Kluwer Arbitration Blog

# What are the Limits of the Fiona Trust Doctrine? A Review of Recent Cases on Inconsistent Dispute Resolution Clauses

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It is critical to invest time to ensure that there are no inconsistencies between multiple dispute resolution/jurisdiction clauses within a particular contractual relationship (whether within a single contract or across multiple related contracts). Such inconsistencies inevitably lead to disputes over how the parties should resolve their disputes – a potentially costly sideshow to the resolution of the real dispute between the parties.

In the seminal case of *Fiona Trust & Holding Corp v Privalov* [2007] 2 Lloyd's Rep 267, the UK House of Lords (as it then was) introduced what is often referred to as the "presumption in favour of one-stop adjudication". The Fiona Trust doctrine presumes that "rational businessmen" are likely to have intended that any disputes arising between them will be decided by the same court or tribunal, unless they use clear language indicating otherwise.

There have been several recent decisions around the world exploring the limits of the doctrine. These cases suggest that, where there are conflicting arbitration and court jurisdiction clauses, in the absence of clear language indicating the parties' intention to resolve certain aspects of a dispute in one forum as opposed to another, the Fiona Trust doctrine will be applied to reconcile both clauses such that they continue to remain valid and operative. These decisions have given effect to both clauses by finding as a matter of construction that the parties intended all disputes to be resolved through arbitration with the court providing supervisory jurisdiction, given the other way round would mean that the arbitration clause would become inoperative.

### *Melford Capital Partners (Holdings) LLP l v Wingfield Digby [2021] EWHC 872 (Ch)*

In *Melford Capital*, there was a breakdown of a business relationship between partners to Melford Capital, and there were two conflicting dispute resolution clauses contained in a limited liability partnership agreement. One was an exclusive jurisdiction clause in favour of the English courts and the other was an arbitration clause, which did not specifically designate a seat of arbitration.

The Court interpreted the exclusive English jurisdiction clause as providing for the supervisory jurisdiction of the English courts in support of arbitration, and therefore concluded that it was possible to read the clauses in harmony rather than in conflict with each other. A similar approach had been taken in other cases prior to *Fiona Trust*, in particular *Paul Smith Ltd v H&S*

*International Holding Inc* [1991] 2 Lloyd's Rep 127.

This arguably went one step further than the House of Lords did in *Fiona Trust*, given the jurisdiction clause was not expressed to be exclusive in *Fiona Trust*, and the court and arbitration clauses referred to each other in *Fiona Trust*. In contrast, in *Melford Capital* there were two arguably completely contradictory clauses, each of which would work independently of the other. The judge considered that the question was whether to determine that the arbitration clause was completely inoperable such that it was "*eviscerated*", or instead to make the two clauses work together.

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

This case concerned a waste disposal project agreement together with three successive agreements, all of which were described as variations to that first agreement. The four contracts each contained various iterations of the same arbitration clause and an exclusive jurisdiction clause in favour of the English courts. The third deed of variation, by which the parties agreed to implement an "EcoPark", contained a new additional exclusive jurisdiction clause in favour of the English courts.

The Claimant, Surrey County Council, commenced court proceedings against Suez relating to delay in the construction and commissioning of the EcoPark. Suez disputed the court's jurisdiction and brought an application for a stay under section 9 of the English Arbitration Act. Suez argued that the development of the EcoPark fell to arbitration in accordance with the original waste disposal agreement, whereas Surrey argued that disputes concerning the EcoPark should be ring-fenced and heard by the English court.

Referring back to *Fiona Trust*, the judge held that the arbitration clause should be construed broadly to encompass disputes concerning the EcoPark, as there was no reason why the parties would have chosen a different forum for one category of dispute without any clear language to indicate that. The judge found that the reference to arbitration and courts in the same contract was a reference to the supervisory jurisdiction of the English courts in support of arbitration, in line with *Melford Capital*.

As for the new jurisdiction clause in the third deed of variation, rather than finding that the existence of the arbitration clause and court jurisdiction clause created a conflict, the judge found that the "varied clauses" would fall to arbitration, but that the rest (e.g. the standard boilerplate clauses) would fall to the court. The judge accepted that the jurisdiction clause would therefore be of limited applicability.

The *Melford Capital* and *Surrey County Council* judgments could arguably be characterised as an expansion of the Fiona Trust doctrine from "presumption in favour of one-stop adjudication" to "presumption in favour of arbitration". However, despite the approach taken in the above cases, there have also been several cases in England, Singapore and Hong Kong where the courts have found that the parties' intention was not to submit all disputes to arbitration.

### *Albion Energy v Energy Investments Global* [2020] EWHC 301 (Comm)

This case involved a sale and purchase agreement (SPA) containing a court jurisdiction clause, and an escrow agreement containing an arbitration clause. The court considered that there would be good reasons why parties would choose different dispute resolution provisions for principal and security agreements forming part of the same transaction. Therefore, the court found that the arbitration agreement in the escrow agreement did not supersede the court jurisdiction clause in the SPA.

### *Silverlink Resorts Limited v MS First Capital Insurance Limited* [2020] SGHC 251

*Silverlink* involved an insurance policy which contained an arbitration clause with respect to "*any dispute arising out of or in connection with this Policy*" and a jurisdiction clause conferring jurisdiction to the Singapore courts with respect to "*any dispute… regarding the interpretation or the application of this Policy"*. Further, a renewal certificate included a choice of law jurisdiction provision which also conferred jurisdiction to the Singapore courts "*in the event of any dispute over interpretation of this Policy"*.

The claimant commenced court proceedings when its claim under the insurance policy was rejected. The defendant applied to the Singapore courts to stay the proceedings in favour of arbitration pursuant to section 6 of the International Arbitration Act of Singapore. As part of its reasoning in rejecting the stay application and determining that the arbitration clause did not apply to the dispute before it, the Singapore High Court ruled that the jurisdiction clause was intended to carve out disputes regarding interpretation and application of the policy from the arbitration clause, such that the two clauses were not inconsistent. Further, the court found that the renewal policy confirmed the parties' intention to resolve disputes falling within the jurisdiction clause through the courts rather than arbitration.

### *H v G* [2022] HKCFI 1327

Most recently in *H v G*, the Hong Kong Court of First Instance set aside an arbitral tribunal's determination that it had jurisdiction over claims under a warranty where an associated building contract between the developer and contractor contained an arbitration clause, but the warranty itself between the two parties and a subcontractor submitted disputes to the non-exclusive jurisdiction of the courts of Hong Kong. The Hong Kong court found that the Fiona Trust doctrine was not applicable, as on the facts of the case, the parties had clearly intended to carve out disputes under the warranty from the arbitration agreement in the building contract and this displaced the *Fiona Trust* presumption.

### Comments and take away

In circumstances where there are conflicting arbitration and court jurisdiction clauses (whether exclusive or not) and in the absence of other indications one way or another, it would appear that the only way in which such conflicting clauses can co-exist is for the court jurisdiction clause to be construed as confirming the supervisory jurisdiction of the court in support of arbitration.

Therefore, arguably the approaches taken in *Melford Capital* and *Surrey County Council* remain true to the original Fiona Trust doctrine – a presumption that disputes should be resolved in the same forum, and not necessarily demonstrative of a presumption in favour of arbitration, which would be an expansion of the Fiona Trust doctrine. That said, these cases demonstrate that the courts are willing to stretch the *Fiona Trust* doctrine to apply even where two conflicting clauses exist independently of one another.

The other cases discussed above demonstrate that the courts and tribunals may not always give preference to an arbitration clause for disputes arising in connection with a particular contractual relationship. Much will depend on the specific circumstances and the wording found in the inconsistent clauses, and what they indicate as to the parties' intentions. An argument could be made that these cases lower the bar for what constitutes sufficiently clear language for the Fiona Trust doctrine not to apply.

The key takeaway from these cases is that arbitration clauses and jurisdiction clauses must be adequately reviewed to avoid inconsistencies (especially in multi-contract transactions). Where the intention is to carve out certain disputes for one forum as opposed to the other, such division and intention should be made clear using express drafting to avoid any unintended outcomes and wasteful disputes over the appropriate forum.

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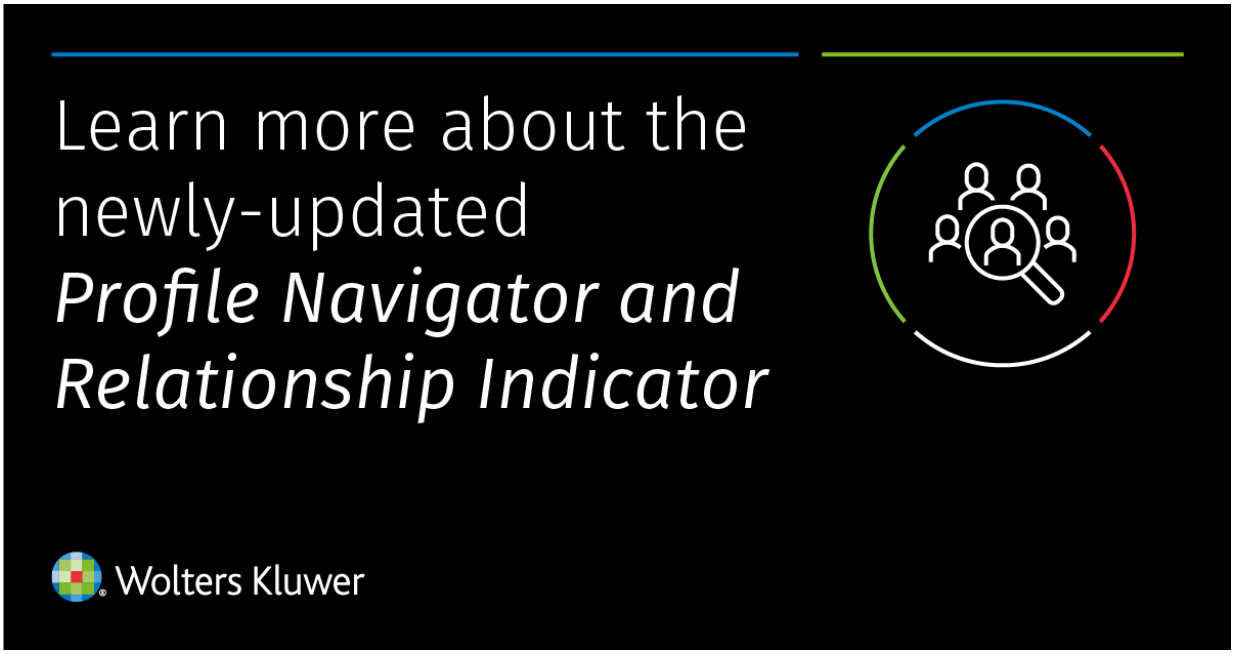


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