UPDATE

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BVI Court of Appeal confirms law on the construction of exclusive jurisdiction clauses

Update prepared by Charlotte Walker (Associate, BVI)

In *Dmitry Vladimirovich Garkusha v Ashit Yegiazaryan* BVIHCMAP 2015/0010 the BVI Court of Appeal confirmed that, when constructing an exclusive jurisdiction clause, the BVI Courts have and will continue to follow the approach taken by the House of Lords in *Premium Nafta Products Limited and Others v Fili Shipping Company Limited and Others* [2007] UKHL 40 (the *Fiona Trust* case)

Introduction

This case concerned an application for leave to appeal to Her Majesty in Council (the Privy Council) against a judgment of the BVI Court of Appeal handed down on 6 June 2016, on grounds that the decision raised questions of great general or public importance which ought to be referred to the Privy Council for resolution.

One of the primary questions for resolution was whether the Court of Appeal's judgment included a misstatement of, and was wider than the approach to, the interpretation of arbitration clauses taken by the House of Lords in the *Fiona Trust* case.

Fiona Trust case

The *Fiona Trust* case arose out of eight charterparties. Each one contained a *law and litigation clause* which enabled either party to it to refer *any dispute arising under this charter* to arbitration in London.

The owner of the ships alleged that the charters were procured by bribery, as a consequence of which the charters had been rescinded.

The question was whether an arbitrator or a court of law should determine whether the rescission was proper. Accordingly, the issue was whether, as a matter of construction, the arbitration clause was apt to cover the question of whether the contract was procured by bribery.

Approach of the Lower Court

When the Fiona Trust was argued, there was some level of discord among the lower courts as to the proper construction of arbitration clauses. Some courts thought that an arbitration clause referring disputes *arising under* a contract was different in scope to a clause referring disputes *arising out of* a contract. Disputes concerning the rights and obligations created by the contract were said to be captured by the phrase *arising under*, whereas a wider class of disputes was covered by the phrases *in relation to* or *in connection with* the contract. The result was that some disputes were referable to a court of law while others could only be referred to arbitration.

House of Lords Judgment

The House of Lords, led by Lord Hoffman, lamented that the distinctions made in previously decided cases *reflect no credit upon English commercial law*. It held 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 or purported to enter to be decided by the same tribunal.*

Accordingly, arbitration clauses were to be:

> *construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.*

It followed, on the facts of Fiona Trust, that the language of the arbitration clause in the relevant charterparties contained nothing to exclude disputes about the validity of the contract, whether on the grounds that it had been procured by fraud, bribery, misrepresentation or otherwise. Accordingly, the clause did apply to the dispute at hand.

The Court also decided that the principle of separability contained in s.7 of the Arbitration Act 1996, meant that the invalidity or rescission of the main contract did not necessarily mean the arbitration agreement is invalid or is rescinded. Section 7 of the Act meant that the two agreements had to be treated as having been separately concluded, and the arbitration agreement could only be invalidated on a ground which related directly to it and was not merely as a consequence of the invalidity of the main agreement.

The House of Lords therefore endorsed the Court of Appeal's analysis that claims to rescind the charterparties on the basis of bribery would fall within the scope of a charterparty arbitration clause. Such allegations did not directly prevent the arbitration agreement from being effective and did not, therefore, affect the parties' obligations to arbitrate.

Garkusha v Yegiazaryan

This case centred principally around two Share Purchase Agreements, which contained an exclusive jurisdiction clause in the following terms[1]:

> *Any disputes, differences or claims arising out of or in connection with this Agreement, including with respect to its performance, breach, termination or invalidity, shall be settled by the courts of the British Virgin Islands.*

The Appellant, who by these agreements had contracted to sell his entire shareholdings in two BVI companies, contended that he had been compelled to do so by threat of violence, intimidation and financial pressure exerted by the other parties. He brought various claims in the BVI, based on those allegations.

In determining whether permission to serve those claims out of the jurisdiction should be granted, the BVI court first had to consider whether the claims that related to the Share Purchase Agreements fell within the exclusive jurisdiction clauses.

At first instance, the BVI Court determined that they did not. The Court of Appeal reversed that decision, finding that they did. In reaching that decision, the Court of Appeal accepted that, for these purposes, there was no distinction to be made between an arbitration clause and an exclusive jurisdiction clause.

The Defendants sought permission to appeal the Court of Appeal decision to the Privy Council. One basis on which the Defendants made that application, was their argument that the Court of Appeal had misstated and adopted a wider test than that set out in Fiona Trust, by stating:

> *Following the guidance in the English and BVI cases I find that as a general principle tort clause for inducing a contract with an exclusive jurisdiction clause fall within the terms of that clause and unless there are exceptional circumstances should be dealt with in accordance with the clause.*

Court of Appeal's decision on permission to appeal

The Court of Appeal dismissed the application for leave to appeal to the Privy Council.

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[1] Together with one earlier agreement which contained no such clause.

In doing so, it confirmed that the Court of Appeal had not declared any principle concerning the construction of exclusive jurisdiction clauses which in any way departed or was intended to depart from or criticise the guidance given by the House of Lords in the *Fiona Trust* case.

In reaching this decision, the Court of Appeal held that when the earlier court had declared the *general principle* that *tort claims for inducing a contract with an exclusive jurisdiction clause fall within the terms of that clause*, it intended no more than to restate in its own words Lord Hoffman's assumption that the signatories to an arbitration clause intended all disputes arising out of their contractual relationship should be decided by the same tribunal, unless the contrary intention is stated.

The Court of Appeal went on to clarify that the earlier court's concluding statement that the parties' intention that disputes should be referred to the court identified in the exclusive jurisdiction clause ought to be followed *unless there are exceptional circumstances* was nothing but the foreshadowing of the discretion which it accepted to be reposed in the court to deny a party access to the jurisdiction chosen in the exclusive jurisdiction clause, where there are *strong grounds* for doing so.[2]

Conclusion

Following this judgment, to the extent it was ever in doubt, the position regarding arbitration and exclusive jurisdiction clauses in the BVI is now clear. The House of Lords decision in Fiona Trust regarding such clauses is persuasive and will continue to be followed.

This is a welcome clarification of the BVI law position.

Contacts

Eleanor Morgan
Partner, Mourant Ozannes
BVI
+1 284 852 1712
eleanor.morgan@mourant.com

[2] Citing the House of Lords judgment in Donohue v Armco Inc and Others [2002] 1 All ER 749, 759, in which Lord Bingham stated:

I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case.

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