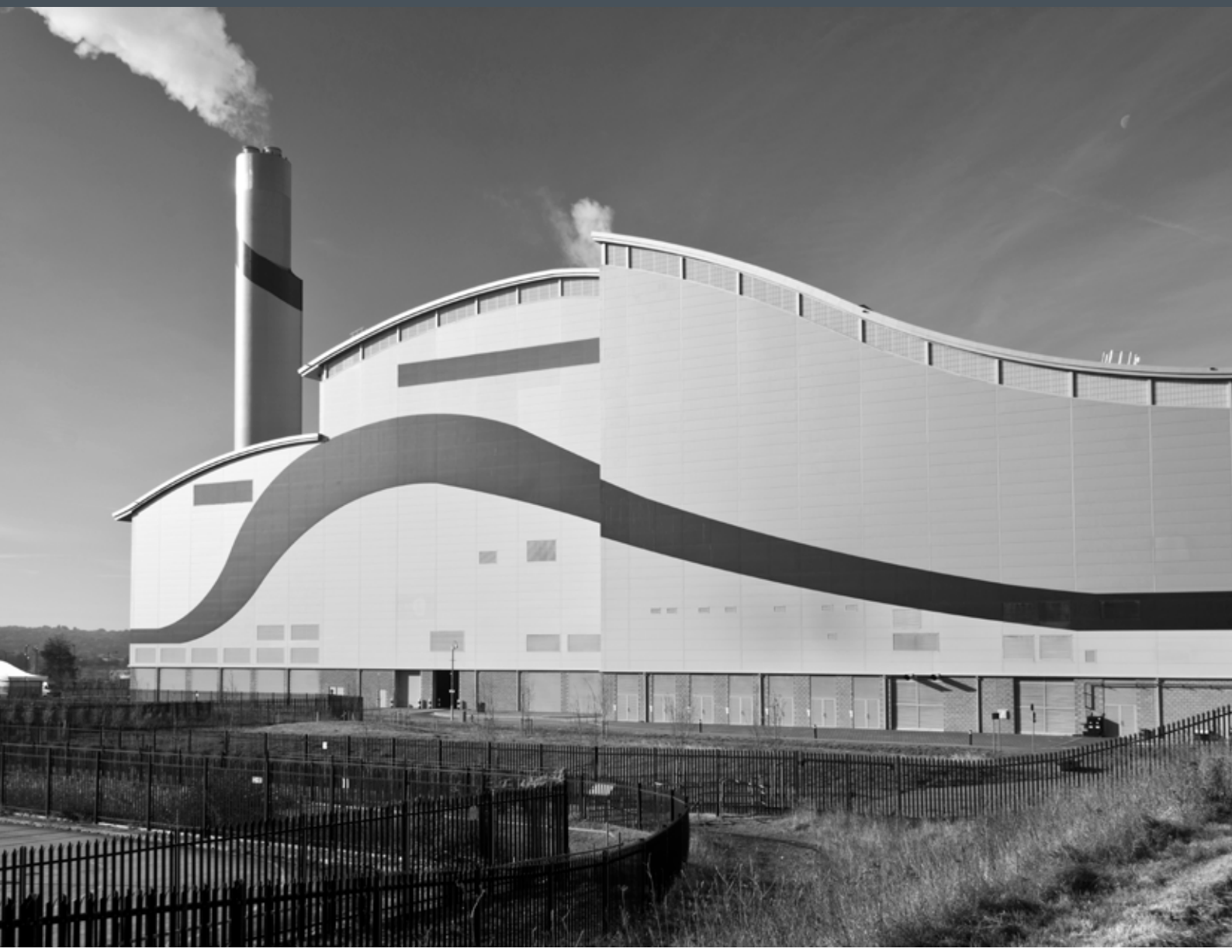

COURT GRANTS STAY IN FAVOUR OF ARBITRATION APPLYING THE PRESUMPTION OF 'ONE STOP ADJUDICATION'

(SURREY COUNTY COUNCIL V SUEZ RECYCLING AND RECOVERY SURREY)

Arbitration analysis: Mr Alexander Nissen QC (sitting as a High Court Judge in the Technology and Construction Court) granted a stay of litigation proceedings in favour of arbitration pursuant to section 9 of the Arbitration Act 1996 (AA 1996).

The decision states that the presumption in favour of 'one-stop adjudication' still has application where there is more than one contract between the same parties, each with a different dispute resolution clause. This is especially so where the different dispute resolution clauses can be construed so as to sit alongside one another. In a case where the first contract contains an arbitration agreement and a second contract contains a clause referring disputes to the domestic courts, it may be possible to construe these provisions consistently.

However, it would not be correct to construe the reference to domestic courts as merely identifying the supervisory court of any arbitration commenced under the first contract. Instead, the correct approach is to identify the remaining provisions of the second contract that do not fall within the ambit of the arbitration agreement, even if this leaves the reference to domestic courts with 'very little purpose in practice'.

Surrey County Council v Suez Recycling and Recovery Surrey Ltd [2021] EWHC 2015 (TCC)

What are the practical implications of this case?

This case addresses the issue of jurisdiction where two or more contracts have been executed by the same parties and one contract contains an arbitration agreement while another contains a clause referring disputes to the domestic courts.

The two main questions for the court were: (a) should it be presumed that the parties intended all matters arising out of their legal relationship to be determined in one forum; and (b) if so, should the forum be arbitration? In a detailed judgment delving into the various cases on each issue, the court gave a qualified 'Yes' to both questions.

With regard to the first question, the court followed *Fiona Trust v Privalov* [2007] UKHL 40, [2007] 4 All ER 951 in finding that the parties should be presumed to have intended all matters arising out of their legal relationship to be determined in the same forum. The court distinguished the decision of *Monde Petroleum v Westernzagros* [2015] EWHC 67 (Comm), which held that the *Fiona Trust* principle had limited application where parties are bound by more than one contract.

With regard to the second question, the court noted the strong legal policy in favour of arbitration. However, ultimately it did not see a need to choose between the two jurisdiction clauses. The court held that it was possible to construe the reference to domestic courts in the second contract so as to sit alongside the arbitration agreement in the first.

What was the background?

In 1999, Surrey County Council (the Council) entered into a 25-year Waste Disposal Project Agreement (WDPA) with Suez Recycling and Recovery Surrey Ltd. Under the WDPA, the Council would collect and deliver waste to Suez who would dispose of it. Suez promised to develop, construct and operate energy from waste (EfW) facilities for that purpose in the future.

In the years that followed, the parties concluded three deeds of variation, each of which amended the WDPA in certain respects. Of particular relevance was the third deed of variation, by which the parties agreed to implement a specific EfW facility called 'EcoPark'.

The construction of the EcoPark was delayed and, in December 2020, the Council commenced proceedings in the English court. It relied on clause 15 of the deed of variation, which stated that the English courts would have '… exclusive jurisdiction in relation to this Deed and any contractual or non-contractual obligations arising from or connected with it…'.

Suez applied to the court to stay the proceedings under AA 1996, s 9 and/or in accordance with the court's inherent jurisdiction to stay proceedings. It said that the development of the EcoPark fell to be implemented within the machinery of the WDPA and therefore the dispute should have been referred to arbitration under the arbitration agreement in clause 52 of the WDPA (which provided for arbitration in accordance with the Arbitration Rules of the London Court of International Arbitration), which covered any dispute that 'arises out of or in connection with this [WDPA]'.

The issue before the court was whether the court proceedings had been commenced by the Council in breach of the arbitration agreement in the WDPA and should be stayed.

What did the court decide?

The court ordered a stay of the proceedings.

It concluded that the arbitration agreement in clause 52 of the WDPA should be broadly construed so as to cover disputes arising out of the construction and commissioning of EcoPark.

While the court accepted that, read in isolation, clause 15 of the deed of variation could also encompass such a dispute; it gave effect to the presumption in favour of 'one-stop adjudication' in *Fiona Trust*. It should be presumed that the parties intended their disputes to be dealt with by arbitration as first identified in the WDPA.

The court said it was possible to construe clause 15 of the deed of variation in a manner which sat alongside the continued applicable of clause 52 of the WDPA because the deed of variation identified the clauses of the WDPA that were to be varied and therefore those to which the arbitration agreement applies. Other provisions of the deed not falling within the scope of the variation fell within the ambit of clause 15 and were therefore subject to the jurisdiction of the court. Those provisions were standard ones concerning counterparts, service of notices and exclusion of third-party rights.

The conclusion that clause 15 of the deed of variation could be construed in such a manner was crucial for two reasons. First, the deed of variation contained an order of priority which stated that the terms of the deed would prevail over the WDPA in the event of conflict. By finding that the two dispute resolution provisions were consistent, the court avoided having the consider the order of priority.

Second, by finding that the two dispute resolution provisions were consistent, the court was able to distinguish the decision of *Monde Petroleum*, which had been relied upon by the Council. That decision had found the presumption of 'one stop adjudication' to have limited application where parties are bound by more than one contract. The court concluded that *Monde Petroleum* concerned a case where the two dispute resolution provisions were in conflict and therefore did not need to be followed in this instance. Further, the second agreement in Monde Petroleum was a settlement and termination agreement, rather than a deed of variation.

Interestingly, the court rejected the argument that the reference to the English courts in clause 15 of the deed of variation should be construed

as a reference to the supervisory court of arbitration under clause 52 of the WDPA, which was another way it could have reconciled the two provisions. See *Paul Smith Ltd v H&S International Holdings Inc* [1991] 2 Lloyd's Rep 127 (not reported by LexisNexis® UK). The court noted the WDPA and the deed of variation were entered into at different times, whereas the competing jurisdiction clauses in *Paul Smith* were contained in the same contract.

Case details

Court: Technology and Construction Court, Business and Property Courts of England and Wales, High Court of Justice

Judge: Mr Alexander Nissen QC

Date of judgment: 16 July 2021

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