Inconsistent dispute resolution clauses - when should the "one-stop shop" give way to gravity?

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Introduction

Where, in complex commercial arrangements, there is a multiplicity of agreements, problems associated with inconsistencies between them abound. That can have significant consequences, particularly where there is an inconsistency between dispute resolution provisions in different but related contracts. Despite having thought that they had made provision for it, the parties end up in dispute as to where and how their dispute should be resolved.

This article provides a brief overview of the position, as a matter of English law, surrounding inconsistent or competing dispute resolution clauses with particular focus on two 2018 cases which involved scenarios that often lead to these issues in practice: projects that involve a suite of documents (e.g. large scale energy and infrastructure projects with complex financing arrangements and guarantees); and transactions involving certain financial products (e.g. agreements to buy or sell interest rate swaps pursuant to a wider "master" agreement).

Key Points

- The starting point in cases involving inconsistent dispute resolution clauses is the "one stop" presumption in the Fiona Trust case - 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 in the same way.
- But, where two dispute resolution clauses conflict as to forum, the English courts will look at the centre of gravity of the dispute in question, in order to decide which forum is the most appropriate for that dispute.
- In cases that also involve questions of incorporation of arbitration clauses, the context of the parties’ arrangement is crucial:
  - In so called "single-contract cases", general words of incorporation will normally suffice and there is no need to refer expressly to the arbitration clause.
  - In a "two-contract case", general words of incorporation will not suffice, and some express reference to arbitration or the provision of the relevant clause is also required.

One Stop presumption

The starting position when considering whether a dispute falls to be resolved by reference to a particular dispute resolution clause is the well know "one stop" presumption first formulated by Lord Hoffman in the Fiona Trust case:

"In my opinion the 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.\textsuperscript{45}

In \textit{Fiona Trust} the House of Lords had to consider whether a dispute concerning the rescission of an agreement fell within the scope of an arbitration clause within that agreement. There were clear inconsistencies within the drafting of the arbitration clause, including as to its scope. But thanks to Lord Hoffman’s presumption the clause was interpreted so as to include the dispute - the parties had chosen arbitration as the forum for disputes arising under their agreement and the clause should be construed accordingly unless the language clearly indicated that certain disputes were intended to be dealt with differently.

The \textit{Fiona Trust} presumption has been followed to some extent in circumstances where the parties have entered into two or more related agreements which contain competing jurisdiction clauses. In Monde Petroleum SA v Westernzagos Ltd\textsuperscript{6}, a case concerning an exploration and production sharing agreement for oil in Kurdistan, the court held that a dispute resolution clause in a settlement agreement superseded the conflicting dispute resolution clause in the underlying agreement. The court stated that the parties were likely to have intended the settlement agreement clause to govern all aspects of outstanding disputes.

\textbf{Gravity of Dispute}

However, where there are two or more related, conflicting agreements the English court is likely to take a different approach. In \textit{Trust Risk Group SpA v Am Trust Europe}, although the \textit{Fiona Trust} presumption was described as a “useful starting point” it was of “limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries”\textsuperscript{8}. Instead, what was required was “a careful and commercially minded construction of the agreements providing for the resolution of disputes”, including an enquiry as to which agreement a dispute arises under by seeking to locate the dispute's “centre of gravity”.

\textbf{Incorporation of terms}

Issues may also arise where it is not clear whether a dispute resolution clause has been incorporated into a contract (whether because it has been set out in a separate document to the main contract, as would be the case where standard terms are used, or where there are two contracts and one purports to incorporate the terms of one into the other). In \textit{The Athena No.2}, a war risks claim in respect of damage to the ship “Athena” from an explosion said to have been caused by Tamil Tigers when the vessel was at Trincomalee, Sri Lanka, the court drew a distinction between two categories of cases: “single-contract cases” and “two-contract cases”.\textsuperscript{9}

\textbf{One-contract cases}

In a “single-contract case”, the clause sought to be incorporated is found in the same contract, but in a separate document (such as standard terms of business designed to be annexed to the main agreement). In “single-contract cases” (of which \textit{The Athena No.2} was one), general words of incorporation will normally suffice and there is no need to refer expressly to the arbitration clause.

\textbf{Two-contract cases}

In a “two-contract case”, the clause is found in a secondary document that is in fact a contract where at least one party is different from the parties to the main agreement. In such a case general words of incorporation will not suffice, and some express reference to arbitration or the provision of the relevant clause is also required.\textsuperscript{5} Such reference should be carefully drafted to ensure there is no dispute.

\textbf{Recent Developments}

Two recent cases may help to shed light on the court's current approach to inconsistent dispute resolution clauses.

\textbf{The ‘One Stop’ presumption revisited and restricted}

The limited application of the ‘one stop’ presumption to cases involving two or more related contracts was
confirmed in the case of Deutsche Bank AG v Comune di Savona. The case dealt with two conflicting dispute resolution clauses in two related agreements between the parties: (i) an agreement to provide certain financial services (the 'Convention'); and (ii) a number of interest rate swaps (the 'Transactions') which were stated to be subject to an ISDA Master Agreement between the parties. While the Convention was governed by Italian Law and specified the exclusive jurisdiction of the Court of Milan, the ISDA Master Agreement was governed by English Law and specified the jurisdiction of the English courts.

The court stated that the 'one stop adjudication is only a presumption' and that it was 'desirable that potentially conflicting jurisdiction clauses should be given a mutually exclusive construction'. In other words, in an ideal world two such inconsistent dispute resolution clauses should be construed on the basis that they do not overlap in terms of scope. In this case the court was able to do so, because the two agreements dealt with 'particular legal relationships' (the Convention dealt with the generic relationship, while the Transactions dealt with the specific interest rate swap relationship). However, the court acknowledged that such a mutually exclusive construction may not always be realistic and advised that it should not adopt a convoluted construction merely to achieve it.

In another 2018 case, Eurochem v Dreymoor, Butcher J rejected an argument that breaches of various sales contracts should fall within the dispute resolution mechanism of the 'umbrella' agency agreement under which the sales were carried out, rather than the mechanisms in the individual sales contracts. In doing so the judge might be said to have favoured certainty of forum over the 'one stop' presumption. This, then, is a recent example of the 'centre of gravity' approach applied in Trust Risk as described above. It is an illustration of how a party may be able to distinguish between a Fiona Trust case and a Trust Risk case: inconsistent dispute resolution clauses in the same contract, consider the 'one stop' presumption; multiple contracts with competing provisions, locate the 'centre of gravity'.

The orderly resolution of the dispute as a whole

A common example of inconsistency occurs between a guarantee and the main contract to which that guarantee relates, as guarantors from different jurisdiction may well require their local law and preferred jurisdiction as a condition of giving the guarantee. In Autoridad del Canal de Panamá v Sacyr SA and others, a dispute arose out of a major engineering project to widen the Panama Canal, in order to allow for passage of larger vessels. The main contract between Autoridad del Canal de Panamá (the Employer) and Sacyr SA (the Contractor) was subject to Panamanian law and contained a dispute-resolution procedure which ultimately led to arbitration in Miami. Various advance payments by the Employer to the Contractor were secured by guarantees, which had the same dispute resolution procedure as the main contract. However, the final advance payment guarantee specified English law and gave exclusive jurisdiction to the English courts.

A dispute arose in connection with the reimbursement of certain advance payments. The Employer commenced English Commercial Court proceedings. In response the Contractor commenced arbitration in Miami under the main contract and the Panamanian Law guarantees and sought a stay of the English Commercial Court proceedings pursuant to s9 of the Arbitration Act 1996, on the basis that the issues raised were matters that were agreed to be referred to arbitration in Miami.

Blair J accepted that "[i]n circumstances in which an international commercial dispute involves arbitration as well as court proceedings, it makes good commercial sense for the court to have regard, where appropriate, to the orderly resolution of the dispute as a whole." However, despite substantial overlap between the issues arising under the main contract and the guarantees, Blair J held that there was sufficient distinction between the English Commercial Court "matter" (liability to repay under the guarantees) and the "matter" that had been agreed to be referred to arbitration (liability to repay under the main contract), and refused to grant the stay. Relevant factors included:

(i) the fact that arbitration proceedings had only come about after court proceedings were underway, seeking negative declarations as to liability only, rather than positive claims;

(ii) the fact that court proceedings were still more advanced than arbitration proceedings; and

(iii) the fact that the issues to be decided were the kind of issues which the court would be able to decide fairly easily.
On that basis the Court held that the orderly resolution of the dispute as a whole prevailed over any suggestion of a "one stop shop".

**Conclusion**

When dealing with inconsistent dispute resolution clauses, it is important to distinguish between a *Fiona Trust* case and a *Trust Risk* case: where the inconsistent dispute resolution clauses are in the same contract, parties should first consider the "one stop" presumption, though remembering that it is only a presumption; where multiple, related contracts exist with competing provisions, the parties should instead locate the "centre of gravity". As ever, careful drafting can avoid such issues arising, and advice should always be sought before entering into an agreement or set of agreements.

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1. 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.
4. 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.
5. Ibid., at paragraph 13.
8. Ibid., at paras 45 and 46.
12. Ibid., at para 31.

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