

# Different dispute resolution clauses in related contracts. Which one prevails?

By Jo O'Dea

If you have a number of related contracts between different parties and they have different dispute resolution clauses, which one do you use?

## Summary

In [ZPMC- Red Box Energy Services Ltd v Adkins](#) [2021] HKCFI 3501, there were three related contracts between the parties. Two of the contracts provided for dispute resolution through arbitration and the third through the Hong Kong courts. A payment dispute between the parties forced them to ask the Court to decide which clause prevailed. The Court found that the clause which was *at the centre of gravity* of the argument was the *winning* clause.

## The facts

ZPMC is a joint venture company involved in ocean-going vessels and oil and gas projects. The defendants were:

- 1 the former CEO and a director of ZPMC (Adkins);
- 2 an advisory company that provided consulting services to ZPMC (Fathomless Advisory Services Ltd) (FSA); and
- 3 a shareholder of ZPMC (RBF HK Ltd) (RBK).

At all material times, Adkins controlled FSA and RBK.

The three contracts containing the conflicting clauses were:

- 1 a CEO agreement between ZPMC and Adkins with a clause referring disputes to the Hong Kong courts (CEO Contract); and
- 2 a service agreement between ZPMC and FSA with a clause referring disputes to HKIAC arbitration (FSA agreement); and
- 3 a shareholder's agreement between RBF and ZPMC





also a clause referring disputes to HKIAC arbitration (RBF agreement).

At some point Adkins made payments of over USD3.5 million from ZPMC to FSA and RBF which ZPMC alleged were not authorised. ZPMC brought court proceedings against him in Hong Kong, alleging breach of fiduciary duties, contractual duties and breach of trust by Adkins. ZPMC also made claims against FSA and RBF as constructive trustees for knowing receipt of payments from ZPMC.

Relying on the arbitration clauses in the FSA and RBF agreements, Adkins, FSA and RBF applied for a stay of court proceedings. They wanted the dispute to be referred to the HKIAC (Hong Kong International Arbitration Centre) for arbitration (as set out in the RBF and RBF agreements).

## Decision

When determining which clauses take priority in interrelated agreements, the starting point for the Court was set out in [Houtai Investment Holdings Ltd v Leung Yat Tung & Others \[2021\] HKCFI 1504](#):

1. First it is presumed that the parties intend all disputes from the relationship to be decided by the same tribunal - the "one stop" presumption (*Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40).
2. BUT the "one stop presumption" is refutable and each arbitration clause must be considered in its own context.
3. In particular, the "one stop" presumption is not applicable, where there are multiple related commercial agreements (each dealing with different aspects of the parties' relationship) and each containing its own dispute resolution clause. The Court should instead identify *the nature of the claim and the agreement that has the closest connection with such dispute* (also referred to as the agreement *at the centre of gravity of the dispute*).

Keeping the original claim in mind, the Court held that the substance of the dispute was ZPMC's claims against Adkins for breaches of fiduciary duties, contractual duties and trust. These were personal duties that Adkins owed due to his position as a former director and CEO of ZPMC. The CEO agreement was at the *at the centre of gravity* of the dispute, and in this agreement, the parties agreed to the jurisdiction of the Hong Kong courts.

For the claims against FSA and RBF, there was no allegation that they had committed any breaches of their respective agreements. Their liability was secondary (knowing receipt of funds), which was (or would be) determined by Adkins' liability.

The Court dismissed the defendant's application.

It is interesting that the Court noted that ZPMC had made a deliberate decision not to include arbitration as a dispute

resolution forum. It had wanted the Court to be the determining body in any dispute with their (former) CEO. Also of note was the arbitration clauses in the RBF and FSA agreements. These stated that they would only cover disputes between the parties that came from that agreement.

## Conclusion

In this case, the Court was easily able to establish what was *at the centre of gravity of the dispute* and determine that the ZPMC claims against Adkins, the CEO, were the main claims. This case serves as a reminder that:

- 1 Parties should consider what dispute resolution provisions they have in related, or linked contracts. They should also consider what dispute resolution forum is appropriate, depending on the nature of the contract.
- 2 It is also important that any dispute resolution clause accurately sets out the scope of the clause. That is, is the dispute resolution clause intended to settle all disputes between the parties?

## About the author



Jo O'Dea is a member of NZDRC's Knowledge Management team and provides technical support to the NZDRC/ NZIAC TEAM.

She has recently joined us from UNICEF, where she worked as a contracts specialist, assisting the Corporate Partnerships team to enter into international partnerships. Prior to this, Jo worked as a solicitor in New Zealand and the United States.

