

MULTI-CONTRACT DISPUTES AND CONFLICTING DISPUTE RESOLUTION CLAUSES: HONG KONG COURT CONFIRMS THE PROPER APPROACH TO DETERMINE THE TRIBUNAL'S JURISDICTION

The Hong Kong Court has clarified the proper approach when analysing dispute resolution clauses in related contracts and the scope of the tribunal's jurisdiction, confirming that the "*centre of gravity*" of the issue in dispute is a key factor when deciding which resolution clause is "*closer*" to the issue and ought therefore be applied. The Court also commented on issues which can arise when the notice of arbitration is improperly drafted.

On 16 February 2024, the Hong Kong Court of First Instance (the court) handed down judgment in *AAA and Others v DDD*¹.

Background

The parties entered into a finance transaction which was set out in separate, but related contracts.

The Borrower wished to acquire option shares in a company (**Company X**) held by another party (**Guarantor 1**). The **Lender** provided a loan to the Borrower for the acquisition of the option shares and the parties entered into a **Loan Agreement**² in terms of which the **Borrower** agreed to repay to loan and the loan was guaranteed by Guarantor 1 and a fourth party (**Guarantor 2** and, together, the **Guarantors**).

The Borrower also issued a Promissory Note in favour of the Lender, with the payment obligation thereunder again being jointly and severally guaranteed by the Guarantors on a joint and several basis³.

The Loan Agreement and Promissory Note each contain dispute resolution clauses, in terms of which the parties agreed to refer any disputes arising under the relevant contract to arbitration in Hong Kong, with reference to the rules of the Hong Kong International Arbitration Centre (**HKIAC**). However, the clauses are not identical.

The Borrower defaulted on the loan. The Guarantors argued that they had been released from their obligations to guarantee the loan under the Loan Agreement. This was disputed by the Lender.

The Arbitration

The Lender commenced arbitration under the HKIAC's 2018 Administered Arbitration Rules (**HKIAC Rules**), by issuing a Notice of Arbitration (**NOA**) against the Borrower and the Guarantors.

It was clear that the NOA commenced arbitration under the Loan Agreement.

¹ HCCT 39/2023, [2024] HKCFI 513, Deputy High Court Judge Reyes SC (*AAA v DDD*). You can read the judgment [here](#).

² As amended by an amendment agreement which did not materially change the terms of the Loan Agreement which are relevant to the parties' dispute and which incorporated, in full, the dispute resolution clause set out in the Loan Agreement.

³ Other obligations (Share Charges and a Pledge) were also entered into as security for the loan, but those contracts are not relevant to the Court's decision so, for simplicity, this article focusses on the interplay between the Loan Agreement and Promissory Note and the proper interpretation of the NOA.

A dispute arose over whether the NOA also commenced an arbitration under the Promissory Note, giving the Tribunal jurisdiction to determine the Lender's related, but distinct, claims against the Guarantors under the Promissory Note⁴.

The NOA enclosed a copy of the Promissory Note, including the text of the dispute resolution clause, however:

- the NOA only mentioned the Promissory Note once, as a background fact, and did not otherwise refer to the Promissory Note;
- all of the relief claimed by the Lender was sought under the Loan Agreement. The Lender did not seek a declaration of the Lender's right to enforce the Promissory note against the Guarantors.
- The Lender's statement of claim did not claim relief in relation to the Promissory Note.

The Lender indicated an intention to supplement the relief sought in the statement of claim to include claims based on the terms of the Promissory Note and the Borrower and Guarantors objected on the basis that the Tribunal lacked jurisdiction to determine claims arising out of the Promissory Note.

Having considered the terms of the NOA, the Tribunal decided that it had jurisdiction to hear the Lender's claim under the Promissory Note on the basis that the single reference to the Promissory Note in the NOA, and enclosed copy, was sufficient to constitute an implied reference to arbitration under the arbitration clause in the Promissory Note.⁵

The Borrower and Guarantors were dissatisfied with the Tribunal's decision and appealed to the Hong Kong Court of First Instance.

Appeal to the Court of First Instance

Conflicting Dispute Resolution Clauses: the "centre of gravity" Approach

The court provided guidance on how a tribunal should approach the question of conflicting dispute resolution clauses in a "package deal" (i.e. a transaction set out in multiple contracts which have the same goal or common objective and were entered into at approximately the same time⁶):

- The *Fiona Trust* principle does not assist in these circumstances. In *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40⁷ (*Fiona Trust*), the House of Lords considered a single contract which contained more than one conflicting dispute resolution clause and held that, when interpreting dispute resolution agreements, it should be assumed that the parties intended that any dispute arising out of the relationship into which they have entered or purported to enter should be decided by the same tribunal, unless clear language excludes certain questions from that tribunal's jurisdiction.
- Nor does the *Terre Neuve* approach (an extended version of the Fiona Trust principle used where there are multiple, related, contracts but only one dispute resolution clause⁸).
- Rather, the court ought to interpret each contract and analyse the parties' objective intentions as to the scope of each dispute resolution clause, and then consider the "centre of gravity" of the issue in dispute (e.g. by considering the ultimate relief sought) and decide which resolution clause is "closer" to the issue in dispute.
- Where an issue is "intertwined" (i.e. there is a possibility that the issue might reasonably be regarded as falling within the scope of more than one dispute resolution clause), the court held that the judge "must locate the 'centre of gravity' of that issue or dispute as best one can, assessing which resolution clause is 'closer' to the issue

⁴ *AAA v DDD* at paragraph [20].

⁵ *AAA v DDD* at paragraph [22].

⁶ *AAA v DDD* at paragraph [48].

⁷ In *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 (*Fiona Trust*) the House of Lords considered a single contract which contained more than one conflicting dispute resolution clause and held that, when interpreting dispute resolution agreements, it should be assumed that the parties intended that any dispute arising out of the relationship into which they have entered or purported to be decided should be decided by the same tribunal, unless clear language excludes certain questions from that tribunal's jurisdiction.

⁸ Laid down in *Terre Neuve SARL & Others v Yewdale Limited & Others* [2020] EWHC 772 (Comm) (*Terra Neuve*), which applies the *Fiona Trust* principle to cases where there are multiple related contracts but only one of them contained a dispute resolution clause.

or dispute" with a "liberal and generous" attitude.⁹ A "possible test" was to look at the ultimate relief being sought.¹⁰

Applying this approach to the facts of this case, the court found that the Tribunal did not have jurisdiction to determine whether the Guarantors were liable to make payment to the Lender under the Promissory Note.

This was a distinct question from the question of liability under the Loan Agreement, and falls within the "centre of gravity" of the dispute resolution clause contained in the Promissory Note.

The court disagreed with the Tribunal's interpretation of the NOA, finding that: "*clear words are needed to indicate that one is bringing a dispute to arbitration under a specific provision in a particular contract*", and doubted whether a mere reference to a document and exhibiting the document to the NOA would be sufficient¹¹.

Importantly, the court observed that the HKIAC had only confirmed the Tribunal's appointment under the Loan Agreement. This is important because under Article 9.1 of the HKIAC Rules, an arbitrator's appointment is only effective upon the HKIAC's confirmation. Consequently, the tribunal could not unilaterally assume an appointment, without the HKIAC's confirmation and the HKIAC's confirmation of appointment under a dispute resolution clause in one contract could not simply be taken as the HKIAC's confirmation under a different dispute resolution clause in a separate contract.

Moreover, the two dispute resolution clauses were differently worded (e.g. as to the need for negotiation and number of arbitrators). These substantive differences led the court to conclude that the arbitration regimes were distinct and could not be merged into a single regime.

It is important to note however that a tribunal can, and should, consider **relevant** issues and not take too narrow a view. For example, part of the relief sought in this case (e.g. the relief sought against the Guarantors under the Promissory Note) fell outside the tribunal's jurisdiction. However, the court agreed with the Lender that the question of whether a clause in the Loan Agreement which released the Guarantors from obligations under the "*Transaction Documents*", including the Promissory Note, was triggered is a matter which could fall within the tribunal's jurisdiction under the NOA, since that issue arose from the terms of the Loan Agreement and the release affected obligations arising from all of the Transaction Documents. That being so, and if the Tribunal in this case makes a determination on this issue, the parties may need to carefully consider the question of *estoppel* in any arbitration which follows in relation to the Promissory Note.

Commentary

The judgment in *AAA v DDD* provides useful guidance on how arbitral tribunals (and the Hong Kong courts) should approach the question of jurisdiction in cases concerning "*package deals*" involving multiple, related, contracts.

It is also a stark reminder that the notice of arbitration, which will become the terms of reference for the arbitration which follows, must be carefully prepared after detailed analysis of the contractual documents and facts of the case, noting that an arbitral tribunal cannot unilaterally assume appointment or jurisdiction for questions that are not within the scope of their appointment¹². Further, the absence of the relevant arbitral institution's confirmation of arbitrator appointment can be fatal to a tribunal's jurisdiction where such confirmation is necessary for an effective appointment (in this case, the dispute resolution clause in the Promissory Note required compliance with the HKIAC Rules which include confirmation of arbiter's appointment).

In some cases, claimants may be able to remedy the situation by amending the NOA. In this case, for example, the claimant might have been able to rectify matters by serving a second NOA convening a tribunal in respect of the Promissory Note and seeking to consolidate the two arbitrations and / or by inviting the HKIAC to appoint the panel convened in respect of the Loan Agreement to hear the Promissory Note dispute.

However, issues will arise in relation to limitation and costs. Consequently, it is preferable to carefully draft the notice (or notices) of arbitration at the outset.

⁹ *AAA v DDD* at paragraphs [57-64]. The court cited the English Court of Appeal case *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWCA 437 in support of its analysis. The *Amtrust* case was cited and applied in *X v Y* [2020] HKCFI 2782 (Hon Mimmie Chan J) and *Capital Wealth Holdings Limited and others v 南通嘉禾科技投资开发有限公司* [2021] HKCFI 272 (Hon K Yeung J).

¹⁰ *AAA v DDD* at paragraph [65].

¹¹ *AAA v DDD* at paragraph [33].

¹² *AAA v DDD* at paragraph [37].

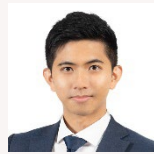
This article provides a high-level overview of the court's decision in AAA v DDD and the proper interpretation of conflicting dispute resolution clauses. If you would like to discuss the decision or require specific advice, please contact the authors or your usual HFW contacts.

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