

Insights

HK COURT OVERRULES ARBITRATOR'S DECISION IN JURISDICTIONAL CHALLENGE

AFFIRMATION OF “CENTRE OF GRAVITY” TEST IN MULTIPLE RELATED CONTRACTS WITH DIFFERENT DISPUTE RESOLUTION CLAUSES, FIONA TRUST “ONE-STOP-SHOP” PRESUMPTION DOES NOT APPLY

Jul 10, 2024

SUMMARY

In *AAA, BBB, CCC v DDD* (HCCT 39/2023) [2024] HKCFI 513 (date of decision: 16 February 2024), the Hong Kong Court of First Instance (“**the Court**”) provides much welcomed guidance on the situation where there is a group of related contracts and two or more of those contracts have different dispute resolution clauses – a situation which the Court recognised as “not infrequently arises in commercial disputes today”.

The Court overruled an HKIAC Tribunal’s decision that the arbitration clause in a Loan Agreement did confer jurisdiction on the Tribunal formed under it to determine related disputes arising out of a Promissory Note – a related but separate contract which has its own arbitration agreement.

In his judgment, Deputy High Court Judge Reyes SC explained the proper approach to conflicting dispute resolution clause situations, through discussion of three “paradigm situations”, namely (1) the “Fiona Trust principle” (presumption of one-stop adjudication) and the “basic paradigm” under *Fiona Trust & Holding Corporation v Privalov* [2007] UKHK 40, (2) the “extended Fiona Trust principle” and the “intermediate paradigm” under *Terre Neuve SARL & Others v Yewdale Limited & others* [2020] EWHC 772 (Comm), and (3) the “centre of gravity” and the “generalised paradigm” under *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWCA 437.

BACKGROUND

The dispute arose out of a Loan Agreement, where DDD was the Lender, and AAA, BBB and CCC respectively were the Borrower, Guarantor 1, and Guarantor 2. In the underlying arbitration, the Claimant was the Lender, and the Respondents were the Borrower and the Guarantors. The Borrower

failed to repay the Principal Amount upon demand by the Lender, and the Lender commenced an arbitration against the Borrower and the Guarantors.

The Lender was a foreign company. The Borrower was incorporated in US state Y. The Loan Agreement provided for the Borrower to issue a Promissory Note to the Lender as security for the loan. Under the Promissory Note signed by the Borrower and the Guarantors, the Borrower undertook to repay the Principal Amount, and the Guarantors guaranteed the Borrower's payment obligation under the Promissory Note. The group of related contracts in question – defined as "Transaction Documents" in the Loan Agreement – included separate Share Charge Agreements, a Pledge and the Promissory Note. The Loan Agreement, the Share Charge Agreements, the Pledge and the Promissory Note each had their own dispute resolution clauses:-

- The Loan Agreement was governed by Hong Kong law and had an arbitration clause (HKIAC Administered Arbitration Rules)
- The Share Charge Agreements were governed by foreign law and had different arbitration agreements from the Loan Agreement
- The Pledge was governed by the law of US state Y and had no arbitration clause
- The Promissory Note had a different arbitration clause from the Loan Agreement

THE ARBITRATION – JURISDICTIONAL CHALLENGE

After the Borrower failed to repay the Principal Amount upon demand by the Lender, the Lender commenced the arbitration against the Borrower and the Guarantors (HKIAC administered arbitration under the HKIAC Administered Arbitration Rules), pursuant to the arbitration clause under the Loan Agreement, which provided that:-

"(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 ..."

The Loan Agreement defined the expression "Transaction Documents" as comprising "this [Loan] Agreement, the Share Charge Agreements, and the [Promissory] Note to be issued with the utilization of this Loan".

In the arbitration, in addition to the Loan Agreement itself, the Lender also sought to claim against the Guarantors under the related (but separate) contract, i.e. the "Transaction Document" Promissory Note. The Promissory Note contained a different arbitration 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 and Guarantors asserted that the Tribunal lacked jurisdiction over the Lender’s claims against the Guarantors under the Promissory Note, alleging *inter alia* that the dispute over payment under the Promissory Note had yet to crystallise. The Tribunal dismissed the jurisdictional challenge and held that it had jurisdiction to hear the claim under the Promissory Note. The Borrower and Guarantors appealed the Tribunal’s decision to the Court.

Deputy High Court Judge Reyes SC explained the proper approach to conflicting dispute resolution clause situations through discussion of three “paradigm situations”.

COURT’S DECISION

“BASIC PARADIGM” – FIONA TRUST PRINCIPLE

The “basic paradigm” is where there is a single contract with two or more conflicting dispute resolution clauses. The Fiona Trust principle applies to the “basic paradigm”, i.e. a presumption of one-stop adjudication, that rational businessmen are likely to have intended all disputes to be decided in a single forum. The Court held that this paradigm did not apply to the present case – multiple related contracts with different dispute resolution clauses.

“INTERMEDIATE PARADIGM” – EXTENDED FIONA TRUST PRINCIPLE

The “intermediate paradigm” is where there are multiple related contracts, but only one of the contracts contains a dispute resolution clause, while the others do not. Under the case of *Terre Neuve*, the Fiona Trust principle may be extended – a jurisdiction agreement contained in one contract may extend to a claim that is made under another contract – particularly where the parties to the multiple related contracts were the same and the contracts were part of a single package or transaction. The Court held that this paradigm also did not apply to the present case – different dispute resolution clauses in the contracts comprising the “single package”.

“GENERALISED PARADIGM” – CENTRE OF GRAVITY

The “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. Under the case of *AmTrust*, there can be **no initial presumption that the parties intended all their disputes to be resolved in a single forum, if there are several contracts with different dispute resolution clauses**. In such a situation, the centre of gravity approach should be applied, i.e., one must locate the “centre

of gravity” of a particular issue or dispute to assess which dispute resolution clause is “closer” to that issue or dispute, in order to determine which particular forum has jurisdiction. Applying the “centre of gravity” test, the Court in AAA, BBB, CCC v DDD held that the Lender’s claims against the Guarantors fell within the “centre of gravity” of the dispute resolution provision in the Promissory Note itself – not that of the Loan Agreement.

BCLP TAKEAWAYS

This Court decision provides much welcomed guidance regarding the proper approach to conflicting dispute resolution clause situations through the three “paradigm situations” above. It re-affirms that the “centre of gravity” approach applies where multiple related contracts contain different dispute resolution clauses – in contrast to the “basic paradigm” or the “intermediate paradigm” as discussed above. The Court decision also follows the two Hong Kong cases of *X v Y* [2021] 2 HKC 68 and *H v G* [2022] HKCFI 1327, where *AmTrust* was cited and applied by the Court (Mimmie Chan J in both decisions):

- Under *X v Y*, Mimmie Chan J held that: “... the proper test in ascertaining the parties’ intention on how their dispute should be dealt with is to identify the nature of the claim, and the agreement which has the closest connection with such dispute and claim (the agreement “at the centre of gravity of the dispute” ...)”
- Under *H v G*, Mimmie Chan J held that: “... the Fiona Trust presumption has limited application in a case where the overall contractual arrangements between the parties gave rise to agreements containing different dispute resolution provisions ...”

Despite being *obiter dictum*, the Court in AAA, BBB, CCC v DDD also helpfully suggested possible ways to minimise the risk of conflicting outcomes (one outcome which the Fiona Trust principle sought to prevent), despite the fact that the claims under the Promissory Note could not be brought in the underlying arbitration under the Loan Agreement, namely:-

- In an arbitration under the Promissory Note, invoke issue estoppel arising from the Tribunal’s findings of fact on the Guarantor’s liability under the Loan Agreement
- Invite HKIAC to appoint the same Tribunal (in the underlying arbitration of the Loan Agreement) to an arbitration under the Promissory Note
- Apply for consolidation of the arbitration under the Loan Agreement, with an arbitration under the Promissory Note
- Apply for a stay of proceedings in an arbitration under the Promissory Note pending the outcome of the arbitration under the Loan Agreement

This case indeed highlights the importance of careful analysis of the different dispute resolution clauses in a multiple related contracts scenario – for both claimant side and respondent side.

RELATED PRACTICE AREAS

- Litigation & Dispute Resolution
- Business & Commercial Disputes
- International Arbitration

MEET THE TEAM



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