



**Note 2: on 17 October 2007, the House of Lords upheld the decision of the Court of Appeal to the effect that the arbitration clauses in the relevant charterparties did apply to disputes about rescission of those contracts on the grounds that they had been induced by bribery. To access a note on the House of Lords judgment, click [here](#)**

**Note 1: On 29th March 2007 the House of Lords granted permission for the Court of Appeal decision to be appealed. The Court of Appeal then had to decide whether the restraint on the charterers from continuing the arbitration proceedings should be extended until the House of Lords gives judgment, which could be twelve months away. The Court of Appeal held that the restraint should be lifted, but on certain conditions - see Fiona Trust Holding v. Primalov [2007] EWCA Civ 414. (Editor, 27 July 2007)**

DMC/SandT/07//06

**Fiona Trust and Holding Corporation and Others v Yuri Privalov and Others**

**English Court of Appeal: Tuckey, Arden and Longmore LJ: [2007] EWCA CIV 20: 24 January 2007**

**Available on BAILII @ <http://www.bailii.org/ew/cases/EWCA/Civ/2007/20.html>**

Nicholas Hamblen QC and Vernon Flynn<sup>SC</sup> (instructed by Lawrence Graham LLP) for the Appellants/Defendants

Christopher Butcher QC and Philip Jones QC<sup>SC</sup> (instructed by Ince & Co) for the Respondent/Claimants

**TIME CHARTERPARTIES: SHELLTIME 4 FORM, CLAUSE 41: EFFECT OF FRAUD AND BRIBERY ON VALIDITY OF JURISDICTION AND ARBITRATION CLAUSES: "ARISING OUT OF" COMPARED TO "ARISING UNDER": ARBITRATION ACT 1996, SECTIONS 9<sup>1</sup> AND 72<sup>2</sup>**

## Summary

**The Court of Appeal, overruling the [Commercial Court judgment of October 2006](#), held that arbitration clauses in certain charterparties did apply to disputes about rescission of those contracts on the grounds that they had been induced by bribery. The words "arising out of" in a charterparty jurisdiction clause did cover every dispute under that charter except a dispute as to whether there was ever a contract at all. The Court of Appeal held that this case was different from a dispute as to "whether there was a contract at all". In particular it was not enough to say that bribery impeached the whole contract unless there was some special reason for saying that bribery impeached the arbitration clause in particular. There was no such reason here.**

DMC Rating: Confirmed/Developed

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## Background

This claim concerned the shipowners' entitlement to rescind certain charterparties on the grounds that they were tainted with fraud due to bribery. All of the charters had been entered into on the Shelltime 4 Form. Clause 41 of the charters provided that the contract would be governed by English law and jurisdiction but "notwithstanding the foregoing ... either party may, by giving written notice of election to the other party, elect to have any such dispute referred ... to arbitration in London ...". A further sub-clause referred to a dispute "arising out of" the charter.

On 12 April 2006, the shipowners purported to rescind eight of the charters. On 25 April, the charterers instituted arbitration proceedings and sought to enforce their rights in arbitration. On 27 April, the shipowners purported to rescind the jurisdiction and arbitration clauses in the charterparties.

The shipowners made their application on the basis of section 72<sup>2</sup> of the Arbitration Act 1996 (the "1996 Act"), seeking to restrain the arbitration proceedings on the basis that they (the shipowners) had rescinded both the charterparties and the arbitration agreements contained in them for bribery and that there can be no arbitration. The charterers responded by seeking a stay from the court under section 9<sup>1</sup> of the 1996 Act of the shipowners' rescission claims.

[At first instance](#), Morrison J had declined to stay the claims for rescission and had granted interlocutory injunctions to restrain the arbitration proceedings pending the trial of the action. That trial had not yet been concluded.

The submissions of the parties were conveniently grouped under the following heads:

Construction of the arbitration clause, namely whether a claim that the charterers had rescinded for bribery came within the arbitration clause;

Separability of the arbitration clause; and

Procedural matters, namely the relationship (if any) between sections 9 and 72 of the 1996 Act.

## Judgment

Construction

The charterers argued that the phrase "out of the charterparty" was a wider phrase than "under" the charterparty and the parties therefore intended a wider meaning to be given to the clause. The shipowners, for their part, referred to numerous authorities which supported their submission that the arbitration clause did not apply to a dispute about rescission for bribery.

The court considered the opening words of the clause in which the parties agreed a choice of English jurisdiction. The logic of the shipowners' argument was that their claim of rescission for bribery could not be brought in England because it was not a claim "under the contract" since it was a claim to have the contract set aside. The court considered that it could not be right that the businessmen negotiating these charterparties intended that any claim suggesting the contract was invalid would have to be brought wherever the defending companies were incorporated while claims for breach of contract were to be brought in England.

The importance of a liberal construction of an arbitration clause in favour of a "one stop" approach to arbitration was emphasised by the court. Although in the past the words "arising under the contract" had sometimes been given a narrower meaning, that should no longer continue to be so. In addition no commercial man would knowingly create a system that required that the court should first decide whether the contract should be rectified or avoided or rescinded before the arbitrators could go on to resolve the dispute that had arisen.

In these circumstances the court concluded that disputes as to whether contracts can be set aside or rescinded for alleged bribery did fall within the arbitration clauses on their true construction.

Separability

English common law has been moving towards a recognition that an arbitration clause is a separate contract which survives the destruction (or other termination) of the main contract. The question here was whether the assertion of invalidity by the shipowners went to the validity of the arbitration clause as opposed to the validity of the charterparties as a whole of which the arbitration agreements are a part.

The court pointed to previous authority for the proposition that it is not enough to say that the contract as a whole is impeachable and that there must be something more than that if the arbitration clause is also to be impeached. Their reasoning was that if the arbitrators could decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract had been procured by bribery, just as much as they can decide whether a contract has been procured by misrepresentation or non-disclosure.

Sections 9 and 72 of the Arbitration Act 1996

The shipowners submitted that any party challenging the jurisdiction of the arbitrators was entitled to apply to the court for a declaration or injunction or other appropriate relief. However, the court rejected the shipowners' arguments and held that the arbitration clauses were separate (and unrescinded) agreements, unimpeached by the claim to set aside the charterparties and wide enough to determine whether the charterparties could indeed be set aside. The trial judge had therefore been wrong to hold that he would have restrained the arbitration proceedings under section 72. If there was a valid arbitration agreement, proceedings could not be launched under section 72 at all.

It was therefore clear that the trial judge did not have the discretion he thought that he had and there was no reason why the charterers should be prevented from arbitrating the claims. To conclude, the arbitration tribunal should be free to decide whether the charters had been procured by bribery and they should then be able to decide what consequence that conclusion had on any claims which the charterers might otherwise legitimately have.

1. 9. -(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.  
(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.  
(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.  
(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.  
(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.
2. 72. -(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question-  
(a) whether there is a valid arbitration agreement,  
(b) whether the tribunal is properly constituted, or  
(c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief.  
(2) He also has the same right as a party to the arbitral proceedings to challenge an award-  
(a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or  
(b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him; and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.

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