

Searching for gravity: High Court applies *Fiona Trust* presumption in a multi-contract situation

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Introduction

As the House of Lords (as it then was) famously held in *Fiona Trust & Holding Corporation v Privalov*,⁽¹⁾ when construing an arbitration agreement to ascertain whether a dispute falls within its scope, the applicable presumption is whether the parties, "as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered... to be decided by the same tribunal".⁽²⁾ Several cases have since considered whether the presumption also applies in multi-contract situations where contracts contain different and potentially inconsistent arbitration agreements.

In some cases, the presumption has been applied to elucidate parties' intention that the arbitration provisions in one agreement also capture disputes under another agreement. However, the Court of Appeal in *Trust Risk Group SpA v AmTrust Europe Ltd*⁽³⁾ recently found otherwise, holding that instead of applying a presumption, a carefully and commercially minded construction of the agreements at hand is required.

C v D1, D2 and D3⁽⁴⁾ concerned an application to set aside an arbitral award on the grounds that the tribunal had no substantive jurisdiction and that serious irregularity during the proceedings had caused injustice (Sections 67 and 68 of the Arbitration Act 1996). The court rejected the application on both grounds. Upholding the tribunal's own finding of jurisdiction, the court applied the *Fiona Trust* presumption and determined that the arbitration agreement at the centre of gravity of the parties' dispute should apply.

Facts

In 2005 the claimant, a Nigerian subsidiary of a major oil company, entered into a product sharing contract to exploit oil mining leases with the first and third defendants, Nigerian companies engaged in commercial activities relating to crude oil. The product sharing contract was governed by Nigerian law and provided for arbitration in Paris.

In 2011 the parties – intending to end their joint operations – entered into a sale and purchase agreement under which the claimant agreed to relinquish its role as operator and transfer operating assets relating to the mining leases and the product sharing contract to the first defendant in return for \$250 million, guaranteed by the second defendant (the parent company). The sale and purchase agreement contained widely drafted reciprocal indemnities for any losses in relation to the transfer of the assets under the leases and the product sharing contract. Both the sale and purchase contract and the guarantees provided for English law and English-seated arbitration pursuant to the 1998 LCIA Rules. Completion of the sale and purchase agreement was subject to the execution of a novation agreement between the claimant and the first and second defendants, which transferred certain rights under the product sharing contract to another party in the second defendant's group.

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Following the defendants' non-payment, the claimant commenced arbitration proceedings against both the first defendant and the second defendant (as guarantor). The defendants raised defences under the sale and purchase agreement. They also advanced counterclaims for breaches by the claimant of the product sharing contract in its role as operator, and sought the joinder of the third defendant for these purposes.

In a partial award, the tribunal held that the arbitration clause in the sale and purchase agreement was sufficiently broad to confer jurisdiction on it to determine disputes concerning breaches of the product sharing contract. Accordingly, the tribunal held that the indemnity in the sale and purchase agreement extended to claims arising from breaches of the product sharing contract. In addition, the tribunal determined that it was empowered to join the third defendant to the arbitration under Article 22.1(h) of the 1998 LCIA Rules. The claimant challenged these decisions.

Decision

The court held that the tribunal's determination that the indemnity extended to claims arising from breaches of the product sharing contract concerned the merits of the dispute and, as such, was not open to challenge.

Turning to the question of construction – that is, whether the sale and purchase agreement's arbitration clause conferred jurisdiction on the tribunal to consider disputes arising from the product sharing contract (as well as the sale and purchase agreement) – the court found as follows:

- The *Fiona Trust* presumption may apply in contractual arrangements between two parties which contain two or more choices of jurisdiction in different agreements.
- The presumption may apply with "particular potency" where parties have entered into an agreement for the purpose of "terminating the commercial relationship" created by an earlier agreement between them.⁽⁵⁾
- It may be necessary to identify where the centre of gravity lies and which agreement lies at the commercial centre of the transaction (or is closer to claim) to understand which agreement covers all the issues in dispute.

The court held that the sale and purchase agreement represented a new phase between the parties – one in which their commercial relationship shifted from the product sharing contract to the sale and purchase agreement and one dealing with the termination of their relationship. The supremacy of the terms of the sale and purchase agreement was underlined by the terms of the deed of novation, which expressly deferred to the sale and purchase agreement in case of inconsistency. As such, the court held that the broader arbitration clause in the sale and purchase agreement superseded the narrower provision in the product sharing contract.

In so finding, the court distinguished the Court of Appeal ruling in *Am Trust*, where the *Fiona Trust* presumption did not apply, since the multiple agreements between the parties represented two parallel streams of business – there was no intention for the disputes arising from the agreements to be heard together.

The court also made two other findings of note. In considering whether the joinder of the third defendant could be challenged, the court clarified that Section 67 is reserved for challenges of substantive jurisdiction and therefore was not an applicable ground of challenge. As set out in Section 30 of the act, only three grounds fall under this head:

- whether there is a valid arbitration agreement;
- whether the tribunal was properly constituted; and
- whether disputes fall within the scope of the arbitration agreement.

Contrary to the suggested interpretation of this section by leading commentators, the court held that this section contains an exhaustive list of grounds. Therefore, the question was whether – contrary to Section 68(2) – the tribunal had exceeded its powers in permitting joinder of the third defendant. The court held that the tribunal had not exceeded its powers: the joinder of the third defendant was effective, since there had been no clear opt-out of the parties' agreement to allow joinder as set out in

the 1998 LCIA Rules.

Comment

The court's application of the *Fiona Trust* presumption in this multiple contract situation was justified by the fact that the sale and purchase agreement sought to terminate previous agreements between the parties. The decision demonstrates the court's willingness to promote one-stop adjudication in line with the ethos of the Arbitration Act. However, it also demonstrates that much can turn on the nature of the parties' contractual arrangements, since *Am Trust* shows that the presumption is not appropriate where, for example, the multiple contracts to be considered relate to parallel coexisting streams of business.

As always, parties should be vigilant to use clear wording to convey their true intention in relation to what arbitration provisions they wish to apply – and understand the commercial end goal of the matrix of the contracts between them.

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Endnotes

- (1) [2007] UKHL 40.
- (2) *Ibid*, [7].
- (3) [2015] EWCA Civ 437.
- (4) [2015] EWHC 2126 (Comm).
- (5) *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437, [104].

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