The Fiona Trust doctrine revisited: the continued relevance of party autonomy and contract construction

Article

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The Fiona Trust Doctrine Revisited: The Continued Relevance of Party Autonomy and Contract Construction

Law Sau Wai

Abstract

Quite often, within a particular contractual relationship, there are inconsistencies between multiple dispute resolution/jurisdiction clauses, which can lead to disputes over how parties may resolve any contractual dispute. Like the recent case in Ganz v Petronz FZE,[1] *and many other cases, the House of Lords' decision in Fiona Trust & Holding Corp v Privalov*[2] *becomes an opening line to examine the validity of arbitration clauses and, if they are not valid, judges can move on to evaluate the merit of the case itself. Yet the validity of the arbitration clause is seldom challenged. By revisiting the Fiona Trust judgment and subsequent related cases, this article contends that there are two gaps in establishing the presumption of one-stop arbitration. The much-needed finality and certainty for the doctrine is established through a wider application of the three-stage test already stated in Fiona Trust: first, to state an intent not to make submissions to different tribunals; second, to evaluate the centre of gravity of the dispute; and third, to examine whether it could be reconciled with arbitration clauses. This framework complements the presumption of one-stop arbitration that completes the missing pieces of* Fiona Trust *and can better serve business needs by avoiding courts mechanically directing parties to arbitration.*

I. Fiona Trust doctrine

The well-established House of Lords decision in *Fiona Trust* has long been regarded as an authority on the scope and effect of arbitration clauses or jurisdiction clauses. It introduced a "one-stop shop presumption" (hereinafter referred as "the Presumption") that assumes that rational businessmen intend for any disputes between them to be resolved by the same court or tribunal, unless clear language indicates otherwise.

Since then, in cases involving stay proceedings, jurisdictional appeals, and applicable law, the *Fiona Trust* principle has consistently been the starting point when the jurisdictional issue itself is under dispute. In fact, it can be argued that the original intention of *Fiona Trust* has become blurred because the courts have

* University of Reading.

[1] *Ganz v Petronz FZE* [2024] EWHC 635 (Comm).

[2] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2007] Bus. L.R. 1719.

struggled to establish a consistent approach to adjudicate on jurisdictional issues. Through a doctrinal analysis of subsequent *Fiona Trust*-related cases and cases that consider, apply, mention, follow, or adopt *Fiona Trust*, it becomes evident that *Fiona Trust* established a test to challenge the presumption of one-stop arbitration.

II. Inconsistent application of the "one-stop shop" presumption

According to *Fiona Trust*, it is presumed that "rational businessmen" are likely to have intended that any disputes arising between them should be decided by the same court or tribunal, unless they use clear language indicating otherwise. However, this very question of Lord Hoffmann is not as straightforward as it appears. In continuous development of case law, English courts have struggled to examine the Presumption, as the facts presented in front of them are ever-changing and the approach adopted can be different with different cases of similar facts.

In *UBS AG v HSH Nordbank AG*,[3] when considering a jurisdiction clause concerning a complex Credit Default Obligation (CDO) transaction, the Court of Appeal ruled that where different agreements forming part of an overall package of arrangements between two parties contain two or more differently expressed choices of jurisdiction in respect of different agreements, it can be presumed that the parties intended that the jurisdiction clauses in the agreements "at the commercial centre of the transaction" would apply.[4] Shortly after, in *Deustche Bank AG v Sebastian Holdings Inc (No.2)*,[5] when considering another series of financial agreements relating to equities and foreign exchange trading with separate and distinct arbitration clauses addressing parallel but different aspects of the overall continuing relationship between the parties, the Court of Appeal distinguished the case from the facts in *UBS v Nordbank* and found that where a claim arose under a particular agreement, "a broad and purposive construction must be followed". It was decided that the jurisdiction clause in that agreement would apply even if this resulted "in a degree of fragmentation in the resolution of disputes between parties to the series of agreements".[6]

Five years later, in *Hashwani v OMV Maurice Energy Ltd*,[7] where the first agreement clearly contemplated that there would be further parties to the series of agreements in the future, the arbitration provision in the first agreement should be construed to allow the resolution of disputes between all such future parties, and hence any third party to the dispute would also have been bound by that provision. Nonetheless, in *AmTrust Europe Ltd v Trust Risk Group*,[8] a case decided a few months earlier than *Hashwani*, the Court of Appeal found that there was no presumption that the provisions in the more recent contract are intended to capture disputes in the earlier contract, even if there is a risk of fragmentation of the overall process for the resolution of disputes; instead, the court's job in interpreting the contracts is to discern the intention of the parties by applying "a careful and

[3] *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585; [2009] 1 C.L.C. 934.
[4] *UBS AG v HSH Nordbank AG* [2009] 1 C.L.C. 934 at [95], per Lord Collins of Mapesbury.
[5] *Deustche Bank AG v Sebastian Holdings Inc (No.2)* [2010] EWCA Civ 998; [2010] 2 C.L.C. 300.
[6] *Deustche Bank AG v Sebastian Holdings Inc (No.2)* [2010] 2 C.L.C. 300 at [49], per Lord Justice Thomas.
[7] *Hashwani v OMV Maurice Energy Ltd* [2015] EWHC 1811 (Comm).
[8] *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWCA Civ 437; [2017] 1 C.L.C. 456.

commercially-minded construction to the agreements".[9] In *AmTrust*, the court found that the multiple agreements between the parties represented two parallel streams of business and hence there was no intention for the parties to have the disputes arising from these agreements heard together.

The usual application of *Fiona Trust* shows the trend that the application of the Presumption has been extended. As pointed out by Mr Justice Byran in *Terre Neuve Sarl v Yewdale Ltd*,[10] subsequent to *Fiona Trust*, the generous interpretation to be given to jurisdiction clauses has been extended to cover multi-contract disputes. An arbitration agreement in one contract could extend to disputes arising under another contract with no competing jurisdiction clause between the same parties (the "Extended *Fiona Trust* Principle", as described by Mr Justice Byran). This case has been followed or applied elsewhere.[11] Yet, in some jurisdictions, this Extended *Fiona Trust* Principle is held to have "limited application" as it can be displaced by clear language.[12]

Moreover, the court will displace the earlier dispute resolution clause when there is clear language in the subsequent agreements by the parties. For example, in a case where there was a sale and purchase agreement that had the purpose of terminating an earlier commercial relationship, the court ruled that the arbitration clause in the earlier contract was superseded by the later contract;[13] and where there was a settlement agreement to settle the dispute arising out of a consultancy agreement, the jurisdiction clause in the settlement agreement was ruled to have displaced the arbitration clause in the consultancy agreement.[14]

The court will usually not rule an arbitration clause to be valid if a "pre-condition" in the agreement has not been fulfilled and hence no agreement to arbitrate has been reached. *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd*[15] illustrates the above issues. The English High Court granted a claimant's application to set aside an award pursuant to s.67 of the Arbitration Act 1996 on the basis that the tribunal did not have substantive jurisdiction. The court emphasised that the "subject" provision, which is also regarded as a pre-condition, prevented a binding contract coming into existence unless and until the charterers "lifted" the subjects after satisfying the condition being met. In discussing the issues of separability, s.7 of Arbitration Act was not significant in terms of safeguarding the arbitration agreement as the subject provision negated any intent to agree to the arbitration clause, and any other clauses, in the proforma charterparty. In other words, the main contract did not exist in the first place, and hence an arbitration agreement did not exist either. In reaching this decision, Justice Jacobs said the arbitration agreement is not "a mini-agreement which is in some way divorced from the main agreement",[16] and reiterated the argument that the separability principle does not mean the arbitration agreement is a "different and

[9] *AmTrust Europe Ltd v Trust Risk Group SpA* [2017] 1 C.L.C. 456 at [61], per Lord Justice Beatson.

[10] *Terre Neuve Sarl v Yewdale Ltd* (2020) EWHC 772 (Comm).

[11] *Tugushev v Orlov* [2021] EWHC 926 (Comm); [2021] 2 Lloyd,s Rep. 205.

[12] Holman Fenwick Willan LLP (2022), "Hong Kong Court decides that the Extended Fiona Trust Principle can be displaced by clear language", *https://www.hfw.com/downloads/004503-HFW-Hong-Kong-Court-decides-that-the-Extended-Fiona-Trust-Principle-can-be-displaced-by-clear-language.pdf* [Accessed: 4 October 2024].

[13] *C v D1, D2, D3* [2015] EWHC 2126 (Comm).

[14] *Monde Petroleum SA v Westernzagros Ltd* [2015] EWHC 67 (Comm); [2015] 1 C.L.C. 49.

[15] For example, *Tugushev v Orlov* EWHC 181 (Comm).

[16] *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2022] EWHC 181 (Comm); [2022] 1 Lloyd's Rep. 575 at [93].

separate agreement" from the rest of the contract, but instead regarded it as "part of the bundle of rights and obligations under negotiations"[17] in the contractual document. This innovative reasoning, now widely accepted, has further separated the common understanding of the notion of a contract, but illustrates the grey area when it comes to the Presumption.

The factors above are not exclusive. Many similar cases face the same issues when judges appear to evaluate in the name of *Fiona Trust*.[18] The Presumption does not seem to assist the courts other than in providing a starting point. Determining whether an arbitration clause applies to claims arising under a different contract involves an exercise of construction.

In the *CNB and CNC v CNA, CND, and CNE*[19] case before the Singapore International Commercial Court, conflicting dispute resolution clauses within a limited liability partnership agreement led to legal complexities. One clause favoured English courts' exclusive jurisdiction, while the other was an arbitration clause without a specific seat designation. The court interpreted the English jurisdiction clause as providing for the supervisory jurisdiction of English courts in support of arbitration. This approach harmonised both clauses, aligning with the *Fiona Trust* doctrine, which emphasises consistent dispute resolution mechanisms within related contracts. However, some argue that it extends the doctrine from a "presumption in favor of one-stop adjudication" to a "presumption in favor of arbitration".

III. "Presumption in favour of arbitration" may not be what "rational businessmen" intend

From the development of cases, despite the rationale businessman test being concerned with the presumption of a single forum, the courts seem to hold a view that any "rational businessmen" would intend the disputes to be submitted to arbitration. However, the results of surveys show the opposite: litigations are preferred. A 2013 Queen Mary college survey showed that whilst arbitration has been an increasingly popular and preferred mechanism, cost, delay, and the fear of "judicialisation" of arbitration was increasingly a hurdle.[20] From the *2015*

[17] *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2022] 1 Lloyd's Rep. 575 at [94].

[18] For example: in *Master Special Maritime Enterprise v Arab Bank (Switzerland) Ltd* [2022] EWHC 1953 (Comm), of which the vessel contained both a jurisdiction clause and an arbitration clause, the court had to navigate concurrent litigation and arbitration. Despite different clauses existing within a single contract, they can still intersect and impact the dispute resolution forum. In *Port de Djibouti SA v DP World Djibouti FZCO* [2023] EWHC 1189 (Comm); [2023] 1 C.L.C. 681, the court grappled with a jurisdictional puzzle. The joint venture company, Doraleh Container Terminal S.A. (DCT), was at the heart of the legal battle. Port de Djibouti SA (PDSA) claimed that a Presidential Ordinance transferred its DCT shares to the Republic of Djibouti. However, the arbitration agreements were specifically limited to disputes between "shareholders". The critical question: did PDSA remain a shareholder despite the share transfer? The court meticulously examined the contractual terms, ruling in favour of DP World, affirming the validity of the arbitration agreement and deeming the share transfer to be unlawful. This case underscores the importance of contractual definitions and the overall context in resolving complex disputes, aligning with the principles of the *Fiona Trust* doctrine, without much help from the one-stop presumption or separability principle. In *Tugushev v Orlov* [2021] EWHC 926 (Comm); [2021] 2 Lloyd's Rep 205, the *Fiona Trust* principle was extended to cases where a claim had been brought under one contract (contract B) between parties rather than the contract (contract A) which contained the arbitration clause. The principle normally applied where the parties to contracts A and B were the same and where both contracts were interdependent or had been concluded at the same time.

[19] *CNB and CNC v CNA, CND, and CNE* [2023] SGHC(I) 6.

[20] 2013 Corporate Choices in International Arbitration: Industry Perspectives, *http://www.arbitration.qmul.ac.uk /research/2013/index.html* [Accessed 23 October 2023].

International Arbitration Survey conducted by Queen Mary College,[21] businessmen found a "lack of effective sanctions during the arbitral process" that would lead to courts being chosen over arbitration. In the same survey conducted in 2016, it was concluded that "[a]rbitration was most preferred, but litigation was the most used".[22] As such, the *Fiona Trust* doctrine and its extended doctrine have failed to put an end to these issues—to refer disputes to the jurisdiction the parties want to due to uncertain contractual terms (or to a change of mind which the courts shall not cater to). Resolving these issues is important as they affect the speed of resolving a dispute, the enforceability of the arbitral award, and the worries over arbitrators not utilising the powers given to them (the procedural paranoia), which are heavily valued by users of arbitration, according to the 2021 and 2022 *International Arbitration Survey*.[23]

Cases following *Fiona Trust* distinguish between disputes on arbitration clauses and jurisdiction clauses; and this is often, in my view, confused with that of the separability principle. As Merkin (2021) stated, which is also cited in the *DHL v Gemini* case at [77], that "if the issue between the parties is the existence of the arbitration clause itself, as opposed to the main agreement to which it relates, the separability of the arbitration clause and the main agreement under section 7 of the 1996 Arbitration Act is not significant as the question is jurisdictional only".[24] Whilst the issue of *DHL v Gemini* is clearly over the main agreement, its substance is still subject to the specific details within the agreement, such as whether the subject provision comes prior to any of the contractual clauses, which in reality would qualify everything that follow.[25] *InSalford Estates (No.2) Ltd v Altomart Ltd*,[26] which concerned a winding-up petition based on an arbitrator's award, the respondent company contended that the outstanding amount was disputed and had to be referred to arbitration in accordance with the arbitration clause. The judge accepted that argument and stayed the petition in accordance with the Arbitration Act 1996 s.9. On appeal, the Court of Appeal held that the mandatory stay provisions in s.9 did not apply. It was noted by the Chancellor that the Insolvency Act 1986 Pt IV s.122(1) conferred on the court a discretionary power to wind up a company and it was appropriate that the court should, save in wholly exceptional circumstances, exercise its discretion consistently with the legislative policy embodied in the 1996 Act. What was adopted in *Salford Estate (No.2)* was later adopted in *Al Kuwari v Cantervale Ltd*[27] a set-aside application, to distinguish the difference between an "arbitration case" into this "jurisdiction case".[28] Yet it was noted that both *Al Kuwari* and *DHL* did not examine the one-stop presumption, despite it being mentioned. The courts seem to have no issues in disregarding, or applying without referring to it in detail, the presumption of *Fiona Trust* and then

[21] 2015 Improvements and Innovations in International Arbitration, *http://www.arbitration.qmul.ac.uk/research/2015/* [Accessed 23 October 2023].

[22] 2016 An insight into resolving Technology, Media and Telecoms Disputes, *http://www.arbitration.qmul.ac.uk/research/2016/index.html* [Accessed 23 October 2023].

[23] 2021 International Arbitration Survey; Adapting arbitration to a changing world, *LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf*; and 2022 Future of International Energy Arbitration Survey Report, *Future-of-International-Energy-Arbitration-Survey-Report.pdf* (qmul.ac.uk) [Accessed 15 February 2024].

[24] R. Merkin, *Arbitration law* (Informa Business Publishing, 2007), para.5.40.

[25] *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2022] 1 Lloyd's Rep. 575 at [92].

[26] *Salford Estates (No.2) Ltd v Altomart Ltd* [2014] EWCA Civ 1575; [2015] B.C.C. 306.

[27] *Al Kuwari v Cantervale Ltd* [2022] EWHC 3490 (Ch).

[28] *Al Kuwari v Cantervale Ltd* [2022] EWHC 3490 (Ch) at 32.

moving on to analyse the facts, as if the underlying principle is that the arbitration clause should be given priority which a reasonable businessman would have intended during the contract construction stage, instead of what could have been intended when grievances started to form.

Urge for a new approach

As we have seen, the application of *Fiona Trust* in addressing contemporary challenges within commercial law disputes appears to have expanded too widely without sufficient reasoning. It might have potentially been misapplied into a realm that it was not supposed to reach. Therefore, a comprehensive re-examination of *Fiona Trust* is warranted to assess its continued relevance and effectiveness in providing a consistent framework for addressing such issues.

Further, the development of jurisprudence subsequent to *Fiona Trust* (2007) raises the question: does the presumption hold water or is it obsolete? The question is answered by an examination of the courts' approach in ascertaining the parties' intention. The approach entails a "two-stage test" which puts a reasonable barrier for a dissenting party to assess their grounds of challenging the competence of the tribunal in the presence of a valid arbitration clause.

The first stage relates to determination of the "centre of gravity of the dispute" which concerns the circumstantial evidence of the purpose of agreement(s) and the dynamics of the parties' relationship. This method involves analysing the nature of the issue and determining its provenance to decide which dispute resolution clause (the forum) is likely to apply.[29]

The second stage is a reconciliation of the two or more arbitration clauses to ascertain:

(a) whether the clauses govern distinct and different aspects of the parties' relationship; and
(b) whether the later arbitration clause has the effect of superseding the first.

Only where the facts fall outside the scope of (a) and (b) should the court consider the possibility that the parties might want a single tribunal to deal with all disputes. The Presumption is not obsolete in its entirety but since an arbitration agreement is contingent in nature with different purposes, it makes better commercial sense that circumstantial changes should be examined first to determine if there is sufficient justification for not giving effect to the two separate arbitration clauses.

The missing gaps in establishing the presumption of one-stop arbitration

Fiona Trust is regarded as a landmark case that concluded the evolution of the doctrine. However, I am of the view that there two distinct gaps emerged when the court established the Presumption, as explained below.

[29] *C v D1, D2, D3* [2015] EWHC 2126 (Comm).

The first gap: between "initial existence of the contract" and "entitlement to rescind"

The applicants raised the issue of the initial existence of the contract, yet both higher courts ruled that the issue was about the rescission of the contract despite the unavailability of rescission, given that three (out of eight) of the charter-parties had been wholly performed. Instead, the natural consequence of rescission against the owners was considered.[30] The argument of the initial existence of the contract was switched to the jurisdictional issues on rescission.

The House of Lords mentioned the initial existence of the contract, that the appellant argued that "there was no contract at all" but still "they were entitled to rescind the contract". The House of Lords disregarded this argument by saying: "Allegations of that kind, if sound, may affect the validity of the main agreement. However, they do not undermine the validity of the arbitration agreement as a distinct agreement". The House of Lords did not explain how "no contract at all" and "entitled to rescind" connect with each other, and hence could not explain whether the dispute as to rescission was one covered by the arbitration clause, which is the first gap. It is unclear whether the arbitration tribunal would have no jurisdiction should the argument be the latter. But the rescission appeared to be only addressing the damages entitled by the parties should they win, which was not the cause of action here. The difficulty in adopting this view, however, is the bar to rescission because of the fact that some trades had been conducted. The parties seemed to have confused the court by bringing rescission to light. Initial existence should be the centre of the argument, as identified by the Queen's Bench.[31] Initial existence contained different legal meanings with invalidity or illegality.[32] There are questions in the event of the dispute that could not have been incorporated in the arbitration clause.

The second gap: in establishing the "presumption of one-stop arbitration"

The purpose of an arbitration clause is to provide "one-stop arbitration" to resolve all types of disputes arising from the contract,[33] unless clear language suggests otherwise. This presumption not only helps explain why the impeachment of a main agreement could not automatically apply to the arbitration agreement, but also helps to eliminate the differences between disputes arising "under" and "out of". Parties must use clear language if disputes should be referred to national courts. In this case, in the absence of clear language in the arbitration clause, other evidence suggests that different submissions, the rescission or validity of the arbitration agreement should not be excluded from arbitration, regardless of the argument (i.e., induced by fraud). A very wide interpretation of the arbitration clause is adopted. Lord Hoffmann went on to address one-stop arbitration as the most rational and sensible option given its efficiency to resolve disputes. Although, intuitively,

[30] See *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20 at [42]–[43].

[31] *Fiona Trust & Holding Corp v Privalov* [2006] EWHC 2583 (Comm); [2007] 1 All E.R. (Comm) 81 at [29].

[32] The legal differences between illegality and initial existence deserve deeper examination given its impact on the equity of law.

[33] *Fiona Trust* [2007] UKHL 40; [2007] Bus. L.R. 1719 at [27].

it may not be the true intent of the businessmen that all disputes should fall under arbitration clauses—this is evident by the behaviour of the parties, which has clearly shown the opposite: litigation is preferred, or at least court clarification is always needed. In the *Fiona Trust* case itself, after the 2007 ruling, another 16 directly related cases were submitted by the parties to national courts, of which two reached the Court of Appeal. Nearly all cases were interlocutory applications falling well within the jurisdiction of the arbitration. In those cases, the courts had not reminded the parties to refer the matters to arbitration, except in one case that the court clarified that the arbitrator had the authority to interpret the court order.[34] These gaps arise due to a fundamental misunderstanding of the fact in the case—that the respondent did not appear to seek a different submission. They were hoping to have a one-stop national court in a certain dispute otherwise not written into the contract in the first place—and understandably, it is very difficult to predict all possible disputes at the contract construction stage; but rather at dispute stage, parties would start to think about which forum is more suitable and an arbitration clause, or the presumption, would not be able to bind them altogether. It was clear that the parties were no longer in a hurry to resume a business relationship but instead the respondent needed to make sure the claimant was "guilty" and sought compensation. This is different from most of the cases where parties usually want to maintain or rebuild a business relationship. As such, in *Fiona Trust*, the purposes of arbitration no longer existed. The court established the Presumption without giving due consideration to the centre of gravity of the forum arising out of the alleged bribery and the change in the dynamics of the parties' relationship when the alleged bribery was discovered.

IV. The policy implication of one-stop arbitration

Despite the gaps identified, it would be helpful to understand and appreciate the policy implications of having a one-stop arbitration. The impact of *Fiona Trust* (2007) is conclusive. It reinforced the previous establishment to the empowerment of an arbitration tribunal through honouring party autonomy reflected in an arbitration agreement. The court reinforced the presumption of one-stop arbitration, which impacted the following.

Firstly, the meaning of the language "under" or "out of" is unified and therefore no more legalistic argument would be useful in challenging the arbitration argument. However, this is difficult to justify unless the Presumption is upheld. The phrases have distinct meanings or else one or the other would not exist. The phrase "out of" indicates the "source or derivation of something, or from, or having (the dispute) as a motivation".[35] The word "under" means "extending or directly below", or "controlled, managed, or governed by".[36] Eliminating their distinct literal meaning would remove the boundaries and make disputes fall within the arbitration agreement, unless a clearly defined contract governing the same parties exists.

Secondly, by advocating for the benefit of conducting arbitration, the parties were reminded of the reasons why they were included in the first place and were encouraged to arbitrate. However, once again, it would be difficult to justify because

[34] *Fiona Trust & Holding Corp v Privalov* [2015] EWHC 527.
[35] Oxford Dictionary Online: *https://en.oxforddictionaries.com/definition/out_of* [Accessed 23 October 2024].
[36] Oxford Dictionary Online: *https://en.oxforddictionaries.com/definition/under* [Accessed 23 October 2024].

one could not rule out a chance that some issues would be better resolved in the national courts. Or would the purpose of arbitration be rendered meaningless upon circumstantial changes? A blanket interpretation of the arbitration clause would create uncertainty and attract challenges. In *Fiona Trust*, a contract induced by bribery could have amounted to an argument that rendered the purpose of making an arbitration meaningless when one of the parties was not following the law (i.e., committing crime) or did not even exist, in which case there could not be a valid arbitration clause, but current application may not follow this line.

Thirdly, by addressing the rational behaviour of businessmen to one-stop arbitration, the court regarded different issues submitted to different proceedings as not being rational. However, in reality this did happen, which might mean it is too soon to regard it as not rational. In addition, in *Fiona Trust*, the respondent did not want to go for arbitration at all, and the intention was for the entire dispute to be adjudicated under the national courts. Therefore, the respondent could still be rational if he could prove that the benefit or purpose of arbitration was no longer upheld. In this instance, however, the court refused to allow the parties to change their minds. The court took this to the extreme as it did not seem to be willing to hear any arguments that were associated with the main agreement.

The court might have addressed the three hurdles above through the presumption of one-stop arbitration. As pointed out in the surveys stated above, the parties might have preferred one-stop national court proceedings over one-stop arbitration, because of reasons including disputes over jurisdictions or simply due to a change of mind. If *Fiona Trust* offers finality and certainty to the doctrine, then parties should not be forced to conduct arbitration if it is no longer effective to do so, even with a clear arbitration clause. The national courts should provide ways to rebut the Presumption to address the issue.

V. A test to replace the presumption of one-stop arbitration

To offer a framework for determining whether arbitration should be the forum for resolving disputes, especially when inconsistencies arise between arbitration clauses across different agreements, we should replace the existing approach by bridging the gaps arising from the Presumption. The two-part test consists of two stages. The first stage involves identifying the "centre of gravity" of the dispute, that is, the core of the disagreement and the commercial context from which it arose. This helps to determine which agreement and, consequently, which arbitration clause or jurisdictional forum should govern the dispute, in order to analyse the purpose of the agreements and the circumstances under which the dispute arose to determine the appropriate dispute resolution mechanism. The second stage deals with reconciling any conflicting arbitration clauses from different agreements. This involves determining whether the clauses cover different aspects of the business relationship or whether one clause supersedes another. If different arbitration clauses govern distinct disputes, separate forums may be necessary, even if this results in some fragmentation. These components existed at the start of *Fiona Trust* when the House of Lords asked questions that laid down the foundation of such a test. I will present the underlying foundation first in order to set forth how the courts ought to approach the question of jurisdiction.

Underlying presumption: no intention to make submissions to different proceedings

This underlying presumption asserts that parties entering into a contract with an arbitration clause did not intend to submit different disputes to different forums unless explicitly stated. This assumption ties directly into the first stage of the proposed test: determining the centre of gravity of the dispute. This stage helps identify the core of the disagreement and assesses whether it logically fits under the agreed arbitration clause or a different forum. By focusing on the centre of gravity, the test respects the presumption that parties likely intended a unified dispute resolution process but allows for flexibility if circumstances or contractual terms suggest otherwise.

The courts presumed that the parties did not intend to submit different questions to different proceedings in light of an arbitration clause unless clear language suggested otherwise. The presumption that clear language must be present to indicate that parties intended to submit disputes to different proceedings links directly to the second stage of the proposed test: reconciling conflicting arbitration clauses. In this stage, the court examines whether different arbitration clauses govern distinct aspects of the contractual relationship or whether one clause supersedes another. The purpose is to assess whether clear language exists that points to a distinct dispute resolution forum. This stage reflects the presumption that, unless explicitly stated, parties likely intended a single forum for all disputes—but provides a mechanism to reconcile inconsistencies or complexities in multi-agreement situations.

To illustrate this, let us examine the respective judgment, starting at [6]:

> "In approaching the question of construction, it is therefore necessary to *inquire into the purpose of the arbitration clause*… The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. *They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law.* Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction." (Emphasis added.)

Lord Hoffmann asserted that there was "no doubt" parties "chose" their disputes to be resolved in the most efficient manner, that parties could have the discretion to choose the people, platform and channel that are most suitable. Arbitration served such a purpose. Yet a question to ask is what if arbitration could not serve these purposes anymore? Hoffmann continued at [7]:

> "If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have *intended that only some of the questions arising out of their relationship* were to be submitted to arbitration and *others* were to be decided by national courts…

> …Could they have intended that the question of *whether the contract was repudiated* should be decided by arbitration but the question of *whether it was induced by misrepresentation* should be decided by a court?…
>
> …If, as appears to be generally accepted, there is no rational basis upon which businessmen *would be likely to wish* to have questions of the *validity or enforceability of the contract* decided by one tribunal and questions about its *performance* decided by another…" (Emphasis added.)

It is clear that the driving cause of the judgment is about upholding party autonomy, which is rational and commercially sensible. A natural conclusion would be, if one can establish that it was not irrational to go against the Presumption, the Presumption would be rebuttable. He concluded at [7] by saying that no rational businessman would want a submission to different proceedings unless clear language was provided:

> "…. one would need to find very clear language before deciding that they must have had such an intention…"

Should the parties foresee what could go wrong in the future, they are unlikely to incorporate these issues into the contract, as they would likely have fixed the issues before they occurred in the first place. In particular, in the case of *Fiona Trust*, if they could foresee that the counterparties were out-laws, no contract (and thus no arbitration clause) would have existed. To say that arbitration clauses have to cater for all foreseeable and unforeseeable events goes against good business sense. This certainty, in my humble opinion, outweighs the adverse implication of a split, such as competing decisions, duplication of costs, delay, and issues with enforcement.

The commercial reality is that circumstances change quickly and relationships may shift. While additional agreements may be entered into by parties to cater for the changes, courts should retain flexibility in construing arbitration clauses. This is neatly summarised in *Sebastian Holdings* at [39]:

> "[I]n construing a jurisdiction clause, a broad and purposive construction must be followed."

The next question is how to approach the parties' intention with sufficient flexibility. In this regard, we should refer to [8] of *Fiona Trust* itself, which reads:

> "A proper approach to construction therefore requires the court to *give effect*, so far as the language used by the parties will permit, *to the commercial purpose of the arbitration clause*. But the same policy of giving effect to the commercial purpose also drives the approach of the courts (and the legislature) to the second question raised in this appeal, namely, whether there is any conceptual reason why parties who have agreed to submit the question of the validity of the contract to arbitration should not be allowed to do so." (Emphasis added.)

At the end of [8], it is crystal clear that a direction to approach the question is not to apply any presumption but to give effect to commercial purpose as effectuated by the language. It is important to see that the establishment of the Presumption,

if significant at all, only demonstrates the keen efforts by the courts to support arbitration by honouring a valid arbitration agreement.

Proper approach to jurisdictional challenge (arbitration)

The starting point: centre of gravity of the dispute

The crux of deciding a jurisdictional issue, as pointed out in *Fiona Trust*, is to ascertain the commercial purpose. Thus, the question to ask is whether any circumstances exist that give purpose to the arbitration. Where inconsistencies between arbitration agreements are noted, as in the case of *UBS*, the courts find it necessary to first identify where the centre of gravity lies and which agreement lies at the commercial centre of the transaction (or is closer to the claim), or under which series of agreements the dispute essentially arises. The arbitration agreement in that agreement will then be taken to cover all disputes. But this is not the end of story. Fragmentation may occur if clear wordings and commercial arrangements lead to that conclusion. *AmTrust Europe Ltd v Trust Risk Group SpA* was a case where there were two parallel lines of business between the parties operating contemporaneously.[37] Beatson LJ examined a number of inter-related contractual agreements. In determining the intention of the parties and construing the agreement, the form and party drafting the agreement are also relevant. In the actual analysis, there is simply no such thing as applying the Presumption; the Presumption had been given a role originally not intended in determining which of two or more competing clauses applies to a dispute. Likewise in *C v D1, D2 D3* a similar exercise was conducted. Since the parties were seeking to end their contractual relationship, there was no co-existing status between the two agreements. The purpose of the latter agreement is to terminate the relationship between C and D1. Hence, the centre of gravity was laid in the second agreement. Following the same logic, although *Fiona Trust* (2007) concerns a single arbitration clause, there were two sets of commercial realities. First, the alleged fraud which determines whether there would be a commercial relationship in the first place, and second, the substance of the contract. Under these circumstances, what the courts ought to consider is whether a national court or arbitral tribunal is more preferred by parties. In such a case where one party was accused of fraud, the parties were not seeking speedy resolution of a dispute for future business, but the legality of the entire arrangement, including any possible criminal conduct. The national courts are arguably closer to the claim.

The second part: reconciling the arbitration clauses

The first alternative When different agreements deal with different aspects of the parties' relationship or when it is convenient to apply a special regime to some aspects, separate jurisdictions may be required, even if the effect is fragmentation of the overall process for the resolution of disputes. In *UBS*, the different agreements were part of one package deal.[38] In such a case, similar disputes should

[37] *AmTrust Europe Ltd v Trust Risk Group SpA* [2017] 1 C.L.C. 456.
[38] *UBS AG v HSH Nordbank AG* [2009] 1 C.L.C. 934.

be dealt with by the same jurisdiction. For example, in *Deutsche Bank AG v Sebastian Holdings Inc*,[39] it was found that financial transactions were not closely related in time and conflicting clauses might be found within the agreements. This supports the proposition that the parties should use a specific forum for specific disputes. By applying the same proposition to *Fiona Trust*, it is not difficult for one to conclude that the fraud allegation should be resolved by the national court forum.

The second alternative Where parties to a contractual dispute enter into a settlement agreement, they may envisage further disputes which may relate to both the settlement agreement itself and to the previous contract. Parties may also envisage that one may wish to impeach the settlement agreement and to advance a claim based on the previous contract. In such circumstances, rational businessmen would intend that all aspects of such a dispute should be resolved in a single forum to avoid complication. Hence, when a settlement/termination agreement contains a dispute resolution provision that is different from, and incompatible with, a dispute resolution clause in an earlier agreement, the parties are likely to have intended the dispute resolution clause in the settlement/termination agreement to govern all aspects of future or outstanding disputes. Putting the complication aside, the new dispute resolution clause has been agreed by the parties in the light of the specific circumstances that gave rise to the disputes being settled and/or the circumstances leading to the termination of the earlier agreement. Further, the new dispute resolution clause is the operative clause governing issues concerning the effect of the termination/settlement agreement and therefore it is the only clause capable of applying to disputes that arise out of or relate to the termination/settlement agreement. Finally, in considering any dispute further to the settlement or termination agreement, the tribunal is likely to have to consider the background and circumstances in which the dispute arose and the rights of the parties under the earlier contract, which may result in inconsistent findings if considered by different tribunals.

VI. Practical example offered by the test

The "centre of gravity" approach and the "purposive approach" are not new. Adopting these long-standing principles would not be contrary to the judicial policy of promoting arbitration. Rather, it encourages careful consideration under a guided direction before challenging the jurisdiction of the arbitration. The consideration is guided by the court. If we only consider the cost of civil proceedings, a simple ban or mandatory arbitration or mediation might be very helpful. Yet, if we also consider the needs of the businessmen, the court must recognise that intervening circumstances would override the original purposes and confidence in arbitration. Some issues are better managed by a tribunal, and some by national courts, but this does not mean either forum has to handle the entire case. The substance of a contract may be better decided by an arbitral tribunal. Similarly, just because the arbitration has the jurisdiction does not mean the parties are bound to submit every question to arbitration. A high standard leeway for the courts and parties to deal

[39] *Deutsche Bank AG v Sebastian Holdings Inc* [2010] 2 C.L.C. 300.

with issues not covered by the Arbitration Act could impose discipline. It also provides more flexibility to avoid an impasse in arbitration should jurisdiction become controversial. The substance of the main agreement would not be affected by not applying the Presumption. The centre of gravity approach instead allows parties to continue arbitration and resolve difficult matters in the most effective forum. The converse is also true; upholding the arbitration agreement might not stop parties from submitting a dispute to court, nor would it give reasons for the court not to entertain a claim. The doctrine was meant to secure business efficacy. *Fiona Trust* has, therefore, laid down good questions for parties to balance whether their needs could be fulfilled through arbitration or in court.

For example, the two-stage test would apply as follows. Suppose two companies, A and B, enter into a series of contracts for a construction project. The first contract (Contract 1) for the design phase includes an arbitration clause, while the second contract (Contract 2) for the building phase has a different arbitration clause with a distinct jurisdiction. A dispute arises due to a design flaw affecting the construction. First, under the centre of gravity stage, the court would determine that the dispute's core issue lies in Contract 1, as the design flaw originated there. Next, under the reconciliation of clauses stage, the court would assess whether the arbitration clauses govern separate aspects of the relationship or if one should supersede the other. Since the dispute stems from the design, Contract 1's arbitration clause would take precedence, applying to the entire dispute and avoiding fragmentation in resolving the issue.

As an example, we can examine the two-stage test into *UBS AG v HSH Nordbank AG*, which involved a complex financial transaction with multiple agreements containing different jurisdiction clauses—some referring disputes to English courts and others to arbitration. When a dispute arose over the interpretation of these jurisdiction clauses, the court first identified the centre of gravity by determining that the core issue related to a specific agreement central to the transaction. It found that the jurisdiction clause of this agreement should take precedence. Next, the court reconciled the conflicting clauses across the various agreements, applying the jurisdiction clause of the core agreement to ensure that all related disputes were resolved in a single forum, thereby avoiding fragmentation in the resolution process. This case exemplifies how the test prioritises the contract at the heart of the dispute while effectively addressing potential conflicts in dispute resolution clauses.

VII. One stop arbitration?

The unspoken truth of the fallacious interpretation and hence fallacious application of *Fiona Trust* is mainly caused by the fact that the court itself, as opposed to the parties involved, prefers arbitration on certain matters, but lacks justification—other than in specific circumstances—to rule on that.[40] Nonetheless, the reality is that parties, on most occasions, may prefer litigation. The present case law, perhaps rightfully, is not ready to be put fully into context. The unexplored understanding of *Fiona Trust* and its subsequent development could be unveiled to better cater

[40] Aaron Yoong, "Of principle, practicality, and precedents: the presumption of the arbitration agreement's governing law" (2021) 37(3) *Arbitration International* 653–665.

to concerns over arbitration. Although the establishment of the presumption is influential, the reluctance from businessmen would affect parties' willingness to honour the arbitration clause and create unnecessary challenges for the courts to handle. A standardised approach to the question of jurisdiction would solve this problem. This approach has been established in the same line of judgments and finds its support in the long development of private international law. The parties must show which jurisdiction is closer to the claim using circumstantial evidence and then reconcile different clauses regarding their purposes.

The discussion above has suggested that the proposed approach completes the missing pieces of *Fiona Trust* and would serve business needs better as it is less desirable for the courts to mechanically direct parties to arbitration once they find a valid arbitration clause, and to rebut every possible argument submitted on a case-by-case basis. When it comes to contract construction, requiring the parties to carve out every specific dispute from an arbitration agreement is not practical and would likely terminate the legal relationship in the first place. The test could resolve this dilemma as party autonomy is upheld not only at the literal level but also at a purposive level. From a public interest perspective, it would present an advancement of judicial attitude as the court would also consider the needs of businessmen when disputes arise. This test presents a balance between improving cost-effectiveness in civil proceedings and facilitating a settlement for parties. A blanket push to drive parties away from the courts would not achieve these objectives.

This article proposes a framework to complement the presumption. The courts' concerns about selective submission are unfortunately an unavoidable reality. National courts and arbitration serve different functions and parties would want to achieve multi-purposes during the process of dispute resolution. Therefore, a better way is to remain flexible. The new approach is not to allow the court to disregard an arbitration clause, but rather to recognise that arbitration clauses are not applicable for certain disputes in the first place—an arbitration clause does not automatically imply one-stop arbitration and the new approach should recognise that not all possible disputes are listed in a contract, and hence can be incorporated into an arbitration agreement at the contract construction stage. This might have the impact of reducing the need for one-stop arbitration. Further studies should be conducted to advance the function of arbitration in terms of the powers it has to better protect parties, and also the growing concerns on cost, delay and increasing formalities that deter businessmen from engaging in arbitration.

This test might have been suggesting a potential regression to a time when courts could disregard arbitration clauses, which could create undesirable uncertainty for all parties. While there is a notion that parties may prefer litigation, one might question why arbitration is still widely chosen. The proposed test may enable unilateral forum shopping, undermining the integrity of the arbitration process. Additionally, it may also extend the *Fiona Trust* doctrine beyond its intended scope, raising concerns regarding competing clauses and successive contracts. While it's true that the current framework provides stability, it's important to recognise that things have changed over time. The way the system has been utilised by businessmen may not always align with the intentions behind the *Fiona Trust* doctrine. Case laws have consistently shown that judicial intervention is

always necessary to address complexities. It could be time to reassess the role of courts in these matters, acknowledging that their involvement might be beneficial in ensuring fairness and addressing potential abuses in arbitration.