Exercising an option to arbitrate: avoiding the pitfalls*

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Overturning a decision of the Court of Appeal of the Eastern Caribbean Supreme Court, the Judicial Committee of the Privy Council (the "**Board**") unanimously held in *Anzen Limited and others v. Hermes One Limited* [2016] UKPC 1[1] that the Appellants were entitled to a stay under s. 6(2) of the BVI Arbitration Ordinance 1976 (Cap 6) (the "**Ordinance**") of proceedings commenced against them in the BVI courts by the Respondent, despite not having commenced arbitration themselves.

The parties were shareholders of Everbread Holdings Limited, a BVI company. The parties had entered into a shareholders' agreement. Clause 19.5 of that agreement was an arbitration clause, which provided at its relevant part that in the event of an unresolved dispute arising "*any Party may submit the dispute to binding arbitration*" (emphasis added).

The Respondent commenced proceedings in the BVI courts. The Appellants applied to stay the proceedings pursuant to the Ordinance on the basis that clause 19.5 was a valid and binding arbitration clause. The Appellants' application was dismissed by the court of first instance and thereafter by the Court of Appeal.

The Board was tasked with analysing and interpreting the meaning of clause 19.5. Three analyses based on the construction of the arbitration clause were discussed:

1. The words "*any party may submit the dispute to binding arbitration*" are permissive and exclusive if a party wishes to commence legal proceedings (**Analysis I**);

2. The words are permissive. A party may commence litigation but the other party has the option to submit the dispute to binding arbitration, either by:

    a. Commencing an arbitration (**Analysis II**); or

    b. Requiring the party that has commenced litigation to submit the dispute to arbitration, by making a request and/or by applying for a stay (**Analysis III**).

The Board observed that clauses depriving parties of the right to litigate should be clearly worded. The use of the word "*may*" was considered to be a clear indicator that Analysis I was inappropriate. The Board considered English, Canadian and Singaporean authorities in rejecting Analysis I.

In preferring Analysis III to Analysis II, the Board recognised that "[t]*he hallmark of arbitration is consent*" and parties to an arbitration agreement are under mutual obligations to cooperate with each other in pursuing arbitration. While no arbitration proceedings were yet underway the Board considered that clause 19.5, which "*contemplates a consensual approach*", better supported a construction whereby notice would trigger the mutual obligation to arbitrate rather than a construction that would oblige a party to commence arbitration in respect of a cross claim.

Analysis III enables a party to insist on dispute resolution by arbitration, regardless of whether or not it wishes to commence arbitration itself, whether before or after another party commences litigation. There is no promise by any party not to commence litigation unless and until a party insists on arbitration.

The judgment highlights the importance of careful drafting of arbitration clauses –when seeking to preclude parties from having recourse to the courts parties should use mandatory language such as 'shall' in arbitration clauses. Although a stay for arbitration was granted, the Board recognised that the clause did not preclude the commencement of litigation. Following the judgment, parties intending to commence proceedings in the face of an option to arbitrate must balance the risk that a stay will be granted, and the associated risk of incurring potential wasted costs and causing delay, against the perceived advantages of litigation.

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[1] https://www.jcpc.uk/cases/docs/jcpc-2015-0041-judgment.pdf

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