ARTICLE

It's not rocket science!

Court explains how to find the centre of gravity when there are conflicting dispute resolution clauses in multiple related contracts

Conflicting clauses

→ The judgment works as a practical guide to conflicting dispute resolution clauses.

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In the spectacularly named judgment of *AAA, BBB, CCC v DDD,*[1] the Hong Kong High Court of First Instance (Court) determined whether a Tribunal constituted under the dispute resolution clause in one contract had jurisdiction to resolve a dispute arising in connection with a related contract. The specific issue was whether the arbitration clause in a loan agreement conferred jurisdiction on the Tribunal formed under it, to determine related disputes arising out of a promissory note which had its own arbitration agreement. In reaching its decision that the Tribunal did not have jurisdiction to decide claims for payment under the promissory note, the Court set out the three standard situations where conflicting dispute resolution clauses feature, and provided practical guidance on the application of the legal principles which have been established for resolving that conflict.

1 [2024] HKCFI 513.

Background

It started with a borrower, two guarantors and a lender entering into a number of agreements and associated documents in relation to a loan, including a loan agreement and a promissory note.

The loan agreement was governed by Hong Kong law and had the following arbitration clause:

> (a) Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration in Hong Kong administered by the Hong Kong International Arbitration Centre (the "HKIAC") under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. For the purpose of such arbitration, there shall be three arbitrators.
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> (b) … The arbitrators shall decide any such dispute or claim strictly in accordance with the governing law specified in Section 10.1. …

The promissory note had the following dispute resolution clause:

> Dispute Resolution. If the parties are unable to settle any dispute arising out of or in connection with this Note through negotiations within thirty (30) calendar days of initial notification of such dispute, such dispute shall be submitted to the Hong Kong International Arbitration Centre (the "HKIAC") to be finally settled by arbitration in Hong Kong. Such arbitration shall be conducted in the English language. The arbitration shall be conducted in accordance with the HKIAC's arbitration rules as in effect at the time of submission to arbitration.

The borrower then failed to repay the principal amount due under the loan agreement upon demand by the lender. The lender as claimant responded by issuing a Notice of Arbitration (**NOA**) against the borrower and the guarantors, and initiating an HKIAC administered

arbitration under the HKIAC's arbitration rules.

The NOA was issued under the loan agreement but mentioned the promissory note (and exhibited the note to the NOA). Once the Tribunal was constituted, the lender submitted its statement of claim, which included a pleading that the guarantors should be held jointly and severally liable under the promissory note. The respondents objected and said that the Tribunal lacked jurisdiction over the lender's claims against the guarantors based on the promissory note. The Tribunal disagreed and found it did have jurisdiction. The respondents appealed to the Court on this point.

The High Court's difficulties with the conclusion that the Tribunal had jurisdiction

The Tribunal had reached its conclusion that it had jurisdiction on the basis the Tribunal had been convened under the dispute resolution clauses in both the loan agreement,[2] because it had been expressly invoked, and the promissory note, on the basis there was an implicit appointment due to the promissory note being mentioned in, and exhibited to, the NOA.

The Judge did not agree with this reasoning. His Honour found an appointment could not take place by a side-wind, stating: *I doubt that the mere reference to a document and the exhibition of the same to a request for arbitration, would be sufficient to bring home to any one's mind that the arbitration agreement in the document was being invoked as the basis of arbitration.* But of more significance was that HKIAC's correspondence with the Tribunal and parties only acknowledged the Tribunal's appointment under the arbitration clause in the loan agreement, which was all HKIAC confirmed. The Court held: *The Tribunal could not of its own motion unilaterally declare itself to have also been appointed (whether expressly or impliedly) under the dispute resolution clause in the Promissory Note.*

In considering an argument that this "defect" in appointment was inconsequential as the two dispute resolution provisions were substantially similar, the Judge highlighted two significant differences, being the 30-day negotiation period and the number of arbitrators required to constitute the Tribunal.

The Court noted the Tribunal did not think that the requirement of a 30-day negotiation period before the commencement of arbitration was an impediment to the Tribunal having been appointed under the dispute resolution clause in the promissory note. The Tribunal's view was this raised a question of admissibility, which could be dealt with later. However, the Court found the Tribunal's reasoning missed the point of the respondents' objection, which was *that the dispute resolution clauses in the two contracts constitute distinct, non-fungible regimes for the resolution of disputes*. The Court indicated *the clauses could not be treated in a broad-brush manner as essentially the same*.

As to composition of the panel, there was no evidence that the parties or HKIAC had even considered whether there should be one or three arbitrators. The Court found that the parties were therefore denied the flexibility of this option and deprived of a potential benefit that they had bargained for under the promissory note.

The approach to conflicting dispute resolution clause situations: the paradigms

The Judge identified three broad paradigms in which conflicting dispute resolution clauses can feature (noting that they were not exhaustive of all permutations that can occur).

> A basic paradigm is the situation where there is a single contract with two or more conflicting dispute resolution clauses. An intermediate paradigm is the situation where there are multiple related contracts, but only one of the contracts contains a dispute resolution clause, while the others do not. Thus, the conflict in the intermediate paradigm is not so much between two or more contrary clauses, as opposed to whether (say) an arbitration clause in a single contract should be treated as governing disputes arising out [of] a related contract

2 There was an amended Loan Agreement, and references to "loan agreement" can be read as encompassing both.

which has no dispute resolution clause, or whether the latter disputes must be litigated before the court.

A generalised paradigm is where there are multiple related contracts with conflicting dispute resolution clauses in two or more (but not necessarily all) of the contracts.

The Judge then explained the acknowledged approach to ascertaining the parties' likely intentions when faced with conflicting clauses:

> Whether a case involves the basic, intermediate, or generalised paradigm, the authorities are unanimous that determining the scopes of conflicting dispute resolution clauses is essentially an exercise in objectively construing the clauses to ascertain the parties' likely intentions. Absent contrary indications, one may employ certain common-sense presumptions or assumptions as an aid to construction. But one must be careful not to use the presumptions or assumptions in a manner that runs roughshod over the parties' intentions as manifested in the dispute resolution clauses agreed among them.

Established principles of construction of arbitration clauses: how does *Fiona Trust* fit with the paradigms?

In *Fiona Trust & Holding Corporation v Provalov* [2007] UKHL 40, at [13], Lord Hoffman issued the following dictum on the construction of an arbitration clause:

> [T]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

The Court distinguished *Fiona Trust* to the present case on the basis that *Fiona Trust* involved a *basic paradigm* situation (single contracts with apparently conflicting internal dispute resolution clauses). The Judge rationalised that if different but related contracts had clauses which provided for different forums to decide disputes, it was artificial to maintain mechanically that the parties intended to have all of their differences decided in a single forum. His Honour said that in construing their intentions, the different clauses *are a pointer to the parties having contemplated resort to more than one forum for the determination of their disputes*.

The "extended *Fiona Trust* principle" and its application to the intermediate paradigm was then considered.[3] Again, the Court reasoned that the extended principle was not applicable to the present case because in the instant case there were different dispute resolution clauses in the agreements, and that therefore raised the question of which clause should take precedence (and why).

The centre of gravity and the generalised paradigm

The Court then discussed the pragmatic way of approaching the generalised paradigm, which was where the instance case fell.[4]

> ...what is required is a careful and commercially minded construction of the agreements providing for the resolution of disputes. This may include enquiring under which of a number of inter-related contractual agreements a dispute actually arises, and seeking to do so by locating its centre of gravity and thus which jurisdiction clause is 'closer to the claim' ...
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> 49. There may be a difference

3 In *Terre Neuve SARL & Others v Yewdale Limited & others* [2020] EWHC 772 (Comm), at [30] & [31], Bryan J put forward the "extended Fiona Trust principle" as a possible way of approaching the intermediate paradigm situation. On this approach, "a jurisdiction agreement contained in one contract may, on its proper construction, extend to a claim that is made under another contract".

4 Citing guidance provided by the *English Court of Appeal in AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWCA 437 at [48].

> between a complex series of agreements about a single transaction or enabling particular types of transactions, and the situation in which there is a single contract creating a relationship which is followed by a later contract embodying a subsequent agreement about the relationship.... Where the contracts are not 'part of one package', it may be easier to conclude that the parties chose to have different jurisdictions to deal with different aspects of the relationship."

Finding the centre of gravity - it's not rocket science

In the end, the Court provided welcome and practical guidance on how to assess whether an issue falls within or outside of a tribunal's jurisdiction and recommended looking to the ultimate relief sought in connection with that issue:

> I accept that expressions such as "centre of gravity" and "closer to an issue or dispute" can be nebulous concepts. Inevitably, the determination of an issue's "centre of gravity" or "closeness" to a dispute resolution clause cannot be rocket science. For this reason, in making an assessment, one should adopt a liberal and generous (as opposed to a pedantic) attitude.
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> ...
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> Given that guidance, overlap (that is, the possibility that a disputed issue may reasonably be regarded as falling within the ambit of two or more dispute resolution clauses) may be unavoidable. Thus, a possible test for determining whether an intertwined or overlapping issue falls within or outside of a tribunal's jurisdiction, might be to look at the ultimate relief sought in connection with that issue. If granting the ultimate relief being sought falls within the scope of the arbitration agreement under which a tribunal was appointed, the issue could be regarded as coming within the tribunal's jurisdiction or "centre of gravity". The issue would be a question which reasonably needs to be answered by the tribunal as a stepping stone to deciding whether the relief sought should be granted. This would be the position, even though the issue may also be relevant to the resolution of some other dispute within the "centre of gravity" of a jurisdictional clause in another contract.

Conclusion

This decision is well worth filing away for consideration when faced with conflicting dispute resolution clauses. It provides practical advice and guidance on how to sense check whether a tribunal will have jurisdiction to resolve a dispute and how to avoid wasting time and money arguing about matters ancillary to the real issues between the parties.

About the author

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Maria Cole works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, including working with NZDRC and NZIAC. She was previously a civil litigation barrister for over a decade. During that time she worked on several multi-million dollar development disputes and was involved in arbitrations and mediations.