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The Extended Fiona Trust Principle: When Would a Jurisdiction Clause in One Contract Apply to Disputes Arising Out of Another Contract?

Allianz Capital Partners GmbH, Singapore Branch v Goh Andress **[2023] SGHC(A) 18**

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LEGAL UPDATE

In this Update

The Appellate Division of the High Court decision in *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] SGHC(A) 18 is the first reported decision in Singapore adopting the Extended Fiona Trust Principle in the context of determining the jurisdiction clause applicable in a dispute involving a long-term incentive plan and employment contract. The exclusive jurisdiction clause in the employment contract was found to apply to disputes arising out of the long-term incentive plan.

This article examines the court's reasoning and its application to the present facts.

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INTRODUCTION

The Respondent, Ms Andress Goh, was previously employed by the Appellant, Allianz Capital Partners GmbH, Singapore Branch from 2006 to 2021. The employment was governed by an employment contract ("**Employment Contract**") and an employee handbook which was incorporated by reference into the Employment Contract. The Employment Contract provided that the Respondent may participate in the Appellant's carried interest programme. In this regard, the Respondent was selected to participate in Allianz Capital Partners Incentive Plan for Indirect Private Equity Investments ("**Incentive Plan**") from 2018 to 2020. In each of those years, an allocation letter was issued to the Respondent, which the Respondent had duly signed, thereby agreeing to the terms and conditions of the document setting out the Incentive Plan ("**Plan Terms**"). It is common ground between the parties that the Incentive Plan was a carried interest programme within the meaning of the Employment Contract. The Court referred to the agreements that was formed in relation to each allocation letter collectively as the "**LTIP**".

The Plan Terms provided that if a participant of the Incentive Plan ceases employment before the vesting period ends, the entitlement to the unvested and vested awards would depend on whether he/she is classified as a "Good Leaver", "Normal Leaver" or "Bad Leaver". On 18 June 2021, the Respondent had informed the Appellant of her intention to retire. The Appellant deemed the Respondent to be a "Normal Leaver" under the LTIP, while the Respondent was of the view that she ought to be deemed a "Good Leaver" instead. The implication of the Respondent being classified as a "Normal Leaver" instead of a "Good Leaver" was that the Respondent would not be entitled to her uninvested incentive awards. A "Good Leaver" classification would not have that consequence.

Pursuant to this, the Appellant commenced an action in the Singapore High Court, seeking, *inter alia*, a declaration that the Respondent was a "Normal Leaver" under the LTIP.

In response, the Respondent applied for a stay of proceedings on the ground that Germany was the more appropriate forum to hear the dispute. The Appellant resisted this application and referred to an exclusive jurisdiction clause in the Employment Contract ("**EJC**") and that there was no strong cause why a stay should be granted in breach of the EJC.

The EJC in the Employment Contract was as follows:

> "*Singapore law shall be the sole and applicable law of this Agreement and any dispute arising from it. The Courts in Singapore shall be the sole forum to which any dispute shall be referred to and Singapore shall be the sole jurisdiction for such determination.*"

It should be noted that the Plan Terms on the other hand only contained a choice of law clause which reads:

> *"This Plan and all Incentive Awards granted under it shall be governed by and construed in accordance with the law of the Federal Republic of Germany, excluding the application of the UN Convention on Contracts for the International Sale of Goods (CISG) and the German conflicts of laws rules."*

The case before the ADHC followed the Appellant's appeal against the Judge's decision in the General Division of the High Court ("**GDHC**").

THE DECISION OF THE APPELLATE DIVISION OF THE HIGH COURT

The ADHC characterised the issues as follows:

(a) Does the dispute fall within the scope of the EJC?
(b) If (a) is answered in the affirmative, is there strong cause why the proceedings should be stayed in contravention of the EJC?
(c) If (a) is answered in the negative, what is the more appropriate forum for the dispute to be heard?

Whether the dispute fell within the scope of the EJC

At the outset, the court first determined that both parties had rightly treated both the Employment Contract and the LTIP as separate agreements.

The ADHC then considered whether the principle in *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 4 All ER 951 ("***Fiona Trust***") ("**Fiona Trust Principle**") could be applied to the present case. The Fiona Trust Principle provides a presumption that 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. While the Fiona Trust Principle arose in the context of arbitration clauses, the ADHC noted that the Court of Appeal in *Bunge SA and another v Shrikant Bhasi and other appeals* [2020] 2 SLR 1223 endorsed the application of the Fiona Trust presumption to the interpretation of jurisdiction clauses.

The ADHC further noted that the principle had also been applied in a multi-contract disputes scenario in *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd and another and another appeal* [2017] 2 SLR 814 ("***Trisuryo***"). This meant that the existence of an exclusive jurisdiction clause in one agreement could be extended to apply to another agreement, as it was "unlikely in the extreme that the parties intended to have courts in two different jurisdictions hear such closely related disputes" (citing *Trisuryo* at [79]). Such an application forms the basis of what is termed as the "**Extended Fiona Trust Principle**" in English law that was formulated in *Terre Neuve SARL (a company incorporated in France) and others v Yewdale Ltd and others* [2020] EWHC 772 (Comm) ("***Terre Neuve***").

The ADHC noted that while the local courts have previously applied the Extended Fiona Trust principle, they have not yet considered the normative question of whether the principle ought to be accepted as a matter of

Singapore law. The ADHC found that the Extended Fiona Trust Principle provides a sound and useful framework for determining the proper ambit of a jurisdiction clause in multi-contract scenarios and is a logical extension from the reasoning in *Fiona Trust*. Crucially, it is a fair assumption that the same parties that have entered into two closely-related agreements would have intended for disputes arising out of either agreement to be resolved in the same jurisdiction.

The ADHC adopted the GDHC's summary of the Extended Fiona Trust Principle as follows:

(a) As a matter of contractual interpretation, the wording of the clause in Contract A must be fairly capable of applying to disputes in Contract B.
(b) The Extended Fiona Trust Principle normally applies where:
    (i) the parties to Contract A and Contract B are the same;
    (ii) Contract A and Contract B are interdependent;
    (iii) Contract A and Contract B were concluded at the same time as part of a single package or transaction; and/or
    (iv) Contract A and Contract B dealt with the same subject matter (if concluded at different times).

The ADHC emphasised that the factors above only serve as guides to ascertain the parties' intentions as to how disputes arising under separate agreements should be resolved. The fundamental query is whether the outcome that results from the application of the Extended Fiona Trust Principle was one that the parties, as rational business people, had sensibly envisaged in the context of their commercial relationship.

Applying the Extended Fiona Trust Principle, found that the EJC in the Employment Contract should apply to the LTIP.

First, the text of the EJC was found to be capable of applying to disputes arising from the LTIP. While the choice of law clause in the Employment Contract was restricted to "disputes arising from [the Employment Contract]", the EJC was not limited in the same manner as it referred to "any dispute". The ADHC also considered that the parties had deliberately worded the EJC broadly such that they would have reasonably intended for all disputes concerning the Respondent's employment, including related agreements such as the LTIP, to be resolved in one forum. Furthermore, given that the LTIP does not provide for a choice of jurisdiction clause, this was found to be consonant with the ADHC's view that the EJC was intended to be the applicable jurisdiction clause.

Second, the court found that the Employment Contract and the LTIP are interdependent agreements. This was one of the most significant factors in favour of the Appellant's position. They were negotiated as part of the same overall package with regards to the Respondent's employment relationship with the Appellant. The Employment Contract had referred to the Respondent's right to participate in the Incentive Plan and therefore was likely part of the compensation package that was offered to the Respondent at the time of signing the Employment Contract. The Respondent's

participation in the LTIP was conditional upon her continued employment under the Employment Contract. The classification as "Good Leaver", "Normal Leaver" or "Bad Leaver" also relates to the circumstances surrounding the termination of her employment.

Third, both the Employment Contract and the LTIP concerned the same subject matter, *ie* the Respondent's compensation package, and that they were part of the same overall package. The court held that there is no need for the subject matter of both agreements to be identical, as long as they relate to the same overall package or subject matter.

Lastly, the court noted that the parties to both the Employment Contract and the LTIP were the same. While the GDHC found that the Employment Contract was concluded between the Respondent and Allianz Capital Partners GmbH, Singapore Branch, and that the LTIP was concluded between the Respondent and Allianz Capital Partners GmbH, the ADHC disagreed. The ADHC took the view that the parties perceived Allianz Capital Partners GmbH and the Appellant to be one and the same entity. To this end, the ADHC reaffirmed the trite principle that a local branch office is considered an extension of its foreign parent company, and not a separate legal entity.

Consequently, the EJC ought to be applied to the dispute arising from the LTIP.

As an aside, the court made two observations with respect to its analysis in this section. Firstly, the fact that both agreements contained different choices of law did not affect its analysis. The court rationalised that the different choice of law was due to the fact that the Incentive Plan was offered to employees of Allianz Capital Partners GmbH and not just the Singapore branch and appeared to be managed out of the Germany headquarters. On the other hand, the Employment Contract was a bilateral contract concluded between the Singapore branch and an employee in Singapore. Secondly, the existence of an entire agreement clause also did not affect the analysis as the effect of an entire agreement clause is a matter of construction. In this case, the court found that parties could not have intended to preclude the application of the EJC for the LTIP such that disputes arising from the parties' relationship might have needed be pursued in different jurisdictions.

Whether a stay should be granted despite the EJC

After finding that the EJC applied to the dispute arising from the LTIP, the ADHC then considered whether a stay should nevertheless be granted. The general rule is that where there is an applicable exclusive jurisdiction clause, the party resisting it must show exceptional circumstances amounting to strong cause. The ADHC affirmed the principle in *Trisuryo* at [83], which sets out the matters which the court may have regard to in exercising its discretion:

(a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative

convenience and expense of trial as between the Singapore and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.
(c) With what country either party is connected and, if so, how closely.
(d) Whether the defendants genuinely desire trial in the foreign country or are only seeking procedural advantages.
(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
    (i) be deprived of security for their claim;
    (ii) be unable to enforce any judgment obtained;
    (iii) be faced with a time bar not applicable here; or
    (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

Applying the above principles, the ADHC held that the prejudice alleged by the Respondent did not meet the threshold required. The court noted that the Respondent was not denied a remedy entirely (although she could have obtained *additional* remedies if her claim was brought before a German court) and that the argument that she would be deprived of access to expertise of German labour courts or the European Court of Justice was insufficient. The ADHC considered that it would have been reasonably apparent to the Respondent from the EJC, at the time she entered into the Employment Contract, that any disputes in relation to any carried interest programme would be subject to the exclusive jurisdiction of the Singapore courts. Accordingly, the alleged inconveniences of litigating in Singapore were foreseeable to her.

CONCLUSION

The use of incentive plans that grant employees shares or options (or the cash value of the same) are increasingly prevalent in today's world. By allowing individual employees to have ownership in the company, morale can be boosted and their interests may be more aligned with that of the shareholders. They are also useful to attract talent in this increasingly competitive employment market.

The ADHC's decision in this case serves as a cautionary note to employers (especially MNCs, asset and fund managers) who intend to offer such incentive plans involving equity in a foreign corporation to its employees in Singapore.

Although, on the facts of the present case, only the Employment Contract contains an EJC and the LTIP was silent as to the jurisdiction for dispute resolution, the court observed that where two agreements in question contain competing jurisdiction clauses, it would be difficult to conclude in such scenario that the jurisdiction clause in one contract could be said to apply to disputes arising from the other. In other words, the Fiona Trust Principle will likely not apply to such a scenario.

KEYPOINT

Accordingly, if the company intends for disputes under the employment contract and incentive plan to be brought in different jurisdictions, it would be wise to consider the inclusion of clearly drafted exclusive jurisdiction clauses, in both documents.

Finally, and more generally, it should be noted that the court still has the power not to give effect to an exclusive jurisdiction clause where the court of another jurisdiction is more appropriate due to exceptional circumstances amounting to strong cause. The factors as stated in *Trisuryo* above provide a useful guide in this respect.

If you have any questions or comments on this article or related issues concerning choice of law and choice of jurisdiction for employment contracts involving multi-national entities, please contact:

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