Inconsistent dispute resolution clauses – exploring the limits of the Fiona Trust presumption

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The presumption that "rational businessmen" intend all their disputes to be resolved in the same forum may not apply where the parties clearly intended otherwise. Construing such intentions requires a "broad and commercially minded approach" to inconsistent dispute resolution clauses.

In *H v G* [2022] HKCFI 1327, the Hong Kong Court of First Instance set aside an arbitral tribunal's determination that it had jurisdiction over claims under a warranty where an associated contract contained the arbitration clause, but the warranty itself provided for litigation in Hong Kong. This decision underlines that there are limits to the *Fiona Trust* presumption in cases where the parties' overall contractual arrangements give rise to agreements containing different dispute resolution provisions.

Background

A property developer and its building contractor had entered into a Building Contract, which contained a dispute resolution clause (**Clause 35**) providing for arbitration under the HKIAC Domestic Arbitration Rules. The Building Contract required the building contractor to give a 10-year guarantee/warranty in respect of a waterproofing system to be installed.

The parties jointly executed a Warranty a year later, along with a third-party subcontractor, for the performance of the waterproofing systems.

The Warranty contained a dispute resolution clause (**Clause 11)** in which the parties agreed to submit to the non-exclusive jurisdiction of the courts of Hong Kong.

Disputes arose in 2020 when extensive defects emerged in the waterproofing systems. Consequently, the property developer initiated arbitration seeking damages, claiming breach of the Building Contract and the Warranty. The contractor contended that the tribunal lacked jurisdiction over claims made under the Warranty.

The tribunal dismissed the contractor's arguments, holding that matters arising under the Building Contract which might also amount to breaches of the Warranty could be determined by arbitration. It held that the terms of the Clause 35 arbitration agreement in the Building Contract encompassed claims brought under the Warranty as well. Against this background, the contractor approached the Court seeking an order to set aside the tribunal's determination of jurisdiction under section 34(1) of the Arbitration Ordinance (Cap 609).

Decision

The Court observed that, while the core issue was the interpretation of both the Building Contract and the Warranty, the tribunal's jurisdiction depended solely on the construction of Clause 35, under which the parties referred disputes to arbitration.

Fiona Trust presumption

In *Fiona Trust v Privalov* [2007] Bus LR 1719, the English court held that the construction of an arbitration clause should start from the assumption that the parties, as "rational businessmen", were likely to have intended that disputes arising out of their relationship should be decided by the same tribunal.

Chan J held that this presumption, which provides for interpreting the intention of the parties as expressed in their agreement, was not directly applicable in this case. The Court distinguished the facts of ***Fiona Trust***, highlighting that the present case involved a separate Warranty, and a third party who was not privy to the Building Contract. The Court also emphasised the need to construe Clause 35 and Clause 11 in context, and considered the following factors:

- the parties had anticipated the execution

of the Warranty, and knew the details of the appended Warranty form, at the time of signing the Building Contract;
- the Warranty clearly stated that it was to be given by a third-party subcontractor that was not a party to the previously signed Building Contract;
- the parties submitted to the non-exclusive jurisdiction of the Hong Kong courts under Clause 11 of the Warranty, while knowing that the Building Contract contained a different dispute resolution mechanism; and
- Clause 35 was a general provision for resolving disputes via arbitration, while Clause 11 dealt with specific disputes under the Warranty and the liability of the third-party subcontractor.

The judge noted that "even in ***Fiona Trust***, the Court made the important point that if there is language in the relevant contract which makes it clear either that certain disputes are to be excluded, or that the parties did not intend to have all their disputes resolved by one tribunal, but to have them determined separately, the presumption has no role to play".

Considering the above, she concluded that the parties had clearly intended to carve out disputes under the Warranty from the arbitration agreement contained in Clause 35. As a result, the language in Clause 11 of the Warranty "clearly displaced" the ***Fiona Trust*** presumption.

Commercially minded approach

The Court also considered several practical reasons as to why disputes under Warranty should not be dealt with under the Clause 35 arbitration agreement:

- the Building Contract and Warranty dealt with separate and independent matters as to the developer's rights against the contractor;
- if claims were made under the Warranty, the contractor would likely wish to seek contribution or indemnity from the sub-contractor. This would not be possible in arbitration under Clause 35 since the subcontractor was not a party to the Building Contract. It would, therefore, be desirable for all three parties to be present before the same forum (ie the Hong Kong courts); and
- construing Clause 35 to extend to claims under the Warranty could lead to multiple proceedings, inconsistent findings and duplicated costs – issues a rational businessman would wish to avoid.

Given the nature of the two contracts, the Court concluded that the parties must have considered it rational to bypass the "more cumbersome" arbitration process under Clause 35 of the Building Contract, and expressly elected to use a separate mechanism (litigation) for claims under the Warranty. The Court accordingly set aside the Tribunal's determination and held that it lacked jurisdiction over claims made under the Warranty.

Comment

Courts and tribunals will not always apply an arbitration clause to every dispute that arises in connection with a particular contractual relationship. Parties entering into multi-contract transactions should bear this in mind, and consider not only what types of disputes might arise in the course of the relationship, but how they want those disputes to be resolved. Typically, arbitration clauses are broadly drafted, and will be broadly construed in accordance with the *Fiona Trust* presumption. Frequently, this is desirable and reflects the parties' intentions. However, if the parties wish to refer certain disputes for resolution in a different forum or using a different procedure, it is important to do so using express drafting that makes that intention clear.

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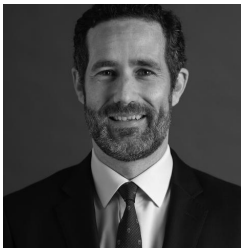

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