overcome will therefore require clear words or conduct giving rise to the waiver as well as equally clear words or conduct showing that the "no-waiver" clause was not to apply. One recent case has, however, suggested an alternative and less-onerous route for overcoming "no-waiver" clauses.

In *Kodric v Bitstamp Holdings NV (Rev1)*, Mr Kodric sought to challenge the exercise of a call option under a shareholders agreement (the "**SHA**") by Bitstamp Holdings NV ("**Bitstamp**") requiring Mr Kodric to sell his shares in a Bitstamp subsidiary. The call option only remained valid whilst the shares were held by Mr Kodric or a "Permitted Transferee", which included transfers to relations or to a family trust. Prior to the exercise of the call option, Mr Kodric wished to transfer his shares to a Luxembourg entity ("**White Whale**") over which he had control. Bitstamp's approval was required for this transfer and was obtained on the faith of representations by Mr Kodric and his lawyers that White Whale was a family trust.

White Whale was not a family trust and Mr Kodric sought to rely on this fact to argue that the call option was no longer exercisable after the shares had been transferred to White Whale. Bitstamp claimed that Mr Kodric was estopped from denying that White Whale was not a Permitted Transferee as a result of the representations made when seeking Bitstamp's consent to the transfer. Mr Kodric, in turn, relied on the following "no-waiver" clause in the SHA (in similar terms to the *GPP Big Field* case):

> *"The rights of each party under this deed may be exercised as often as necessary, are (unless otherwise expressly provided in this deed) cumulative and not exclusive of rights and remedies provided by law and may be waived only in writing and specifically".*

Despite this clause, the English Chancery Court upheld the estoppel asserted by Bitstamp. The Court noted that the guidance as to estoppel in *Rock Advertising* had in mind an estoppel arising from an informal promise or agreement to vary a contract. However, there was *"a potential difference between an estoppel as to the existence of a fact and an estoppel arising from an informal promise or agreement to vary a contract."* The estoppel relied upon by Bitstamp did not, in the Court's judgment, waive or modify the underlying contractual obligations:

> *"[The "no-waiver" clause] expressly preserves rights and remedies provided by law, at least if they do not impinge on the intention that any waiver of rights is to be in writing. When the parties acted on the common assumption or representation that White Whale was a Permitted Transferee neither [Bitstamp] nor Mr Kodrič waived any rights they had under the SHA or Side Letter. They did not modify the SHA or the Side Letter in any way. A determination by a Court that Mr Kodrič is not permitted to deny that White Whale was a Permitted Transferee would have implications for the legal rights that flow from the Side Letter and SHA, but that flows from a remedy provided by law, and the Court's determination, not a mutual dealing between the parties which [the "no-waiver"] clause … requires to be in writing."*

The same conclusion applied to a NOM clause in the SHA:

> *"It defines which parties can make certain types of amendments to the SHA; some require the approval of all shareholders, some do not. Such amendments have to be in writing. But there was no amendment of the SHA at the time of the White Whale transfer. A determination by a Court that Mr Kodrič is not permitted to deny that White Whale was a Permitted Transferee simply does not engage clause 22.1."*

This is a potentially significant exception to the estoppel requirements laid down in *Rock Advertising*. The distinction is essentially one between an estoppel which prevents a party from contesting that contract requirements have been complied with, and one which prevents a party from contesting that those requirements have been changed or modified. The soundness of such a distinction for the purpose of a "no-waiver" clause may be open to question. If, for example, Mr Kodric had represented that Permitted Transferees included any corporate entities over which he had control, the estoppel arising from such a representation would presumably have been frustrated by the "no-waiver" clause as one which had modified the SHA. It might be said that the difference between that representation and the one actually made by Mr Kodric (i.e. that White Whale was a Permitted Transferee) is too subtle to justify the diametrically opposite results which they give rise to on the court's analysis in this case.

The court's reasoning may also be challenged on its own terms. Even an estoppel which modifies a contractual obligation does not do so directly. The contractual obligation remains unchanged, but the party concerned is unable to deny (i.e. is estopped from denying) that the obligation has been modified as alleged by the opposing party. Such estoppels may only temporary and capable of being resiled from with due notice from the party concerned. In such cases, therefore, it may also be said that the estoppel does not modify the original contractual obligations *"in any way"* and that the legal implications flow *"from a remedy provided by law, and the Court's determination, not a mutual dealing between the parties which [the "no-waiver"] clause … requires to be in writing."*

It may also be said that the court's reasoning does not give sufficient weight to the purpose for which NOM and "no-waiver" clauses are included in commercial contracts. As noted in *Rock Advertising*, *"the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the [NOM] clause"*. As the counter-example cited above shows, whether an estoppel arises as to a given fact or the modification of a contractual obligation may depend on fine distinctions in the expression of the representation relied upon. On one view, the advantage of certainty for which the parties had stipulated when including a "no-wavier" clause would be undermined were the application of the clause to depend on such distinctions.

Some support for the court's reasoning in this case might, however, be drawn from the particular drafting of the "no-waiver" clause in question. The requirement for waivers to be specific and in writing is limited in the opening words of the clause to the "*rights of each party under this deed*". This might be said to support the court's finding that an estoppel preventing Mr Kodric from alleging that White Whale was not a Permitted Transferee on the basis that such a waiver was not one strictly in relation to rights under the SHA. By comparison, the "no-waiver" clause in *Barclays Bank* was cast in broader terms, referring to a "*waiver in respect of this Agreement*". Such a more broadly drafted clause might well have prevented the conclusion reached by the court in this case.

Conclusion and implications

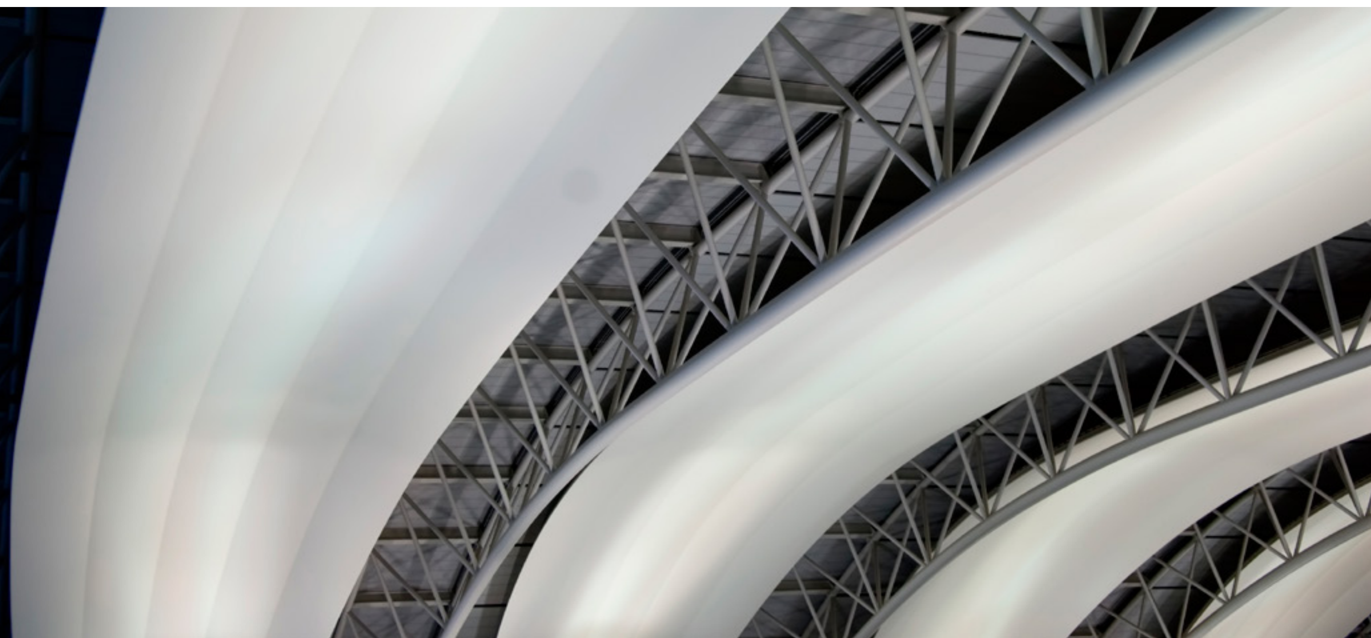
The above discussion shows that "no-waiver" provisions are being enforced by the English courts, but that variations in drafting are important. In particular:

- Clauses which merely refer to the delay in exercising, or the omission to exercise, certain rights as not amounting to a waiver are likely only to provide minimal protection. Waivers arising from positive acts will be unaffected (as in *URE Energy*).
- Providing that waivers must be "express" or "specific", in addition to being in writing and signed, will provide added protection by preventing arguments that certain documents have impliedly given rise to a waiver (as argued in *Sumitomo*).
- The fact that a "no-waiver" clause requires waivers to be signed by both parties will not necessary limit the clause to waivers by agreement (as argued in *Barclays Bank*), but it would be prudent for this point to be clarified expressly in the drafting if possible.
- Attention should be given as to how waivers are described. A clause which refers broadly to waivers "in relation to" or "in connection with" an agreement are more likely to avoid the difficult arguments as to different categories of estoppel which succeeded in overcoming the "no-waiver" clause in *Bitstamp*.

It remains to be seen whether the *Bitstamp* distinction between factual estoppels on the one hand and estoppels which modify contractual obligations on the other will be accepted in future cases. As noted above, there may be grounds on which such a distinction can be challenged. In the meantime, *Bitstamp* does provide some scope for parties to overcome no-waiver clauses, particularly where the drafting limitations present in that case have not been improved upon.

References:

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24; GPP Big Field LLP v Solar EPC Solutions SL [2018] EWHC 2866 (Comm); Sumitomo Mitsui Banking Corporation Europe Ltd v Euler Hermes Europe SA (Nv) [2019] EWHC 2250 (Comm); Charles Lim Teng Siang v Hong Choon Hau [2021] SGCA 43; Kodric v Bitstamp Holdings NV (Rev1) [2022] EWHC 210 (Ch); URE Energy Ltd v Notting Hill Genesis [2024] EWHC 2537 (Comm); Barclays Bank PLC v VEB.RF [2024] EWHC 3088 (Comm).



Termination for remediable and irremediable breaches

A decision of the English Technology and Construction Court last year has considered the concepts of remediable and irremediable breaches in the context of a failure to achieve milestone dates. The difference between these concepts in a construction context is a relatively unexplored area of English law, despite such terms being frequently deployed as termination triggers in international construction contracts.

Termination for remediable and irremediable breaches

Many international construction contracts contain termination provisions which provide the contractor with an opportunity to remedy the grounds on which termination is proposed. For example, clause 29.2 of the LOGIC construction form, 3rd edition, provides that:

> *"In the event of default on the part of the CONTRACTOR and before the issue by the COMPANY of an order for termination of all or any part of the WORK or the CONTRACT, the COMPANY shall give notice of default to the CONTRACTOR giving the details of such default. If the CONTRACTOR upon receipt of such notice does not commence and thereafter continuously proceed with action satisfactory to the COMPANY to remedy such default the COMPANY may issue a notice of termination in accordance with the provisions of Clause 29.1."*

Likewise, under the FIDIC form (in all editions) the Employer may terminate if the Contractor fails to carry out any obligation under the Contract and fails to make good the failure and to remedy it within a reasonable time as specified in a Notice to Correct issued under clause 15.1.

Some contracts go further and provide an immediate right to terminate where a breach is sufficiently serious and is irremediable. In such circumstances, the word "remediable" or similar phrases such as "capable of remedy" are generally understood to be future focused. As noted by Lord Reid in *L Schuler AG v Wickman Machine Tool Sales Ltd*:

> *"The question … is what is meant in this context by the word "remedy". It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think that the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place. And in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause."*

Particular difficulties arise where delayed performance is concerned. Whilst in one sense delayed performance is irremediable, as time can not be reversed, the English courts have adopted a broader approach. In *Peregrine Systems Limited v Steria Limited*, the English Technology and Construction Court noted that termination provisions which refer to remediable and irremediable breaches would lack practical utility *"if the fact that the date for performance of a positive obligation had passed meant that the breach of that obligation was to be taken to be irremediable, even if it could be performed late. Until the last date for performance had passed there was no breach. It would be strange if in those circumstances, the moment there was a breach that breach was irremediable, however quickly thereafter the obligation could be performed."*

Another Technology and Construction Court decision last year has considered the relationship between remediable and irremediable breaches further in the context of delays to contractual milestone dates.

Disclosure and Barring Service v Tata Consultancy Services Ltd

As noted in earlier articles, the Disclosure and Barring Service ("**DBS**") engaged Tata Consultancy Services Ltd ("**Tata**") to build a digital platform to streamline DBS's criminal record checks process. The project was divided into different parts with each part having separate milestone dates. By November 2017, Tata was in culpable delay in relation to the milestone completion date for works known as "R1-D". In September 2018, DBS served a notice of partial termination in respect of the R1-D works relying on the following provision in the contract:

> *"55.11 Subject to the provisions of clause 56 (Remedial Plan Process), the AUTHORITY may, by one (1) month's prior written notice, require the Partial Termination of any part of the Services on the occurrence in relation to that part of a material Default by the CONTRACTOR, where the Default is not capable of remedy or, if the Default is capable of remedy, the Default has not been remedied in accordance with the Remedial Plan Process."*

DBS did not follow the Remedial Plan Process but contended that the delays to the R1-D works were irremediable on the basis that the contract contained an expiry date of 31 March 2019. DBS's notice of partial termination alleged that there was "*not sufficient time within the remaining Term of the Agreement for [R1-D] to be delivered, even if TCS had a credible plan for delivery"*. On this basis, DBS sought to exercise an immediate right to partially terminate under clause 55.11.

The Technology and Construction Court accepted the premise of DBS's argument that the expiry date for the contract provided a useful basis from which to determine whether a particular delay was remediable or not. In this court's view, it did not follow that *"because something could physically be done late it can never amount to an irremediable breach of an obligation to do something by a certain time"*. Everything would depend on the circumstances of the case.

The question as to whether a breach was remediable was to be determined objectively at the time at which the purported notice of termination was given. In circumstances where, viewed at the time, a breach may be capable of remedy, the remedial process provided by the contract would be necessary. It would not be sufficient for DBS to rely merely on hindsight to show that the milestone could not have been completed prior to the contractual expiry date.

The court nevertheless agreed with DBS that at the time of its notice it was not possible for the R1-D works to be completed prior to the contractual expiry date. The breach was therefore irremediable at that point. However, the court found that DBS was unable to rely on clause 55.11 in circumstances where the breach had first arisen 10 months earlier and would have been remediable at that earlier date. In the court's judgment, DBS's rights under clause 55.11 were required to be exercised within a reasonable time:

> *"I accept that the proper construction of the contract is that the Authority could only exercise a right of Partial Termination within a reasonable time of the operation of the Remedial Plan Process or the alleged material Default. This construction is both obvious and necessary. The whole purpose of the Remedial Plan Process is to give the Contractor, within defined timescales, the opportunity to remedy a material Default which otherwise gives the Authority the right to remove that part of the work. The purpose of the regime would be defeated if, in relation to a material Default of which it is aware, the Authority*

could simply wait until, by reason of the effluxion of time, it is no longer capable of remedy, and then invoke Clause 55.11 and, by so doing, sidestep the obligations in Clause 56 to which Clause 55.11 is expressly subject.

Conclusions and implications

This decision has a number of implications for construction contracts which contain termination rights in relation to irremediable breaches as well as those, such as the FIDIC and LOGIC examples quoted above, which merely allow termination where remediable breaches are not cured after reasonable notice.

Whether or not delay related breaches are irremediable is likely to depend on broader indications within the contract as to when delays to completion have serious consequences for the employer. For example, many international construction contracts will contain a cap on delay liquidated damages after which a right to terminate arises. Delays which are unable to be recovered prior to the breaching of such a cap might on this basis said to be irremediable, in the same way that delays which could not be recovered prior to the expiry date in this case were. Such an analysis may enable termination rights to arise at an earlier point in time in contracts where irremediable breaches are a permitted ground for termination.

The court's finding that such rights must be exercised within a reasonable period of time is notable. Termination rights do not always need to be exercised within a reasonable period of time (see for example, the *Essex County Council v UBB Waste* decision reported in the 2021 edition of this publication). The decision in this case, however, suggests that reasonable time requirements are likely to apply where a termination clause distinguishes between remediable and irremediable breaches. Employers are unlikely to be able to rely on any delay prior to the giving of a termination notice to support a claim that a breach is irremediable.

Similar arguments might be made as to the implication of reasonable time limitations into clauses dealing only with remediable breaches such as the FIDIC and LOGIC examples quoted above. Whilst delay in such cases will not have the effect of converting a remediable breach into an irremediable breach, it may still make it more difficult or costly for a contractor remedy a breach than would have otherwise been the case had a notice to remedy been given promptly.

References:

Essex County Council v UBB Waste (Essex) Ltd (Rev 1) [2020] EWHC 1581 (TCC); *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; *Peregrine Systems Limited v Steria Limited* [2004] EWHC 275 (TCC); *Tata Consultancy Services Ltd v Disclosure and Barring Service* [2024] EWHC 1185 (TCC).

Arbitration update: new SIAC rules

Following extensive consultation, on 9 December 2024 the Singapore International Arbitration Centre ("SIAC") officially released the 7th edition of the SIAC Arbitration Rules (the "**2025 Rules**"). The new rules take effect from 1 January 2025. In this article, we discuss the key changes made and the implications for parties, arbitration practitioners as well as tribunals.

Introduction

The previous edition of the SIAC Arbitration Rules were issued in 2016. The 6th edition was groundbreaking at the time it was issued - introducing innovative concepts such as the early dismissal of claims and defences which are without legal merit or manifestly outside the jurisdiction of the tribunal; and greater powers to order the consolidation of disputes and joinder of parties multi-contract disputes.

The 2025 Rules continue in the same vein of addressing the concerns of stakeholders and innovating to ensure that SIAC remains an attractive institution at a time when arbitration is facing its own challenges in relation to costs – survey respondents frequently identify "cost" as the worst characteristic of international arbitration.

The main changes in the 2025 Rules from the 2016 Rules address issues related to cost, efficiency and transparency. Key changes include:

- the introduction of new procedures (such as the Streamlined Procedure, preliminary determinations and coordinated proceedings);
- the expansion of cases eligible for the Expedited Procedure;
- enhancements to the Emergency Arbitrator procedure;
- the incorporation of "SIAC Gateway";
- the updated appointment provisions and codification of the power of tribunals to appoint tribunal secretaries in SIAC arbitrations; and
- the inclusion of specific provisions encouraging parties to consider mediation.

New procedures aimed at increasing efficiency and transparency

The Streamlined Procedure

The Streamlined Procedure (governed by Rule 13 and Schedule 2 of the SIAC Rules 2025) is a new procedure designed for low value disputes not exceeding S$1 million. It is designed to be fast and cost-effective.

Matters will be decided by a sole arbitrator, whose fees, as well as the SIAC's fees shall not exceed 50% of the maximum limits set by the SIAC's Schedule of Fees, unless the Registrar decides otherwise. The default position (unless the tribunal determines otherwise) is that the arbitration shall be decided on the basis of written submissions and documentary evidence; parties will not be entitled to make requests for disclosure; there will not be a right to file any fact or expert witness evidence; and there is no automatic right to a hearing.

The tribunal shall state the reasons upon which any award is based in summary form, unless parties agree that no reasons are to be given. Final awards are to be made within three (3) months from the date of constitution of the tribunal, unless the Registrar extends the time for making the final award. The tribunal also has the general power to conduct the streamlined proceedings in a manner that it considers appropriate, and is empowered to set time limits on the expiry of which parties shall not be entitled to file interlocutory applications without leave of the tribunal.

Preliminary determination

Pursuant to Rule 46 of the SIAC Rules 2025, parties may now apply to the tribunal for a final and binding Preliminary Determination of any issue that arises for determination in the arbitration, if one of the following conditions are met: (a) the parties agree that the tribunal may determine such an issue on a preliminary basis; (b) the applicant demonstrates that the determination of the issue on a preliminary basis is likely to contribute to savings of time and costs and a more efficient and expeditious resolution of the dispute; or (c) the circumstances of the case otherwise warrant the determination of the issue on a preliminary basis.

Once a tribunal accepts an application for a preliminary determination, it must render its determination within 90 days from the date of the application unless the time is extended by the Registrar, by way of a decision, ruling, order or award, with reasons which may be in summary form.

Coordinated proceedings

Rule 17 of the SIAC Rules 2025 provides for the coordination of proceedings where the same tribunal is constituted in two or more arbitrations, and a common question of law or fact arises out of or in connection with all the arbitrations. Under this Rule, a party to the arbitrations may apply to the tribunal for the arbitrations to be coordinated.

If allowed, the arbitrations could be conducted concurrently or sequentially; or be heard together with any procedural aspects aligned; or any of the arbitrations to be suspended pending a determination in any of the other arbitrations.

These new procedures under the SIAC Rule 2025 provide tribunals with greater flexibility and discretion in managing the arbitration process. Given the increasingly complex scenarios that may arise in international construction disputes, these new procedures will allow parties and counsel find innovative solutions in order to increase the overall efficiency and cost-effectiveness of arbitration proceedings.

Developments to current procedures

Expansion of cases eligible for Expedited Procedure

The SIAC Rules 2025 refreshes the Expedited Procedure as was introduced in the SIAC Rules 2016. Changes to the qualifying criteria include an increased ceiling on eligible disputes from S$6 million to S$10 million under Rule 14.2(a), and a new criterion for the applicability of the Expedited Procedure where the circumstances of the case warrant under Rule 14.2(c). Parties may also agree for the Expedited Procedure to govern arbitral proceedings prior to the constitution of the tribunal.

Enhancements to Emergency Arbitrator procedure

Under the SIAC Rules 2025, parties may now request the appointment of an Emergency Arbitrator before a Notice of Arbitration ("**NOA**") is filed. Under the prior SIAC Rules 2016, a party would only be able to apply for an Emergency Arbitrator concurrent with or after the filing of an NOA. This refinement provides parties with greater flexibility and enhanced protections in the event of the need for urgent interim measures. However, the NOA must then be filed within 7 days of the Registrar's receipt of the Emergency Arbitrator application, if not already filed with the application.

The SIAC Rules 2025 also allows parties to obtain without notice protective preliminary orders in aid of intended emergency interim or conservatory measures. Under paragraph 25 of Schedule 1, a party requesting for appointment of an Emergency Arbitrator to consider a request for an interim measure may at the same time apply for such protective orders to direct another party not to frustrate the purpose of the requested emergency interim or conservatory measure, without notifying the other party. The Emergency Arbitrator must decide on such applications within 24 hours of his appointment. Any order made by the Emergency Arbitrator on the application shall be transmitted by the SIAC to all parties to the arbitration subsequently, and the applying party is also required to deliver a copy of all the case papers filed in the arbitration, the Emergency Arbitrator's order, and all other communications between the SIAC and the applying party to all the parties. The party against whom the order is directed will have an opportunity to present their case at the earliest practicable time.

Simplification of processes and increasing collaboration

Measures that are designed to ease case administration, simplify the process of commencing arbitration and constituting the tribunal have been introduced in the SIAC Rules 2025.

Simplified filing procedure

Under Rule 6.3(d) and (e) of the SIAC Rules 2025, it is permissible but no longer mandatory to include a copy of the contract and arbitration agreement in the NOA – a description of the relevant contract and arbitration agreement will suffice.

Additionally, the SIAC Rules 2025 do away with the default requirement under Rules 3.1(h) and 4.1(d) of the SIAC Rules 2016 for claimants to provide nomination or proposal for arbitrator or sole arbitrator, respectively, when filing the NOA, and for respondents to provide nomination, comments on claimant's proposal or counter-proposals for an arbitrator or sole arbitrator, respectively, when filing the Response to the NOA ("**Response**"), subject to the parties' agreement otherwise. Instead, under Rule 6.3(g) of the SIAC Rules 2025, parties are required only to provide *"any comment as to the… number of arbitrators, and procedure for the constitution of the Tribunal"*.

Subject to any such agreement otherwise, the aforesaid amendments provide parties with the opportunity for a more neutral and collaborative approach towards the constitution of the tribunal at the NOA and Response stages. This will also have an impact on parties' strategy with respect to arbitrator appointments.

Incorporation of "SIAC Gateway"

SIAC Gateway is SIAC's newly developed and launched cloud-based management platform that provides features such as electronic filing, an online payment system, secure document and storage for use by parties and tribunals in SIAC arbitrations. SIAC Gateway serves as an enhancement to the existing modes for managing the administration of arbitrations.

Under Rule 4.2 of the SIAC Rules 2025, the Registrar may, after considering the views of the parties and the tribunal, direct the parties to upload all written communications to SIAC Gateway.

Tribunal's power to appoint tribunal secretaries

Rule 24 of the SIAC Rules 2025 provides for the power of tribunals to appoint tribunal secretaries, and the expected and permitted roles of tribunal secretaries. In particular, the tribunal may: (a) after considering the views of the parties and in consultation with the Registrar, appoint a tribunal secretary; or (b) after considering the views of the parties and with approval from the Registrar, appoint a member of the SIAC Secretariat as a tribunal secretary.

In addition, Rule 24 provides that tribunals shall not delegate any of its decision-making functions to the tribunal secretary, and that all tasks carried out by the tribunal secretary shall be carried out on behalf of, and under the supervision of, the tribunal. The appointment of any tribunal secretary is subject to the same duties of disclosure applicable to arbitrators under Rule 20, and parties may challenge a tribunal secretary. Tribunal secretaries may also be removed by the tribunal – unless the tribunal secretary is a member of the SIAC Secretariat, in which case the tribunal must consult with the Registrar before removing them. These provisions safeguard against concerns over the supervision and delegation of functions to tribunal secretaries, and the impartiality or independence of tribunal secretaries.

Encouragement to consider mediation

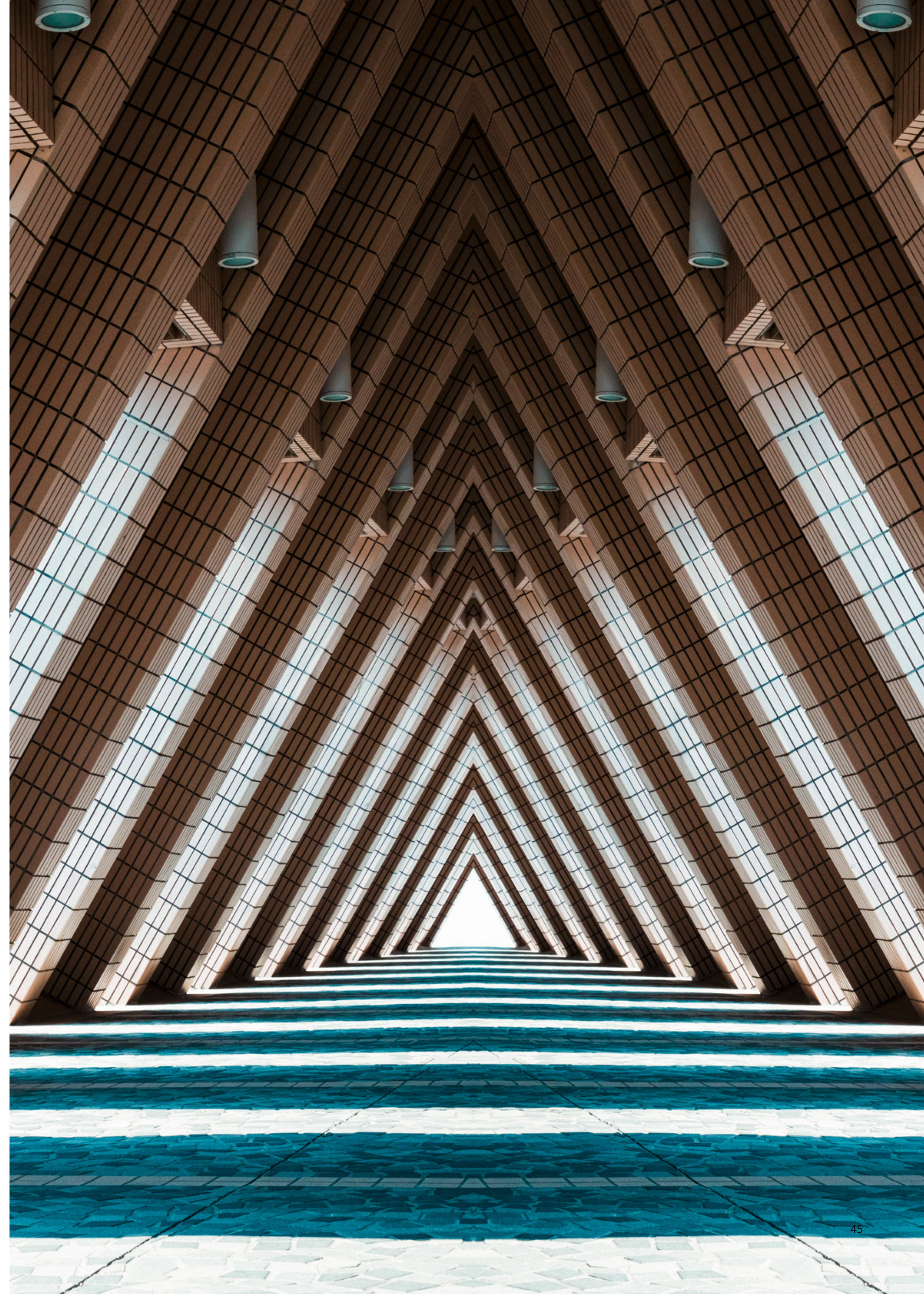
The SIAC Rules 2025 actively encourage the early settlement of disputes. Rule 32.4 provides a new mechanism for tribunals to consult with parties as soon as practicable after the tribunal's constitution in a first case management conference with the parties on the potential for settlement of all or part of a dispute, including through adoption of amicable resolution methods such as mediation. Unless otherwise agreed by the parties or prohibited by mandatory rules of any applicable law, Rule 50.2(l) empowers the tribunal to make any necessary directions, including a suspension of proceedings, for the parties to adopt any amicable dispute resolution methods such as mediation under the SIAC-SIMC AMA (Arb Med Arb) Protocol.

Conclusion

The SIAC Rules 2025 introduces rules and revisions that are clearly aimed at enhancing and expediting the efficiency of the arbitration process for users and arbitration practitioners.

New procedures such as the Streamlined Procedure and enhancements such as expanding the ambit of cases eligible for the Expedited Procedure are responsive to issues prevalent in international arbitration - rising costs, increasingly complex substantive and procedural disputes, and the need for procedures that provide time-sensitive and effective emergency relief.

Overall, the SIAC Rules 2025 reflect a welcome commitment to modernising the arbitration process with a view to enhancing its effectiveness.



International English Law Construction Contacts

Paul Smith
Partner, Energy Projects & Construction Practice Group Manager (London)
T +44 20 7367 3475
E paul.smith@cms-cmno.com

Steven Williams
Partner, Co-Head of ICE Disputes (London)
T +44 20 7524 6713
E steven.williams@cms-cmno.com

Matthew Taylor
Partner, ICE Disputes (London)
T +44 20 7524 6341
E matthew.taylor@cms-cmno.com

Sunil Mawkin
Partner, ICE Disputes (London)
T +44 20 7367 2391
E sunil.mawkin@cms-cmno.com

Philip Norman
Partner, ICE Disputes (London)
T +44 20 7067 3311
E philip.norman@cms-cmno.com

Emma Schaafsma (Kratochvilova)
Partner, ICE Disputes (London)
T +44 20 7367 2316
E emma.schaafsmakratochvilova@cms-cmno.com

Greg Sibbald
Partner, ICE Disputes (Dubai)
T +971 4 374 2858
E greg.sibbald@cms-cmno.com

Lynette Chew
Partner, ICE Disputes (Singapore)
T +65 6422 2840
E lynette.chew@cms-holbornasia.com

Damien Watkin
Partner, ICE Disputes (Abu Dhabi)
T +971 58 211 8580
E damian.watkin@cms-cmno.com

David Parton
Partner, Head of Construction (London)
T +44 20 7524 6873
E david.parton@cms-cmno.com

Adrian Bell
Partner, Co-Head of ICE Disputes (London/Dubai)
T +44 20 7367 3558
E adrian.bell@cms-cmno.com

Phillip Ashley
Partner, ICE Disputes (London)
T +44 20 7367 3728
E phillip.ashley@cms-cmno.com

Sarah Grenfell
Partner, ICE Disputes (London)
T +44 20 7367 3549
E sarah.grenfell@cms-cmno.com

Aidan Steensma
Of Counsel, ICE Disputes (London)
T +44 20 7367 2137
E aidan.steensma@cms-cmno.com

Mohammed Aldowish
Partner, ICE Disputes (Riyadh, Saudi Arabia)
T +966 11 488 6739
E mohammed.aldowish@cms-cmno.com

Kelvin Aw
Partner, ICE Disputes (Singapore)
T +65 6422 2841
E kelvin.aw@cms-holbornasia.com

Jeremie Witt
Partner, ICE Disputes (London & Brisbane)
T +61 7 3184 9111
E jeremie.witt@cms-cmno.com

Jay Randhawa
Partner, ICE Disputes (Riyadh)
T +966 56 418 0323
E jay.randhawa@cms-cmno.com

CMS offices

The Americas

Bogotá
Lima
Mexico City
Rio de Janeiro
Santiago de Chile
São Paulo
Silicon Valley*

Europe

Aberdeen
Amsterdam
Antwerp
Barcelona
Belgrade
Bergen
Berlin
Bratislava
Bristol
Brussels
Bucharest
Budapest
Cologne
Dublin
Duesseldorf
Edinburgh
Frankfurt
Funchal
Geneva
Glasgow
Gothenburg
Hamburg
Istanbul
Kyiv
Leipzig
Lisbon
Liverpool
Ljubljana
London
Luxembourg
Lyon
Madrid
Manchester
Milan
Monaco
Munich
Oslo
Paris
Podgorica
Poznan
Prague
Reading
Rome
Sarajevo
Sheffield
Skopje
Sofia
Stavanger
Stockholm
Strasbourg
Stuttgart
Tirana
Vienna
Warsaw
Zagreb
Zurich

Africa

Casablanca
Ebene
Johannesburg
Luanda
Maputo
Mombasa
Nairobi

Middle East

Abu Dhabi
Dubai
Muscat
Riyadh
Tel Aviv

Asia-Pacific

Beijing
Bengaluru
Brisbane
Chennai
Gurugram
Hong Kong
Hyderabad
Mumbai
New Delhi
Shanghai
Singapore
Sydney

* Representative Office

CMS Law-Now™

Your free online legal information service.

A subscription service for legal articles
on a variety of topics delivered by email.
cms-lawnow.com

CMS Cameron McKenna Nabarro Olswang LLP
Cannon Place
78 Cannon Street
London EC4N 6AF

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Cameron McKenna Nabarro Olswang LLP is a limited liability partnership registered in England and Wales with registration number OC310335. It is a body corporate which uses the word "partner" to refer to a member, or an employee or consultant with equivalent standing and qualifications. It is authorised and regulated by the Solicitors Regulation Authority of England and Wales with SRA number 423370 and by the Law Society of Scotland with registered number 47313. It is able to provide international legal services to clients utilising, where appropriate, the services of its associated international offices. The associated international offices of CMS Cameron McKenna Nabarro Olswang LLP are separate and distinct from it. A list of members and their professional qualifications is open to inspection at the registered office, Cannon Place, 78 Cannon Street, London EC4N 6AF. Members are either solicitors or registered foreign lawyers. VAT registration number: 974 899 925. Further information about the firm can be found at cms.law

© CMS Cameron McKenna Nabarro Olswang LLP

CMS Cameron McKenna Nabarro Olswang LLP is a member of CMS LTF Limited (CMS LTF), a company limited by guarantee incorporated in England & Wales (no. 15367752) whose registered office is at Cannon Place, 78 Cannon Street, London EC4N 6AF United Kingdom. CMS LTF coordinates the CMS organisation of independent law firms. CMS LTF provides no client services. Such services are solely provided by CMS LTF's member firms in their respective jurisdictions. CMS LTF and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS LTF and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

© CMS Cameron McKenna Nabarro Olswang LLP 2025

2509-0200559- 3