

# Insight

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## Fiona Trust & El Nasharty – The English Courts confirm their pro-arbitration credentials

**Recent commentary on the House of Lords's decision in Fiona Trust<sup>1</sup> has suggested that the Lords delivered a ground-breaking decision with major implications for the arbitral process. While this was undoubtedly a robust judgment, a better view is that it marked the most recent development in a judicial trend of supporting arbitration, as evidenced by the fact that the judgment has already been enthusiastically applied by the High Court in El Nasharty<sup>2</sup>.**

In Fiona Trust, the Lords confirmed, unanimously, that the English Courts will take an expansive approach to the construction of arbitration clauses. Going forward, the Courts will work from the presumption that, in the absence of clear wording to the contrary, parties who have included an arbitration clause in their commercial agreement intended to submit all disputes arising to arbitration.

The Lords also clarified the scope of the doctrine of 'separability' (contained in section 7 of the Arbitration Act 1996). Other than in exceptional cases where the validity of an arbitration clause itself is called into question, the Lords confirmed that tribunals, not courts, have jurisdiction to hear disputes as to the validity of the contract from which they derive the authority to act as arbitrators. As discussed below, the strict application of the doctrine was seen only this week in El Nasharty, a High Court case decided squarely within the parameters set by Fiona Trust.

### **An agreement to arbitrate induced by bribery?**

The dispute in Fiona Trust arose out of eight charterparty agreements ("charters")

concluded by various companies (the "Owners") with eight charterers (the "Charterers"). Each charter included a 'law and litigation clause' providing that any dispute arising "under" or "out of" the charter was to be decided by the English courts unless either party elected for the dispute to be referred to arbitration in London.

In April 2006, the Owners purported to rescind the charters on the grounds that their entry into the agreements had been procured by bribery. They maintained that, but for the bribery, they would not have entered into the charters (including the agreement to arbitrate) at all. The Charterers elected to arbitrate the dispute by appointing a tribunal, in accordance with the dispute resolution provisions in the charters. In response, the Owners sought an injunction preventing the arbitration from proceeding, on the basis that the charters had been rescinded along with the arbitration agreements contained in them.

At first instance, the Owners were granted the injunction sought. The Court of Appeal reversed the decision on the ground that the



### **In Brief**

The decision in Fiona Trust will make it harder for parties who have agreed to arbitration to renege on that agreement:

- As a starting point, parties will be presumed to have intended to submit all disputes arising to arbitration; and
- Tribunals will, ordinarily, have jurisdiction to hear all disputes, including disputes as to the validity of the contract in question. The Courts will only intervene where the validity of the agreement to arbitrate itself has been impeached.

### **We're here to help**

For more information about this subject, please contact:

**Aloke Ray**  
Partner, London  
Tel: +44 20 7532 1822  
Email: [aray@whitecase.com](mailto:aray@whitecase.com)

**Charles Balmain**  
Associate, London  
Tel: +44 20 7532 1807  
Email: [cbalmain@whitecase.com](mailto:cbalmain@whitecase.com)

[www.whitecase.com](http://www.whitecase.com)

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<sup>1</sup> Fiona Trust & Holding Corporation & 20 Ors v Yuri Privalov & 17 Ors sub nom Premium Nafta Products Ltd (20th defendant) & ors v Fili Shipping Co Ltd (14th claimant) & Ors [2007] UKHL 40, judgment of 17 October 2007.

<sup>2</sup> El Nasharty v J Sainsbury plc [2007] EWHC 2618, judgment of 13 November 2007.

question of whether the charters had been rescinded fell to be determined by arbitration and not by the Courts. That decision has now been fully endorsed by the House of Lords.

### Construction of arbitration agreements

The first issue the Lords were asked to examine was one of construction. The Owners contended that their claim that the charters had been validly rescinded should not be submitted to arbitration. Their position was that, because the charters had been procured by bribery, this was not a matter which arose “under” or “out of” the charter.

In his leading opinion, Lord Hoffman recalled an earlier line of authorities in which the Courts had scrutinized the wording of the arbitration clause in question and had determined whether or not an issue should be submitted to arbitration based upon subtle distinctions in the language used. In Lord Hoffman’s words, however, the decision in *Premium Nafta Products* “draws a line under the authorities to date and [makes] a fresh start”.

The fundamental character of arbitration is that it is a consensual method of dispute resolution. For Lord Hoffman, the correct approach to construction is for the Courts to start from the assumption that the parties to an arbitration agreement intended to submit all disputes arising out of the relationship (including disputes as to the validity of the contract) to arbitration by the same tribunal. Clear words will be required to demonstrate that the parties intended to exclude certain disputes from their agreement to arbitrate. Such words had not been used in the present case.

### Separability of arbitration agreements

The Lords also examined the doctrine of ‘separability’. This provides that, unless otherwise agreed by the parties, the validity of an arbitration agreement is not dependent upon the validity of the commercial agreement to which it relates (or in which it is found).

In *Fiona Trust*, the Owners contended that they were entitled to rescind the charters (including the agreement to arbitrate) because the entire agreement had been induced by bribery. This issue, they argued, should be determined by the Courts on the basis that there had been no valid agreement to arbitrate.

In rejecting the argument, the Lords distinguished two types of case. The first was that in which a party attacks the validity of the main contract and the arbitration agreement on the same grounds (for example, because the person purporting to sign the agreement on that party’s behalf had no authority to do so). The second type of case was that in which a party challenges the validity of the main contract without impeaching the agreement to arbitrate. This was one such case. The Owners had claimed that the charters were in terms which demonstrated they had been procured by bribery. However, there was no suggestion that the Owners had not authorised the entry into the charters or that the terms of the arbitration clause had been procured by bribery. The arbitral tribunal (and not the Courts), therefore, had jurisdiction to decide whether the charters should be rescinded on the grounds of alleged bribery.

The strict application of the doctrine of separability was confirmed this week by Mr. Justice Tomlinson in *El Nasharty*. Applying *Fiona Trust*, Tomlinson J refused to entertain the argument that the Courts should review the validity of an arbitration clause where there was no evidence “specific to the arbitration agreement” that it had been procured by duress. Tomlinson J roundly endorsed their Lordships’s speeches in *Fiona Trust*, finding that the facts of *El Nasharty* exemplified the policy reasons in support of a strict application of the doctrine of separability; that is, that the parties when choosing to submit their disputes to arbitration would expect the tribunal to have jurisdiction to resolve all disputes, including as to the validity of the contract in question.

### Practical implications

The House of Lords’ decision is to be welcomed for having put to one side a body of confusing case law regarding the construction of arbitration clauses. In practical terms, the judgment encourages English law arbitration by reducing the opportunities for parties to renege on their agreements to arbitrate in two respects.

First, where an arbitration agreement in general (frequently, standard) terms has been included in a commercial contract, the Courts are now more likely to find that the parties intended to submit all disputes to arbitration (including disputes as to the validity of the contract). This is likely to be so in the majority of cases, particularly where the parties have not attempted to preclude any issues from being arbitrated. Thus, the judgment will have repercussions in precisely those situations in which the parties agree to arbitrate but do not wish to make a blanket submission of all disputes to arbitration (for example, where certain technical disputes are to be resolved by expert determination or where certain categories of dispute are to be settled exclusively by the courts). In such cases, care will have to be taken to ensure that those disputes which are not to be arbitrated are clearly identified and carved out of the arbitration clause.

Second, the Lords have confirmed that, ordinarily, the tribunal - and not the Courts - will have jurisdiction to resolve disputes as to the validity of an agreement which includes an agreement to arbitrate. That the Courts will not hesitate to uphold a tribunal’s jurisdiction has already been seen in *El Nasharty*. This decision, together with the *Fiona Trust* judgment, confirm that it will only be in the narrow circumstances in which there is evidence enabling a party to impeach the arbitration clause itself, as distinct from the main contract, that the Courts will intervene to review the validity of the submission to arbitration.

ALMATY ANKARA BANGKOK BEIJING BERLIN BRATISLAVA BRUSSELS BUDAPEST DRESDEN DÜSSELDORF FRANKFURT HAMBURG  
HELSINKI HONG KONG ISTANBUL JOHANNESBURG LONDON LOS ANGELES MEXICO CITY MIAMI MILAN MOSCOW MUNICH  
NEW YORK PALO ALTO PARIS PRAGUE RIYADH SÃO PAULO SHANGHAI SINGAPORE STOCKHOLM TOKYO WARSAW WASHINGTON, DC