Dealing with Competing Jurisdiction Clauses: What is your Centre of Gravity?

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Complex commercial arrangements can generate difficulties for the parties where their obligations are set out in a multitude of related contracts or a single contract containing inconsistent dispute resolution clauses. It is not uncommon for parties to complex commercial contracts to find themselves arguing over the interpretation of inconsistent jurisdiction clauses which are either found in a single contract, or different but related contracts forming part of the same arrangements. Disagreements over the interpretation of jurisdiction clauses can arise in large-scale energy and infrastructure projects, and other types of arrangements where transactions usually take place under a master agreement. This note will explore the most common scenarios in which courts are often asked to interpret inconsistent dispute resolution clauses, with particular focus on the 'centre of gravity' approach adopted by courts.

Inconsistent dispute resolution clauses found in a single contract: the 'one stop' presumption

Where a contract contains an inconsistent dispute resolution clause, the general rule is that the court will apply the 'one stop' presumption formulated by Lord Hoffman in *Fiona Trust and Holding Corporation and Others v Yuri Privalov and Others under name of Premium Nafta Products Ltd (20th Defendant) & Others v. Fili Shipping Co Ltd (14th Claimant) & Others* [2007] UKHL 40 ("Fiona Trust"). In *Fiona Trust* a shipowner sought a declaration that charterparties entered into with a number of charterers were validly rescinded on the basis that they had been procured by bribery. The court, on the request of the charterers, granted a stay of proceedings; the charters contained a jurisdiction clause in relation to 'any dispute arising under this charter', as well as an arbitration clause which provided that any party to the contract could elect to have any such dispute referred to arbitration. The Court of Appeal had found that the issue of whether the shipowner was allowed to rescind the charter parties

was to be determined by arbitration rather than by the courts. The House of Lords held that the construction of an arbitration clause had to start from the assumption that the parties, as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they had entered, or purported to have entered, to be decided by the same tribunal. The clause had to be construed in accordance with that presumption unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction (see Lord Hoffman at [7] – [8]).

Inconsistent dispute resolution clauses found in multiple contracts: the 'centre of gravity' approach

The court is likely to take a different approach where the inconsistent dispute resolution clauses are found in entirely different but related contracts. Although the 'one stop' presumption is still a useful starting point, the principle is more likely to be of limited application where the parties are bound by several contracts which contain jurisdiction agreements for different countries, for example.[1] Instead, the court will look at what the centre of gravity, or centre of the dispute is. In *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437 the contractual arrangements between an insurer and insurance broker were contained in a framework agreement and an earlier terms of business agreement ('ToB') which was appended to the framework agreement. The framework agreement contained an English law and jurisdiction clause, whilst the framework agreement contained an Italian law and jurisdiction clause. A dispute arose between the parties as to which jurisdiction clause applied.

The Court of Appeal held that since the dispute between the parties arose under the ToB agreement, it was hence subject to English law and jurisdiction. The court needs to discern the parties' intentions, objectively speaking, from the words used and the surrounding context. It was further held that where the court is faced with two possible constructions, it is entitled to prefer that which was more consistent with commercial common sense, though that is not to be elevated to an overriding criterion of construction.[2] It is notable that in *Trust Risk* it was common ground that the business arising under the ToB agreement was a separate and distinct stream of business from that arising under the framework agreement, which makes it easier to determine the centre of gravity.

[1] *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437 at [45] – [46].
[2] *Aston Hill Financial Inc v African Minerals Finance Ltd [2013] EWCA Civ 416, [2013] 4 WLUK 477* followed.

The Court took into account that there was no inconsistency with different clauses covering similar ground in respect of different aspects of the relationship dealt with in different agreements, and thus could not be said that commercial contractors could not have contemplated different dispute resolution provisions in the circumstances. Thus, the Court held that the English jurisdiction clause in the ToB agreement applied to the dispute between the parties.[3]

What factors will the court take into account when determining the centre of gravity?

Determining the centre of gravity will usually be a matter of contractual interpretation. The extent to which the 'one stop' presumption is applicable and/or relevant also appears to form part of the assessment, although this will largely depend on the facts of each case, i.e. where the inconsistent dispute resolution clauses are found in different contracts with complex and overlapping provisions, applying the 'one stop' presumption will not be appropriate. The 'centre of gravity' approach enables the court to adopt a targeted methodology and look closely at the *nature* of the issue, determine its provenance, in order to determine which dispute resolution clause is likely to apply to it. In *Trust Risk Group* Beatson LJ outlined the position in relation to multiple jurisdiction clauses found in interrelated agreements, as summarised by Thomas LJ in *Sebastian Holdings Inc v Deutsche Bank AG (No 2)* [2010] EWCA Civ 998:

> "(1) "… [I]n construing a jurisdiction clause, a broad and purposive construction must be followed": see [39];
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> (2) "… [A]n agreement which [is] part of a series of agreements [should be construed] by taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme": see [40];
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> (3) "It is generally to be assumed … that just as parties to a single agreement do not intend as rational businessmen that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals": see [41]; but
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> (4) "… **[W]here there are multiple related agreements, the task of the court in determining whether the dispute falls within the jurisdiction clauses of one or more related agreements depends upon the intention of the parties as revealed by the agreements as against these general principles: see [42].**"

[3] *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437 at [60] – [71].

In short, 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".[4]

The relevant authorities suggest that the following factors will be significant when determining the centre of gravity of a dispute:

- The extent to which the 'one step' presumption is applicable to the facts of the case, at least as a starting point.
- The intentions of the parties, evidenced by their actions and the surrounding circumstances and context.
- The extent to which the different agreements/contracts involved deal with separate matters or issues, and whether there is an overlap between them.
- The subject matter of the dispute, i.e. does it arise from issues that are dealt with by a particular agreement and/or contract?

Advice for legal professionals

Legal professionals involved in the drafting of commercial agreements should be mindful of the following:

- The wording of jurisdiction clauses should always be clear and unequivocal; careful drafting can prevent issues relating to the interpretation of jurisdiction clauses, and save your clients time and money. The court will always first look at the wording of any relevant provisions. Clarity is key.
- Where drafting additional or subsequent related agreements, always examine existing related agreements or – where there is one – the master agreement, to ensure that any potential inconsistencies are remedied through the use of clear wording.

[4] *See* Beatson LJ at [48] of *AmTrust Europe Ltd v Trust Risk Group SpA,* 2015 WL 1916181 (2015); *Credit Suisse First Boston (Europe) Ltd v MLT (Bermuda) Ltd* [1999] 1 Lloyd's Rep 767 at 777; *UBS AG v HSH Norbank AG* [2009] EWCA Civ 585 , reported at [2010] All ER (Comm) 727 at [94].

- When dealing with inconsistent dispute resolution clauses, it is crucial to distinguish between *Fiona Trust* cases and *Trust Risk Group* cases. Whilst the 'one stop' presumption can apply in cases where there are multiple contracts with inconsistent dispute resolution clauses, it usually applies in single contract cases. In multiple contract cases, the court will usually adopt the 'centre of gravity' approach.

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