

## Global Issues: ADR – Law Firms

# When Looking For A Seat Of Arbitration, Try London!

The Editor interviews **Matthew Shankland**, Partner in the London Dispute Resolution Group of Weil, Gotshal & Manges LLP and **Jamie Maples**, Associate in the Group.

**Editor:** Please provide our readers with information as to your practice area in Weil Gotshal's London Office.

**Shankland:** Weil Gotshal's dispute resolution team has been established in London for about eight years now. We specialize in international arbitration and international litigation. The arbitration aspect of the practice forms part of a wider practice group within the firm, our International Arbitration Group, which is headed by Guillermo Aguilar-Alvarez in New York and has lawyers in our offices across the United States and Europe. We are currently looking at expanding the group into our offices in Asia as well. In international arbitration matters we operate as a single team, using attorneys across the whole of the firm's network. In the London office we act both in institutional arbitrations, under the rules of the ICC and the London Court of International Arbitration, for example, and in *ad hoc* arbitrations.

On the litigation side, we regularly appear in cases in the English High Court and are also frequently involved in actions before foreign courts, in conjunction with other Weil attorneys worldwide. Finally, we provide strategic risk management advice during the course of our clients' business negotiations and transactions, so as to minimize the risk and the possible impact of any future litigation.

**Editor:** How do you account for the fact that London has become a major international center for arbitration?

**Maples:** Historically, English law has been a popular choice for business counterparties who otherwise have little or no connection with England. This has encouraged many such parties to also agree to have their disputes heard by arbitration in England. In addition, London has linguistic and geographical advantages which also make it an attractive venue.

**Editor:** Did the Arbitration Act of 1996 contribute to making London a major venue for arbitration dispute settlement?

**Maples:** The impact of the Arbitration Act 1996 in promoting England and London, in particular, as a center for international arbitration should not be underestimated. Prior to the Act, the sources of English arbitration law were scattered amongst the case law and in various statutes. The Act consolidated these sources. Secondly, the Act clearly set out the principles underlying English arbitration law and brought it much closer to internationally accepted practice, for example, by limiting the jurisdiction of the English courts to intervene in the arbitral process. This was welcomed in the arbitration community, as a recognition of party autonomy: parties choose arbitration because they want their disputes resolved by arbitration, not by state courts.

**Editor:** A recent case, *Fiona Trust*, has been regarded as further promoting arbitration in England. Please explain the background of the case and the language of the decision by the House of Lords.

**Maples:** The case was heard by the House of Lords, the highest appellate court in England. It concerned eight contracts for the hire of commercial vessels, known as "charter parties" which, it was alleged, had been procured by bribery. Each of the charter parties



**Matthew Shankland**



**Jamie Maples**

contained arbitration agreements, although the precise terms of these clauses were not consistent in all of the contracts. One of the parties argued that, because bribery had rendered the contract invalid, the effect was to render the arbitration clause invalid as well. The first question, therefore, was whether this argument was correct or whether the "doctrine of severability" applied. This doctrine is well-known in international arbitral practice. It states that, where a contract containing an arbitration agreement is found to be invalid, the arbitration agreement itself need not also be invalid. The Lords decided that the doctrine of severability applied in this case and that, in the absence of evidence that the arbitration agreement itself (as opposed to the contract as a whole) was procured by bribery, the agreement to arbitrate was valid and enforceable. As a matter of law, the decision is not particularly surprising, as the doctrine of severability is set out in the Arbitration Act 1996. However, although the Act did a good deal to limit interference by the courts, the Lords still felt it necessary to reinforce the message that the English court has no jurisdiction in such cases and that the arbitration agreement remains valid.

**Shankland:** On the face of it, it seems surprising that the question of severability still bothered the courts, but the Lords were clearly keen to send out a strong message to parties who seek to circumvent arbitration clauses on technical grounds like this, that they will no longer be able to do so.

**Maples:** The second issue in *Fiona Trust* concerned the scope of the arbitration agreements. As I mentioned, these clauses were inconsistently drafted in the eight charter party agreements. It was argued that some of the language in these clauses was not sufficiently broad to encompass the claims being made in the case (the allegations of bribery). This is an old trick and one which had some basis in English law. Before *Fiona Trust* there was much debate in the case law as to the interpretation of different phrases in arbitration agreements. For example: an agreement to refer to arbitration all disputes arising "out of" a contract was thought to be different in its scope to an agreement to refer to arbitration all disputes arising "under" a contract. However, in *Fiona Trust*, the Lords recognized that business people rarely intend any differences of meaning by such slight variations in the language of an arbitration agreement. The Lords went on to say that such clauses should be interpreted liberally, with the result that English courts should be reluctant to find that a particular claim does not fall within the scope of an arbitration agreement.

**Editor:** What do the findings in *Fiona Trust* import for English law in terms of severability and the interpretation and application of arbitration agreements?

**Maples:** If there was any doubt, the doctrine of severability and its application are now firmly enshrined in English law. It will now be much harder to argue that an arbitration

agreement itself is invalid. To do so, the Lords have said that you need evidence directly impeaching the arbitration agreement itself, which is likely to be rare. For example, where bribery allegations are involved, you will need to show that the arbitration agreement itself (and not just the underlying contract) was procured by bribery. Clearly, this will be a rare occurrence. Furthermore, the English courts will now interpret arbitration agreements liberally and rarely assume jurisdiction themselves in circumstances where there is an arbitration agreement. In this context, it is interesting to note that the Lords looked to the decisions on similar issues of courts in other jurisdictions, such as those in the United States, Germany and Australia, in formulating its approach. In this regard, *Fiona Trust* shows a recognition by the English courts of internationally accepted principles concerning the liberal interpretation of arbitration clauses.

**Shankland:** Looking back at some of the commentary regarding the attitude of the English courts toward arbitration – entertaining pedantic arguments concerning the scope of arbitration clauses, while professing to support arbitration – the Lords is saying that the international community expects the English courts to operate in a way that is sympathetic to arbitration. As the highest appellate court, they have now put their full weight behind arbitration as a method of resolving disputes. It follows that the decision should make a significant difference in the way in which the international arbitration community views the sincerity of the English courts' attitude towards arbitration.

**Editor:** Another case, *West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà SpA*, appears to be less supportive of arbitration. Please provide the background of this case.

**Maples:** This case concerns the use of anti-suit injunctions (temporary restraining orders), for example: where one party starts litigation in country A in breach of an agreement to refer all disputes to the courts of country B (an "exclusive jurisdiction" clause), and the second party seeks an anti-suit injunction restraining the first from continuing the proceedings in country A. In applying a piece of European legislation called the "Brussels Regulation," the European Court of Justice (ECJ) has recently decided that where there are competing proceedings of the kind described above in two Member States, the courts of each state must be left to determine their own jurisdiction and that neither can issue an anti-suit injunction to restrain the proceedings underway in the other court.

The question in *West Tankers* concerned a slightly different situation, where the foreign proceedings in question are started in breach of an arbitration agreement (rather than an exclusive jurisdiction clause). For example, where the parties to a contract agree to have all disputes referred to arbitration in London but where one of them, in breach of that agreement, starts proceedings in the court of another European Member State (Italy, for example). The Brussels Regulation states that it does not apply to arbitration. The question in *West Tankers* is whether this arbitration exception applies to situations of this kind, or whether the courts of Member States are prohibited from issuing anti-suit injunctions in these circumstances as well.

**Editor:** Why was this case referred to the European Court of Justice by the House of Lords?

**Shankland:** In referring the case for a decision by the ECJ, the House of Lords took into account the strong European policy objective against allowing the courts of Member States to "second guess" each other's jurisdiction. For reasons of comity, it has long been thought preferable that each Member State's court should be able to decide its own jurisdiction without interference from another. It was for this policy reason that the Lords referred the case to the ECJ, even though the language of the relevant European legislation (taking into account the arbitration exception in the Brussels Regulation) appears to expressly allow European Member State courts to issue anti-suit injunctions in support of arbitration. What the Lords seems to be saying is: although we do support arbitration and although we do have powers under our national law to issue injunctions in support of arbitration, we may have to accept the fact that the Italian court is sophisticated enough to decide for itself whether or not it should be hearing this dispute.

**Editor:** If, in *West Tankers*, the ECJ rules that arbitration agreements cannot be enforced in other Member States by way of anti-suit injunctions, what impact will this have on arbitration practice in Europe? Would such a decision run contrary to the spirit of *Fiona Trust*?

**Maples:** If the ECJ decides that arbitration agreements cannot be enforced in other Member States by way of anti-suit injunctions, this is likely to have a negative impact on the practice of arbitration in Europe. Currently, Europe is home to several major centers for international arbitration, such as Stockholm, Paris, Vienna and London, to name but a few. If the ECJ strips away the jurisdiction of the national courts in these countries to protect arbitration agreements by way of anti-suit injunctions, there is a significant risk that business people will choose to arbitrate outside Europe instead, in arbitration centers like New York, Singapore and Bermuda, where the relevant state courts are able to issue anti-suit injunctions of this kind. This danger was specifically identified by the House of Lords in its referral of *West Tankers* to the ECJ.

An "anti-arbitration" ruling of this kind would indeed run contrary to the spirit of the decision in *Fiona Trust*, which is self-evidently intended to promote arbitration in England. The effect of *West Tankers*, if the ECJ rules against the use of anti-suit injunctions in support of arbitration agreements, may well make Europe's arbitration centers (including London) less attractive. However, we must wait for the ECJ's ruling to see what in fact they decide, before jumping to any conclusions.

**Editor:** Do you feel *Fiona Trust* will have the effect of making the UK even more attractive as an arbitration venue?

**Shankland:** The answer to that is a firm "yes" and this is certainly how the decision has been received in the arbitration community in London and, more widely, in Europe. It represents a sincere statement from the highest authority in the English judicial system in support of the practice of arbitration in England. Furthermore, the decision gives much greater certainty to parties considering choosing arbitration in England that the English courts will respect such a clause and that they will be reluctant to find that the clause is invalid or insufficiently wide to cover the disputes being referred to arbitration.

Please email the interviewees at [matthew.shankland@weil](mailto:matthew.shankland@weil) or [jamie.maples@weil](mailto:jamie.maples@weil) with questions about this interview.