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International Quarterly

International Quarterly provides informative and practical information regarding legal and commercial developments in construction and energy sectors around the world.

Inside this issue:

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Welcome to Issue 40

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Welcome to our latest edition of *International Quarterly* which highlights issues important to international arbitration and projects.

In our 40th issue, we begin with a look at a Privy Council decision which provided rare judicial guidance on interpretation of standard terms of FIDIC contracts in *Water and Sewerage Authority of Trinidad and Tobago (Respondent) v Waterworks Ltd (Appellant) (Trinidad and Tobago)*. Philip Hancock takes a closer look at the facts of the case and the court's reasoning behind their ruling.

We turn next to the UAE, where the Dubai local onshore courts have recognised and upheld the "*without prejudice*" principle. Roma Patel reviews this departure by the courts form the traditional approach, as well as the implications this may have in the region.

Layla Blair next examines the Singapore International Arbitration Centre's 2025 Rules, which introduce new procedures and enhancements to existing processes.

Finally, Jonathan Clarke analyses the ruling in *Destin Trading Inc v Saipem SA*, which serves as a cautionary tale on the interplay of settlement agreements and arbitration agreements.

If there are any areas you would like us to feature in our next edition, please let me know.

Jeremy

News and Events

News

Fenwick Elliott is delighted to announce that as of 1 April 2025, Karen Gidwani succeeded Simon Tolson as Fenwick Elliott's senior partner, with Simon continuing his extensive work for clients as a partner at the firm. Karen will take up the role following a 25-year career with the firm, having been a partner since 2006. The transition followed Simon's two-plus decades as senior partner, during which time Fenwick Elliott has more than doubled in size, currently being active in nearly 50 jurisdictions. *Visit our website* to read more.

In April we announced the launch of the Jon Miller Scholarship in partnership with Queen Mary University London. The scholarship, in loving memory of Jon Mlller following his passing last year, will support students from low income backgrounds in East London who are studying at QMUL's School of Law. More information is *available here*.

Events

The FIDIC Summer School returns for its fifth year and will be held from 1-5 July at King's College London. Fenwick Elliott partners Nicholas Gould, Claire King and Jeremy Glover are instructors on the course which offers in-depth training on the FIDIC suite of contracts and their practical application in international construction projects.

We are proud to sponsor the Building the Future Conference in London on 2 October. Partner Ben Smith will be speaking on the latest building safety regulations. *Click here* for more information.

Webinars

Fenwick Elliott hosts regular webinars that address key issues and topics affecting the construction industry. Our next webinar looks at AI and Construction Law, with Fenwick Elliott partner Dr Stacy Sinclair, alongside 4 Pump Court barrister Rebecca Keating, exploring how AI is transforming project delivery and dispute resolution. This 19 June webinar will focus on the key opportunities, legal risks and practical implications for those working in construction and infrastructure. Please *click here* to register to attend.

If you would like to enquire about organising a webinar or event with some of our team of specialist lawyers, please contact Stacy Sinclair (ssinclair@fenwickelliott.com). We are always happy to tailor an event to suit your needs.

This publication

We aim to provide you with articles that are informative and useful to your daily role. We are always interested to hear your feedback and would welcome suggestions regarding any aspects of construction, energy or engineering sector that you would like us to cover. Please contact Jeremy Glover with any suggestions (jglover@fenwickelliott.com).

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FIDIC termination for convenience payment did not cover cancellation charges payable under subcontracts

Even though FIDIC contracts are widely used around the world, it can be hard to find judicial guidance on interpretation of standard terms of FIDIC contracts (because they are often considered in confidential arbitrations).

The case of *Water and Sewerage Authority of Trinidad and Tobago (Respondent) v Waterworks Ltd (Appellant) (Trinidad and Tobago)* [2025] UKPC 9 is, therefore, a rare treat. It provides helpful insight and guidance on the court's interpretation of the FIDIC termination for convenience provisions.

The 1999 Yellow Book permits the employer to terminate for convenience (under clause 15.5), and (in such circumstances) provides that the contractor shall be paid in accordance with clause 19.6, which provides that "*upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include: ... (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works ...*". It was this limb (c) that was considered by the Privy Council in the Waterworks case.

Key takeaways

1. What costs fall within clause 19.6(c) of FIDIC will be a matter of interpretation, by reference to the facts around why a particular cost was incurred. In the Waterworks case, cancellation charges under two purchase orders with suppliers, which were executed at an early stage of the contractor's design, were not recoverable because the court found that the purchase orders were executed prematurely (because the design had not yet been finally approved by the employer).
2. For that reason, contractors should think carefully about when it is necessary to enter into supply/subcontracts, especially if at an early (e.g. tender) stage, and keep contemporaneous records that help explain why it may be necessary to execute a particular agreement, on particular terms, at a particular time (e.g. the need to secure particular delivery windows).
3. It is helpful for termination provisions of supply/subcontracts to be back-to-back with the main contract, so that whatever is payable to suppliers/subcontractors is more likely to be recoverable from the employer.

Facts of the case

Waterworks Limited (the "**Contractor**") was engaged by the Water and Sewerage Authority of Trinidad and Tobago (the "**Authority**") to design and build two water treatment plants, pursuant to two design and build contracts (the "**Contracts**") based on the 1999 FIDIC Yellow Book (the "**Projects**").

The Contracts were executed in July and October 2007. The Contractor was due to commence its works 14 days from the date of the relevant Contract, and then had 15 months to complete the works. The general scheme of works entailed (1) preparation by the Contractor, and approval by the Authority, of preliminary designs, (2) preparation, and approval, of final designs, and (3) construction by the Contractor of the water treatment plants in line with the approved final designs.

Early during the Projects, the Authority informed the Contractor of potential issues that the Authority had to overcome to proceed with the Projects, including acquisition of one of the sites,

completion of surveys, and obtaining environmental clearance.

After execution of the Contracts, the Contractor executed purchase orders (in or around April 2008) with a supplier ("**MAAK**") which had, during the tender phase, carried out the Contractor's design work. The true nature of the purchase orders was in contention during the case, but, in effect, they provided for the supply of equipment by MAAK for use in building each water treatment plant. The purchase orders contained a provision that, if cancelled, the Contractor would be liable to pay a minimum amount equal to 30% of the quoted price of the products to be supplied.

In June and October 2009, the Authority terminated the Contracts for convenience. The Contractor submitted financial claims under the Contracts, which included the 30% cancellation charges for the two MAAK purchase orders. The Engineer determined that the Contractor was not entitled to be paid the 30% cancellation charges. The Contractor's entitlement to the cancellation charges was the subject of the appeal to the Privy Council, and specifically whether the Contractor was entitled to payment under clause 19.6(c) (i.e., whether they had been reasonably incurred in expectation of completing the works).

Court's reasoning and decisions

At first instance, the court found that the Contractor was entitled to be paid the cancellation charges. Partly based on witness evidence of MAAK's president, the judge accepted that it was "*necessary and normal business practice*" for contractors to enter into agreements with subcontractors at the tender stage, which bound the subcontractor to provide services or equipment at the prices used as the basis of the tender. By such agreements, contractors mitigated the risk of price increases between tender stage and execution stage (a big issue in recent years!).

However, the Trinidad & Tobago Court of Appeal and, ultimately, the Privy Council, disagreed with the that decision. The Privy Council found that the Contractor was unreasonable, and premature, to execute purchase orders for supply of the equipment at such an early stage. That was because it was necessary to obtain the Authority's approval to the final designs, to give certainty as to what equipment was necessary, which approval the Authority never gave before terminating the Projects.

The first instance decision was partly based on an interpretation that the purchase orders were not in fact orders to obtain the equipment, but rather arrangements to acquire the equipment at an unspecified time in the future, at the price quoted by MAAK in 2008. The Court of Appeal and Privy Council rejected that interpretation and found that the purchase orders were, in fact, purchase orders, and that where the final design was yet to be approved, it was premature to have agreed those purchase orders and, by extension, the 30% cancellation charges.

It was also noted that neither the Contractor nor MAAK had taken any steps to actually arrange shipment or delivery of any of the equipment in the 14 to 18 month period between executing the purchase orders to termination of the Contracts, nor were any invoices raised in the period.

Comment

Part of the Privy Council's reasoning was that the Contractor had not adduced any evidence that it was reasonable for the Contractor to enter into the MAAK purchase orders, and so the Contractor had not discharged its burden of proof to show that the cancellation charges fell within the meaning of clause 19.6(c).

If the Contractor could have proven that it was reasonable to do so, for example, witness evidence that it was necessary to secure a particular delivery window to keep to the programme, and that the cancellation charges were standard in the industry, the result might have been different.

This case highlights the benefit in keeping contemporary records (e.g. minutes of meetings, internal notes) that evidence why it may be necessary to enter into particular contracts at a particular time, especially where they may be executed at an early stage of the works, or contain onerous terms such as the cancellation charges in the MAAK purchase orders.

It is also a warning that parties should think carefully before agreeing to such terms, where they may not be back-to-back with other agreements (and sums may be payable under one contract, and not recoverable under another).

In relation to the fact that the Authority had indicated at an early stage that there were some issues with the Projects that they had to overcome, the Privy Council helpfully noted that "*as a general rule under a contract of this kind, the contractor is entitled to proceed and to incur costs and liabilities on the assumption that the contract will be performed*". So, the Contractor was entitled to proceed with its design and procurement without worrying that the Contracts may be terminated (or, at least, that did not factor against the Contractor in determining whether costs were incurred reasonably).

The 2017 FIDIC Rainbow Suite includes changes that may mitigate against some of these risks: under clause 15.6, termination for convenience by the employer entitles the contractor to payment of "*any loss of profit or other losses and damages suffered by the Contractor as a result of this termination*". That clause is drafted more widely than clause 19.6, and so it might be that the Contractor could have recovered the MAAK cancellation charges under the 2017 form.

For more on termination for convenience under FIDIC and how it is dealt with in different forms, please see this excellent article by my colleagues Mark Pantry and Caitlin Binns.

Recognition of "without prejudice" in the UAE

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The Dubai local onshore courts recently recognised and upheld the "*without prejudice*" principle, a principle previously not recognised. This marks a significant development to the approach taken to confidential settlement discussions in the UAE.

Introduction

"*Without prejudice*" privilege is recognised in several common law jurisdictions. The "*without prejudice*" principle offers protection against certain communications made during the course of negotiations or discussions concerning settlement. It prevents these statements from being used as evidence in court or other legal proceedings, specifically against the party who made the "*without prejudice*" statement. The purpose of this principle is to encourage open, honest and unreserved discussions between parties in an attempt to resolve and settle disputes without the fear that communications will later be held against parties later on in the proceedings.

The traditional approach taken by the courts

The UAE local onshore courts have not previously recognised the "*without prejudice*" principle. In fact, the courts have admitted and considered documents marked "*without prejudice*" or statements used in the course of settlement discussions as evidence. Consequently, this approach has often hampered settlement discussions between parties.

Recent developments

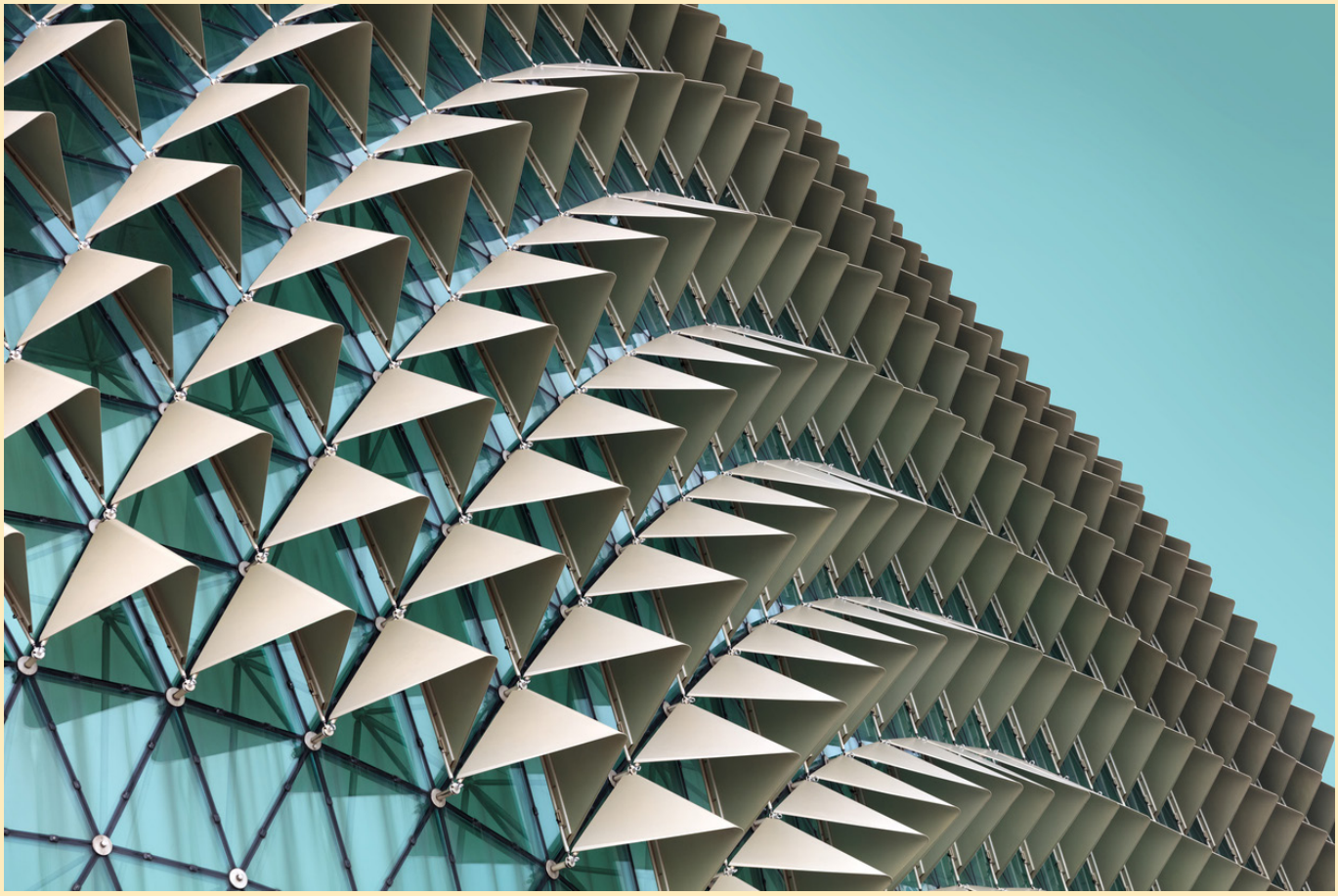
A recent landmark decision on Case No. 31/2024, issued on 22 October 2024 by the Dubai Court of Cassation, significantly departed from the traditional approach taken by the local onshore courts. The judgment held that communications made in the course of settlement were inadmissible as evidence.

Background

The dispute arose out of an agreement to purchase cryptocurrency. The Claimant filed a claim seeking to recover funds plus interest from the Defendant. The Claimant claimed that it had transferred a specific amount of funds to the Defendant to purchase the equivalent amount of cryptocurrency. However, the Claimant alleged that the Defendant failed to transfer the equivalent amount of cryptocurrency which the Claimant claimed had been agreed between the parties. Following the analysis of a court-appointed expert committee, the Court of First Instance awarded a lower amount than claimed by the Claimant.

The Claimant appealed, arguing that the Court of First Instance had not analysed the evidence properly, including WhatsApp communications exchanged between the parties during settlement negotiations. In these negotiations, the Defendant allegedly admitted to owing a higher amount than what was awarded by the Court of First Instance.

On 3 April 2024, the Court of Appeal issued its judgment in Case No. 31/2024. The Court of Appeal upheld the Court of First Instance's judgment. In its consideration of the evidence, the Court of Appeal applied the "*without prejudice*" principle. It held that settlement communications were inadmissible as evidence. Whilst it is unclear and unlikely that the WhatsApp communications were marked as "*without prejudice*", it was clear the communications were intended to facilitate settlement between the parties. The Claimant filed a further appeal to the Court of Cassation.



On 22 October 2024, in Case No. 486/2024, the Court of Cassation upheld the Court of Appeal's judgment. In its analysis, it made clear that statements made during the course of failed amicable settlement discussions were not to be taken as evidence or admission against the individual who made them, on the basis that these statements are made "*without prejudice*" to their rights. The Court stated that such statements enjoyed the right to immunity. The Court made clear that, even if the settlement discussion were unsuccessful, communications during settlement discussions were still not to be considered as evidence in proceedings.

Implications and future approaches

The judgment displays a significant departure from the previous approach taken by the local onshore courts. Whilst the UAE courts do not have a system of binding judicial precedent, meaning that the UAE courts are not bound to abide by the Court of Cassation's findings in this matter, the judgment provides scope for the "*without prejudice*" principle to be applied by the UAE courts in the future. The judgment parties the opportunity to refer to the Court of Cassation's judgment when trying to convince the relevant courts to exclude settlement communications from evidence. Time will tell whether the opportunity for "*without prejudice*" protections will be formalised in legislation.

Further, it can be inferred from this judgment that the courts do not necessarily require communications to be marked "*without prejudice*" during the course of negotiations. If the communications were exchanged with the intent of settlement efforts, this may be enough to apply the "*without prejudice*" principle. However, until the principle is routinely applied in the UAE and/or codified by law, parties should continue to mark settlement communications clearly as "*without prejudice*" to avoid any uncertainty as to the intent behind the communications. Indeed, to avoid any uncertainty around the status of such communications, it would be best practice to ensure they are marked "*without prejudice*".

To conclude, the judgment has brought UAE local onshore courts one step closer to the approach adopted by common law jurisdictions with respect to settlement discussions. This positive change may invite parties in the UAE to engage in more settlement discussions without the fear that their statements may later be used against them in evidence.

SIAC introduces Seventh Edition of Rules

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Introduction

The Singapore International Arbitration Centre ("**SIAC**") introduced its seventh edition of the SIAC Rules (the "**2025 SIAC Rules**"), which features a broad suite of changes aimed at promoting procedural efficiency, transparency and fairness for disputes of varying complexity and scale. The 2025 SIAC Rules include new procedures and enhancements to existing processes to address ongoing criticisms of arbitration. The 2025 SIAC Rules will apply by default to any SIAC arbitration commenced on or after 1 January 2025, unless otherwise agreed by the parties.

Streamlined Procedure (Rule 13, Schedule 2)

The 2025 SIAC Rules introduce a new "*Streamlined Procedure*" designed for low-value disputes of low complexity. The Streamlined Procedure may be applied by agreement between the parties, or where the amount in dispute is less than SGD 1 million (unless otherwise determined by the President upon application by either party, or if the parties agree to exclude the application of the Streamlined Procedure). The introduction of the Streamlined Procedure is focussed on increasing cost effectiveness and efficiency, with the Streamlined Procedure providing that:

- an award must be made within three months of the date of constitution of the Tribunal;
- there will be no provision of any document production or witness evidence unless otherwise determined by the Tribunal; and
- the Tribunal's fees and SIAC administrative fees are capped at 50% of the maximum limits under the Schedule of Fees.

The Streamlined Procedure goes hand in hand with updates to the "*Expedited Procedure*", a similar process that requires an award to be delivered within six months from the date of constitution of the Tribunal (Rule 14, Schedule 3). The threshold to request for the Expedited Procedure has been increased from SGD 6 million to SGD 10 million. In adding to the flexibility of the 2025 SIAC Rules, parties may also agree to conduct the arbitration under the Expedited Procedure at any time prior to the constitution of the Tribunal.

Preliminary Determination (Rule 46)

The 2025 SIAC Rules codify the inherent powers of the Tribunal to make a final and binding determination of any issue in an arbitration at a preliminary stage. While preliminary determinations are a common feature in practice, not all institutions have detailed procedures to govern preliminary determinations.

- The purpose of this provision is to promote effective case management, and complements the existing suite of case management mechanisms available under the 2016 SIAC Rules. The Tribunal must make its decision, ruling, order or award within 90 days from the date of application. An application for preliminary determination may be made on the basis that:
- the parties agree the Tribunal may determine such an issue on a preliminary basis;
- the applicant is able to demonstrate that the determination would save time and costs, or expedite the resolution of the dispute; or
- the Tribunal determines that the circumstances of the case warrant the determination of the issue on a preliminary basis.

Coordinated Proceedings (Rule 17)

In order to streamline the resolution of multiple complex disputes, the 2025 SIAC Rules introduce a mechanism to coordinate the resolution of multiple arbitrations involving common legal or factual issues where the same Tribunal has been appointed. A party may request that the arbitrations be conducted concurrently or sequentially, that the arbitrations be heard together with aligned procedural steps, or that one of the arbitrations be suspended pending termination of any of the other arbitrations. The addition of Rule 17 builds upon the existing suite of provisions concerning consolidation (Rule 16) and joinder (Rule 18) to reduce the risk of conflicting outcomes and to avoid duplication of costs across multiple proceedings.

Emergency Arbitrator Procedure (Rule 12.1, Schedule 1)

The 2025 SIAC Rules have recognised the potential need for immediate relief in the early stages of a dispute by enhancing a party's ability to seek urgent interim measures under the "*Emergency Arbitrator Procedure*" (Schedule 1). A party requiring emergency interim or conservatory relief may apply for

the appointment of an "Emergency Arbitrator" at any time prior to the constitution of the Tribunal. The Emergency Arbitrator will be appointed within 24 hours.

The parties also have the ability to seek a protective preliminary order ("**PPO**") without notice to the other parties to appoint an Emergency Arbitrator and request that they consider a request for an interim measure. The PPO ensures that a party cannot frustrate the purpose of any emergency interim or conservative measures requested before the counterparties of the application are notified seeking the appointment of the Emergency Arbitrator.

The Emergency Arbitrator must determine the PPO application within 24 hours of their appointment, following which the applicant must promptly transmit the order to any counterparties within 12 hours, failing which the PPO will expire within three days. The PPO will expire 14 days after the date on which it was issued.

Promotion of Mediation (Rule 6.4, Rule 32.4 and Rule 50.2)

The 2025 SIAC Rules prompt parties and the Tribunal to consider "*amicable dispute resolution methods*" such as mediation at various stages of an arbitration. The parties are encouraged to consider amicable dispute resolution methods when in the process of commencing an arbitration (Rule 6.4). In addition, Tribunals are encouraged to consider the adoption of alternative dispute resolution methods at the first case management conference (Rule 32.4) and are empowered to make any directions including suspending proceedings pending the outcome of any amicable dispute resolution methods (Rule 50.2).

Third-party funding arrangements (Rule 38)

The 2025 SIAC Rules now require parties to disclose the existence of any third-party funding agreement and the identify and contact details of the third-party funder. In order to preserve the standards of impartiality and independence of arbitrators, the rule also prohibits the entry into a third-party funding arrangement following the constitution of the Tribunal.

Appointment and challenge of arbitrators (Rule 19.7)

Under the 2025 SIAC Rules, where the parties are of different nationalities, the President is required to appoint a presiding arbitrator of a different nationality than the parties, unless the parties agree otherwise (Rule 19.7). The President is also given broad powers to take any measure necessary to constitute an independent and impartial Tribunal, including revoking the appointment of any arbitrators, if there is a substantial risk of unequal treatment (Rule 19.10).

Application for Security for Costs and Security for Claims (Rule 48 and Rule 49)

The 2025 SIAC Rules introduced new provisions for security for costs and claims. Rule 48 allows a party to apply to the Tribunal for an order that any party asserting a claim, counterclaim, or cross-claim provide security for legal costs and expenses, as well as the costs of the arbitration. Rule 49 allows a party to apply to the Tribunal for an order that any party responding to a claim, counterclaim or cross-claim provide security against the relevant claim.

The 2025 SIAC Rules also address the consequences of failing to provide security, allowing Tribunals to make appropriate consequential orders, such as staying the proceedings or dismissing the claim.

Case Management

The 2025 SIAC Rules include several new or updated provisions aimed at streamlining the arbitration process. For example:

- Tribunals are now required to submit draft awards to the SIAC Secretariat for scrutiny within 90 days of the submission of the last directed oral or written submission (Rule 53.2) and Tribunals must decide early dismissal applications within 45 days (instead of 60 days) (Rule 47.4).
- Rule 11 provides that the Registrar may direct the parties to attend an administrative conference (which may be held virtually) prior to the constitution of the Tribunal to discuss any procedural or administrative directions to be made by the Registrar.
- The SIAC Gateway is SIAC's cloud-based information management platform which allows for electronic filing, online payment and document storage. The SIAC Gateway is now integrated into the 2025 SIAC Rules. The Registrar may direct parties to upload all written communications to the SIAC Gateway upon notification and commencement of the arbitration (Rule 4).

Conclusion

The 2025 SIAC Rules mark a significant change to SIAC's approach to international arbitration by introducing new mechanisms designed to streamline proceedings, increase clarity, and offer greater flexibility to parties. While some of the changes mirror developments seen in the rules of other prominent arbitration institutions, others reflect SIAC's position as a leader in international arbitration. These reforms reinforce SIAC's growing influence and will be particularly relevant to parties navigating commercial disputes across the Asia-Pacific region.

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Destin v Saipem: a cautionary tale on the interplay of settlement agreements and arbitration agreements

Introduction

Destin Trading Inc v Saipem SA [2025] EWHC 668 (Ch)

In a tale told far too often, two parties fell out over an alleged payment issue and then disagreed over what was covered by their subsequent settlement agreement.

This disagreement led to Destin Trading Inc ("**Destin**") commencing English High Court proceedings alleging that Saipem SA ("**Saipem**") had made false promises amounting to fraudulent and/or negligent misrepresentation. As a result, Destin claimed that the settlement agreement had been rescinded, and it now wanted to be paid the original outstanding sums. Saipem denied any wrongdoing and submitted a stay application to the High Court for the dispute to be resolved by ICC arbitration in accordance with the arbitration agreements in the underlying commercial contracts.

On 24 March 2025, Mr Andrew Lenon KC dismissed Saipem's stay application and held that the exclusive jurisdiction clause in the parties' settlement agreement superseded the underlying arbitration agreements.

Background

The dispute arose from the Congo River Crossing Project in Angola. Saipem is a French engineering company and provides project management, infrastructure and plant services to the offshore oil and gas industries and activities in Africa. Destin is a Panamanian company which provides management and logistical services, including the chartering of vessels and related equipment, to partners engaged in the offshore oil and gas industry.

In September and October 2012, Destin and Saipem entered into three Frame Agreements (each with ICC arbitration clauses incorporated into them) where Destin agreed to provide marine vessels and other equipment and services to Saipem. As is usually the case, all was going well until a payment dispute arose. Destin claimed that it had been underpaid by US$6,805,020.99 for services relating to the Congo River Frame Agreement.

The parties temporarily resolved their differences and entered into a settlement agreement (with an exclusive jurisdiction clause for English Courts) on 5 November 2013 where Destin's payment dispute was resolved, and the three Frame Agreements were terminated (the "**Settlement Agreement**"). However, another dispute has now emerged, and Destin has asked the English Courts to rescind the Settlement Agreement and order payment of the original outstanding sums due to Saipem's false promises/ misrepresentations. Destin claims that it was promised new contracts and work for years to come in exchange for entering into the Settlement Agreement. Saipem denies this.

Destin commenced its claim before the English Courts pursuant to the dispute resolution clause in the Settlement Agreement. Saipem applied for a stay under section 9 of the Arbitration Act 1996 arguing that the most appropriate forum was ICC arbitration in line with the dispute resolution clauses in the three Frame Agreements.

The Clauses

The Frame Agreements' dispute resolution clause provides:

> *"50.2 Unless otherwise stated in the AGREEMENT, all disputes*

Footnotes

1. [2023] UKSC 32 at [72].
2. [2015] 1 Lloyd's Rep 330.
3. Ibid at [38].
4. [2025] EWHC 668 (Ch) at [38].

arising out of or in connection with the AGREEMENT DOCUMENTS which are not settled amicably under the preceding paragraph of this Clause within forty-five (45) Calendar Days after receipt of the above-mentioned written request, shall be submitted by either PARTY to arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with the said rules.

50.3 Unless otherwise stated in the AGREEMENT, the arbitration proceeding shall be held in London (United Kingdom) and conducted in the English language."

The Settlement Agreement's dispute resolution clause provides:

"10. The Parties irrevocably agree that the Courts of England and Wales shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement)."

Saipem's position

In the stay application, Saipem submitted that Destin's monetary claims were disputes arising out of or in connection with the Frame Agreements, because on Destin's own case the Settlement Agreement had allegedly been rescinded. Further, all of Destin's monetary claims depended on the position of the parties under the Frame Agreements if they were reinstated and so fell within the jurisdiction of the ICC arbitration agreement. The Settlement Agreement dispute resolution clause could not reach back to events pertaining to the Frame Agreements.

Saipem referred to a variety of cases, but principally relied upon *Mozambique v Privinvest*[1] in support of its position, which stated:

"the court in considering such an application [to stay proceedings pursuant to Section 9] adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration agreement."

Destin's position

Destin submitted that the monetary claims were essentially for damages in deceit arising out of misrepresentations made in relation to the Settlement Agreement and so fell within the "*arising out of or in connection with*" wording in the Settlement Agreement.

Destin argued that the dispute resolution clause in the Settlement Agreement superseded the dispute resolution clause in the Frame Agreements. In support of its position, Destin heavily relied upon the case of *Monde Petroleum v Westernzagros Limited*,[2] which shared near-identical facts to its own case. In Monde, the parties had operated a consultancy agreement containing an ICC arbitration clause. A dispute arose with Monde seeking payment of outstanding invoices. The parties settled those disputes under a termination agreement, which terminated the consultancy agreement and stated that any disputes should be resolved before the English Courts. Similar to this case, Monde then subsequently brought a court claim to rescind the Termination Agreement for misrepresentation and for damages representing what it would have earned under the terminated consultancy agreement.

Ultimately, Popplewell J (as he then was) reasoned that:

> *"Where parties to a contractual dispute enter into a settlement agreement, the disputes which it can be envisaged may subsequently arise will often give rise to issues which relate both to the settlement agreement itself and to the previous contract which gave rise to the dispute. It is not uncommon for one party to wish to impeach the settlement agreement and to advance a claim based on his rights under the previous contract. In such circumstances* ***rational businessmen would intend that all aspects of such a dispute should be resolved in a single forum****. Where the settlement/termination agreement contains a dispute resolution provision which is different from, and incompatible with, a dispute resolution clause in the earlier agreement,* ***the parties are likely to have intended that it is the settlement/termination agreement clause which is to govern all aspects of outstanding disputes, and to supersede the clause in the earlier agreement, for a number of reasons****"*[3] [Emphasis added].

Decision

The judge favoured Destin's position and concluded that the dispute resolution clause in the Settlement Agreement prevailed over the arbitration agreements in the Frame Agreements. On this basis, the judge dismissed the stay application and noted that:

> *"The authorities relied on by Saipem [...] were concerned with the allocation of disputes between competing dispute resolution provisions. They were not concerned with the construction of a dispute resolution clause in a settlement or termination agreement.* ***Such a dispute resolution clause is in a special category****, as explained in Monde. For this reason, these authorities did not provide any real support for Saipem's application"*[4] [Emphasis added].

Comment

Destin v Saipem should serve as a cautionary tale for parties to always include any promises made in the actual settlement agreement rather than leave certain aspects of the bargain to chance. If it isn't written down in the agreement, then you are just causing problems for yourself.

This case also provides a harsh reminder that dispute resolution clauses shouldn't be treated as a simple boilerplate at the bottom of a settlement agreement and that parties need to think carefully about the scope and interplay of their dispute resolution clauses across agreements. In the words of this judge, "*a [settlement agreement] dispute resolution clause is in a special category*".

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