

Hong Kong Court Adopted the Centre of Gravity Approach in Setting Aside Tribunal's Decision on Jurisdiction

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NEWSLETTER

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In a recent case *AAA and Others v DDD* [2024] HKCFI 513, Deputy High Court Judge Reyes SC examined the issue of whether the arbitration clause in a loan agreement confers jurisdiction on the Tribunal to determine disputes arising out of a promissory note which has its own dispute resolution clause. Having conducted a detailed analysis of the facts of the case and adopted the “centre of gravity” approach, the Court concluded that the Tribunal had jurisdiction to adjudicate certain claims centred upon the loan agreement, but it had no jurisdiction to decide the guarantor’s liability under the promissory note. The Court therefore quashed the Tribunal’s decision on jurisdiction.


The practical consequence of this judgment to the parties is the fragmentation of related disputes in different legal proceedings. This case will serve as a reminder about the importance of having consistent dispute resolution clauses in the suite of transaction documents. Further, if litigants intend to invoke certain operative obligations and the dispute resolution clause in one contract, they have to do so expressly.

Background

The 1st to 3rd Plaintiffs, AAA, BBB and CCC, were respectively the Borrower, Guarantor 1 and Guarantor 2 in respect of a loan. The Defendant, DDD, was the Lender to the loan. By the Loan Agreement (as amended by the Amendment Agreement), the Lender agreed to loan a principal amount to the Borrower, and each of the Guarantors irrevocably guaranteed the loan as a primary obligor.

On the same day as the Loan Agreement, the Borrower and Guarantor 1 entered into separate Share Charge Agreements with the Lender, and Guarantor 2 executed a Pledge in the Lender’s favour.

After the Lender wired monies pursuant to the Loan Agreement, the Borrower issued a Promissory Note to the Lender as security for the loan.



By way of the Promissory Note, the Borrower undertook to repay the principal amount at a specific interest rate, and the Guarantors jointly and severally guaranteed the Borrower's repayment obligation.

The Borrower failed to repay the principal amount and the Lender commenced an HKIAC administered arbitration against the Borrower and the Guarantors.

The Loan Agreement, the Share Charge Agreements, the Pledge and the Promissory Note each have their own dispute resolution clauses. The arbitration agreement in the Loan Agreement provides:

"(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 Promissory Note contains a different dispute resolution 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 Lender's claims in the Notice of Arbitration ("**NOA**") were based on the Borrower's obligations under the Loan Agreement. The NOA exhibited the Promissory Note as evidence, reciting that the Borrower acknowledged receipt of the principal amount and issued the Promissory Note, but said nothing else on the Promissory Note. The relief sought in the Lender's in Statement of Claim also centred on the Loan Agreement.

The Lender later signalled its intention to supplement the relief sought to include payment claims based on the Promissory Note. In response, the Respondents raised a jurisdictional challenge that the Tribunal lacked jurisdiction over the Lender's claims against the Guarantors based on the Promissory Note.

The Tribunal's Decision

The Tribunal decided that it had jurisdiction over the Lender's claims based on the Promissory Note. The Tribunal held that it had been implicitly appointed under the dispute resolution clause in the Promissory Note, given that the Promissory Note had been mentioned and exhibited in the NOA.

The Respondents applied to the Court of First Instance to set aside the Tribunal's decision on jurisdiction.

The Court's Decision

Disagreement with the Tribunal's analysis

The Court first doubted that the mere reference to the Promissory Note and exhibition of the same in the NOA would be sufficient to be invoked as the basis of arbitration. The NOA only invoked the arbitration clause in the Loan Agreement and stated nothing about the dispute resolution clause in the Promissory Note.

Further, the Court noted the fact that HKIAC's correspondence with the parties and the Tribunal only acknowledged the Tribunal's appointment under the arbitration clause in the Loan Agreement. For this reason, the Court had difficulty with the Tribunal's position on its "implicit appointment" and held that the Tribunal could not of its own motion unilaterally declare itself to have been appointed under the dispute clause in the Promissory Note.


The Court also emphasised the two "significant differences" between the dispute resolution clauses in the Loan Agreement and the Promissory Note. First, the Promissory Note imposes a period of 30-days negotiation before arbitration, the Loan Agreement does not. Second, the Loan Agreement provides that three arbitrators should be appointed, while the Promissory Note does not specify the number of arbitrators. The Court further noted that in deciding that it had jurisdiction, the Tribunal in effect deprived the parties of a potential benefit of the dispute resolution clause that they bargained for in the Promissory Note.

The approach to conflicting dispute resolution clause situations

The Court proceeded to examine how the Tribunal ought to have approached the question of jurisdiction. The judge listed three broad paradigms in which conflicting dispute resolution clauses can feature:

- 1) where there is a single contract with two or more conflicting dispute resolution clauses ("**basic paradigm**");
- 2) where there are multiple related contracts, but only one of the contracts contains a dispute resolution clause, while the others do not ("**intermediate paradigm**"); and
- 3) where there are multiple related contracts with conflicting dispute resolution clauses in two or more (but not necessarily all) of the contracts ("**generalised paradigm**").

With regard to the basic paradigm, the Court referred to the principle in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, being that 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 to be decided in a single forum. However, the difficulty with applying the *Fiona Trust* principle to the present case is that *Fiona Trust* involved singleton contracts with apparently conflicting internal dispute resolution clauses, whereas the present case involves multiple contracts with different clauses which indicate that parties resort to multiple fora for their disputes.



With regard to the intermediate paradigm, a possible approach is the so-called “*extended Fiona Trust* principle” as established in *Terre Neuve SARL & Others v Yewdale Limited & Others* [2020] EWHC 772 (Comm). By this approach, a jurisdiction agreement contained in one contract may, on its proper construction, extend to a claim that is made under another contract. The Court held that the extended *Fiona Trust* principle would not be applicable in the present situation, where there are different dispute resolution clauses in related agreements in the package (comprising of the Loan Agreement, the Share Charge Agreements, the Pledge and the Promissory Note). It would be difficult to determine which dispute resolution clauses should take precedence over the others.

The Court noted that the English Court of Appeal’s decision in *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWCA 437 offers a pragmatic way of approaching the generalised paradigm, namely the present case situation. The judge derived from *AmTrust* that there can be no initial presumption that the parties intended all their disputes to be revolved in a single forum, if there are several contracts with different dispute resolution clauses. One must construe each contract in the package to map out what disputes must have been intended to be covered by the dispute resolution clause of a given contract.

In deciding whether a particular forum has jurisdiction to deal with an intertwined issue or dispute between the parties, one must locate the “centre of gravity” of that issue, assessing which dispute resolution clause is “closer” to the issue. One way to discern the gravity is to look at the ultimate relief sought in connection with that issue.

Application of the “centre of gravity” approach to the present case

In applying the “centre of gravity” approach, the Court concluded that the question whether the Guarantors are or remain liable to pay under the Promissory Note is a distinct issue from provisions in the Loan Agreement. Rather, it falls within the “centre of gravity” of the dispute resolution in the Promissory Note, and therefore falls outside of the Tribunal’s jurisdiction.

Conclusion and Comments

This decision provides a helpful guidance on the rather common situation where related contracts contain different dispute resolution clauses and disputes arise out of multiple linked transaction documents. Reyes J differentiated between the three paradigms and their respective legal principles. For the “generalised paradigm”, the Hong Kong court applied the “centre of gravity” approach to decide where a disputed issue sits among various dispute resolution clauses.

From a procedural perspective, these disputes appear to be a scenario where the claimant could have attempted “commencement of single arbitration under multiple contracts” under the HKIAC Rules. Whilst the Court observed that the arbitration agreements were different, it might still be arguable that they were nonetheless compatible. The institution’s decision to resolve the disputes in one or two arbitrations is a procedural decision, which is likely to spare the parties a jurisdiction challenge. If you wish to know more about this complicated area of arbitration law and practice, please get in touch with the authors or your usual Fangda contacts.