

# PRIVY COUNCIL GIVE "OPTIONAL" ARBITRA

In *Anzen Limited & Ors v Hermes One Limited* [2016] UKPC 1, the Judicial Committee of the Privy Council comprising Lords Mance, Clarke, Sumption, Carnwath and Hodge considered the effect of a clause in a shareholders agreement that, in the event of a dispute, "any party may submit the dispute to binding arbitration".

## The facts

The parties were shareholders in a BVI company established to pursue the development of airline fare search software. The shareholders agreement contained an arbitration clause, which provided:

... If a dispute arises out of or relates to this Agreement or its breach (whether contractual or otherwise) and the dispute cannot be settled within twenty (20) business days through negotiation, any Party may submit the dispute to binding arbitration.

The respondent commenced court proceedings in the BVI against the appellant, alleging unfairly prejudicial conduct in the management of the affairs of the company. The appellants applied to stay the proceedings pursuant to section 6(2) of the Arbitration Ordinance 1976, on the grounds that the shareholder agreement contained a valid and binding arbitration clause.

At first instance the judge refused the application for stay, and that decision was upheld by the Court of Appeal of the Eastern Caribbean Supreme Court.

## The judgment

The appellant appealed to the Privy Council, where Lords Mance and Clarke allowed the appeal and granted a stay of the proceedings. The judges considered English, Commonwealth and US authorities and concluded that there were three possible analyses which could be adopted, namely:

1. The words "any party may submit the dispute to binding arbitration" are not only permissive, but exclusive, if a party wishes to pursue the dispute by any form of legal proceedings (analysis 1);
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, such option being exercisable either by:
  - a. Commencing arbitration (analysis 2); or
  - b. Requiring the party which has commenced litigation to submit the dispute to arbitration, by making an unequivocal request to that effect and/or by applying for a corresponding stay (analysis 3).

In rejecting analysis 1, the Board noted that there was an "obvious linguistic difference" between a promise that disputes "shall" be submitted to arbitration and a provision that any party "may" submit a dispute to binding arbitration; clauses depriving a party of the

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right to litigate should be expected to be clearly worded.

With regard to analysis 2, the Board noted that this would give each party a right to have disputes submitted to arbitration. However, if one party commenced litigation, the other party could only end that litigation by itself submitting the dispute to arbitration. As the Board pointed out, the party submitting the dispute to arbitration may itself be seeking no positive relief – only a declaration of no liability. In the present case it was said that the appellant would have had to pay a non-refundable filing fee of US\$3,000 to the ICC, plus the Advance on Costs, in order to bring arbitration proceedings. Analysis 2, therefore, did not make "commercial sense".

Having rejected analyses 1 and 2, the judges concluded that analysis 3 was to be preferred. Analysis 3 would enable a party wishing a dispute to be arbitrated, either to commence arbitration itself or to insist that the other party commences arbitration.

## Comment

The judgment provides some welcome clarification on the question of how to interpret "optional" arbitration clauses. Although not binding as a matter of English law, judgments of the Privy Council are of persuasive authority in English courts.

## AUTHOR PROFILE



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Harriet has experience of both ad hoc and institutional arbitration and has acted for clients in LCIA and ICC arbitrations in relation to disputes in the insurance, pharmaceutical, energy and media sectors. She has also represented clients in commercial disputes in the High Court and Court of Appeal.

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