

Client Alert

Latham & Watkins
Litigation Department

A "Fresh Start": The Construction of Arbitration Clauses Under English Law Following *Premium Nafta v Fili*

By Philip Clifford and Oliver Browne

On 17 October 2007, the House of Lords handed down an important decision in the case of *Premium Nafta Products Limited (20th Defendant) & Others (Respondents) v Fili Shipping Company Limited (14th Claimant) & Others (Appellants)*.¹

The decision has resulted in greater certainty for, and is thus of importance to, those using arbitration clauses in English law documents, those who arbitrate in England and those who operate in other jurisdictions that might be influenced by English law relating to arbitration.

The House of Lords confirmed that, under English law, the scope of an arbitration clause is to be construed with the rebuttable presumption that the parties intended a "one-stop shop" for dispute resolution. Accordingly, the English courts will now not easily be persuaded to draw distinctions between the various formulations commonly used for the scope of arbitration agreements ("arising from", "under", "relating to", "in connection with" and so on), as it will generally be presumed all the parties' claims are to be resolved through arbitration.

Background

The background facts are relatively straightforward. The procedural history of the case (and its associated

pieces of litigation) is less so: the dispute is hotly contested by all parties and has resulted in a series of court applications of varying degrees of complexity. The *Premium Nafta v Fili* case is an appeal from the Court of Appeal decision in the case of *Fiona Trust & Holding Corporation & Others v Yuri Privalov & Others*.²

Eight single ship companies, all part of the Russian Sovcomflot shipping group, entered into eight charterparty contracts (each governed by English law) with three separate chartering companies. Those contracts form part of a larger series of disputes between Sovcomflot and its numerous subsidiaries and affiliates and a Mr. Nikitin, who is alleged to have bribed one or more directors or employees of Sovcomflot and its associated companies. Amongst other things, it is alleged that the charterparties were procured on terms highly favourable to the charterers as a result of bribery by Mr. Nikitin.

Issues

The House of Lords summarised the legal issues as:

- "whether, as a matter of construction, the arbitration clause is apt to cover the question of whether the contract was procured by bribery"; and

"... whilst the English courts have previously drawn distinctions between the two phrases [arising under and arising out of], the House of Lords decided that it was "time to draw a line under the authorities and make a fresh start" in determining the scope of arbitration agreements."

- *"whether it is possible for a party to be bound by submission to arbitration when he alleges that, but for the bribery, he would never have entered into the contract containing the arbitration clause".*

Construction of the Arbitration Clause

The charterparties contained a *Law and Litigation* clause which states (in relevant part):

"... either party may, by giving written notice of election to the other party, elect to have any [dispute arising under this charter] referred ... to arbitration in London ..." (emphasis added).

A sub-clause stated that:

"A party shall lose its right to make such an election only if: (a) it receives from the other party a written notice of dispute which (1) states expressly that a dispute has arisen out of this charter; (2) specifies the nature of the dispute; and (3) refers expressly to this clause. ..." (emphasis added).

It was argued that, in order to decide whether, as a matter of construction, the arbitration clause was apt to cover the question of whether the contract was procured by bribery, the court should consider what was meant by the wording *"arising under"* (as used in the main part of the *"Law and Litigation"* clause) and whether this was affected by the use of the different words, *"arisen out of"*, in the sub-sub-clause.

However, whilst the English courts have previously drawn distinctions between the two phrases, the House of Lords decided that it was *"time to draw a line under the authorities to date and make a fresh start"* in determining the scope of arbitration agreements.

Lord Hope said that:

"The proposition that any jurisdiction or arbitration clause in an international commercial

contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all such disputes."

Lord Hoffman agreed:

"In my opinion 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. The clause should 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."

Separability

The House of Lords also rejected the argument that a party should not be bound to arbitrate if it alleges that, but for the bribery, it would not have entered into the contract containing the arbitration clause.

The doctrine of separability of arbitration agreements in English law is enshrined in section 7 of the Arbitration Act 1996:

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement".

Lord Hoffman said that section 7:

“shows a recognition by Parliament that, for the reasons I have given in discussing the approach to construction, businessmen frequently do want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration and that the law should not place conceptual obstacles in their way”.

Accordingly, the House of Lords confirmed that the question under English law is not whether a fraud goes to the validity of a contract containing an arbitration clause, but whether it goes to the validity of the arbitration clause itself; the two are not inextricably linked:

“The arbitration agreement must be treated as a “distinct agreement” and can be void or voidable only on grounds which relate directly to the arbitration agreement”.

Conclusion

The House of Lords has confirmed that arbitration clauses should be construed with a general presumption that the parties intended “one-stop” dispute resolution. In many cases, this will mean construing arbitration agreements very widely.

The House of Lords has also confirmed that simply showing that a contract containing an arbitration clause is invalid as a result of fraud is insufficient to avoid the arbitration agreement. For an arbitration agreement to be invalidated, a fraud would have to have been directed at the agreement of the arbitration clause itself.

Endnotes

¹ [2007] UKHL 40.

² [2007] EWCA Civ 20. The *Fiona Trust* decision was reviewed and analysed in the sixth edition of Latham & Watkins' *London Litigation Briefing*, produced by the London Office Litigation Department. For more information, and to subscribe to *London Litigation Briefing*, please visit www.lw.com.

Office locations:

Barcelona
Brussels
Chicago
Frankfurt
Hamburg
Hong Kong
London
Los Angeles
Madrid
Milan
Moscow
Munich
New Jersey
New York
Northern Virginia
Orange County
Paris
San Diego
San Francisco
Shanghai
Silicon Valley
Singapore
Tokyo
Washington, D.C.

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact Philip Clifford or Oliver Browne, London based members of our International Dispute Resolution practice group, any of the attorneys listed below or the attorney with whom you normally consult. A complete list of our *Client Alerts* can be found on our Web site at www.lw.com.

If you wish to update your contact details or customise the information you receive from Latham & Watkins, please visit www.lw.com/LathamMail.aspx to subscribe to our global client mailings program.

If you have any questions about this *Client Alert*, please contact Philip Clifford or Oliver Browne in our London office, or any of the following attorneys.

Barcelona

José Luis Blanco
+34.93.545.5000

Brussels

Jean Paul Poitras
+32.2.788.6000

Chicago

Janet Malloy Link
+1.312.876.7700

Frankfurt

Volker Schäfer
Finn Zeidler
+49.69.6062.6000

Hamburg

Sebastian
Seelmann-Eggebert
+49.40.41.40.30

Hong Kong

Joseph Bevas
+852.2522.7886

London

Philip Clifford
Robert Volterra
+44.20.7710.1000

Los Angeles

Mark Flagel
Robert Perrin
Daniel Schechter
+1.213.485.1234

Madrid

José Luis Blanco
+34.91.791.5000

Milan

David Miles
+39.02.3046.2000

Moscow

Mark Banovich
+7.495.785.1234

Munich

Jörg Kirchner
+49.89.20.80.3.8000

New Jersey

Alan Kraus
+1.973.639.1234

New York

Mark Beckett
David McLean
+1.212.906.1200

Orange County

Jon Anderson
+1.714.540.1235

Paris

Laurent Jaeger
Rachel Thorn
+33.1.40.62.20.00

San Diego

Michael Weaver
+1.619.236.1234

San Francisco

Stephen Stublarec
+1.415.391.0600

Shanghai

Rowland Cheng
+86.21.6101.6000

Silicon Valley

Patrick Gibbs
+1.650.328.4600

Singapore

Mark Nelson
+65.6536.1161

Tokyo

Daiske Yoshida
+81.3.6212.7800

Washington, D.C.

Everett (Kip) Johnson, Jr.
Abid Qureshi
+1.202.637.2200