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UPDATE

Permission required?

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On 18 January 2016 the Privy Council handed down judgment in *Anzen Limited Anors v Hermes One Limited* [2016] UKPC 1 (Anzen). This judgment considered the effect of an arbitration clause which provided that, in certain circumstances:

... any Party may submit the dispute to binding arbitration.

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The cases reviewed in our other BVI update[1] all involved arbitration clauses which provided that certain disputes shall be referred to arbitration. Indeed, arbitration clauses using 'shall' are more common than 'may' clauses.

Facts

The Respondent and Appellants were shareholders in a BVI company. The Respondent commenced proceedings against the Appellants and the company claiming, *inter alia*, statutory remedies in relation to the Appellants' alleged unfairly prejudicial conduct in the management of the company's affairs.

The Appellants subsequently applied to the BVI Court, seeking to stay those proceedings, under section 6(2) of the Arbitration Ordinance 1976 (ie the older, now superseded Arbitration statute, also discussed in our other BVI update[2]). Section 6(2) provides:

'If a party to an arbitration agreement ... commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.'

At that stage, the Appellants had not commenced arbitration.

The BVI Commercial Court held, at first instance, that the Appellants were not entitled to a stay, due to their failure to refer the matter to arbitration. The Court of Appeal upheld that decision.

[1] *C-Mobile, Peak Hotels and Retribution*.

[2] Update entitled Arbitration clauses and winding up applications – Part II.

Privy Council judgment

Overturning those decisions, the Privy Council (led by Lords Mance and Clarke) held that the Appellants were entitled to a stay of proceedings.

In their reasoning, their Lordships outlined three possible analyses of the relevant words ('any party may submit the dispute to binding arbitration') in the arbitration clause:

Analysis 1 - The words are not only permissive but exclusive ie, this clause prevents the parties from seeking to resolve their dispute by court, or any other proceedings, apart from arbitration.

Analysis 2 - The words are purely permissive, leaving it open to one party to commence litigation, but giving the other party the option of submitting the dispute to binding arbitration, by commencing that arbitration.

Analysis 3 - The words are purely permissive, leaving it open to one party to commence litigation, but giving the other party the option of submitting the dispute to binding arbitration, by making an unequivocal request that the party that has commenced the litigation to submit the dispute to arbitration and/or by applying for a corresponding stay.

The Privy Council noted that the more common, 'shall' or 'should' clauses were exclusive, stating:

'Arbitration clauses commonly provide that unresolved disputes 'should or 'shall' be submitted to arbitration. The silent concomitant of such clauses is that neither party will seek any relief in respect of such disputes in any other forum.'

The Privy Council concluded that the words 'may submit the dispute' were purely permissive. They were insufficiently clear to amount to words depriving a party of the right to litigate. Also, it was substantially more likely that it was the parties' mutual intention that the words should mean that, once a dispute had been raised, either party would be entitled to insist on its being dealt with by arbitration.

As to how the other party should submit the dispute to arbitration, the Privy Council held that Analysis 3 was to be preferred. This was because Analysis 2 was capable of giving rise to evident incongruity and did not, in the Privy Council's view, make commercial sense. The defendant to proceedings might not have any interest, or even any ability to refer the dispute to arbitration itself. For example, in this case, the Privy Council observed that the Appellants would have to have commenced arbitration proceedings seeking a negative declaration that they were not liable in respect of specific claims (which they would have to define and articulate themselves).

Accordingly, the Privy Council viewed Analysis 3 as correct, as a matter of general principle:

'It enables a party wishing for a dispute to be arbitrated, either to commence arbitration itself, or to insist on arbitration, before or after the other party commences litigation, without itself actually having to commence arbitration if it does not wish to. It comes close in effect to analysis 1, save that, unless and until one party insists on arbitration, there is no promise by the other party not to litigate.'

Conclusion

While providing clarity on the contractual interpretation of the use of the word 'may' in arbitration clauses, the decision further reinforces the contractual nature of arbitration proceedings and the court's willingness to hold parties to their contractually chosen forms of dispute resolution.

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