EXERCISING AN OPTION TO ARBITRATE AND THE RIGHT TO A STAY OF NATIONAL COURT PROCEEDINGS - *TIMOTHY COOKE*

The Privy Council has unanimously held that an arbitration clause stating that *'any party* **may** *submit the dispute to binding arbitration'* amounts to a binding commitment to arbitrate if either party chooses to rely on it. Such a clause amounts to an option to arbitrate, which, if exercised, requires the party that has brought a dispute before a national court to refrain from taking further steps in that litigation and instead to commence arbitration. The decision is likely to be influential in the construction of arbitration clauses with similar language in popular arbitration jurisdictions such as England, Singapore, and Hong Kong.

In *Anzen and Others v Hermes One Limited* [2016] UKPC 1, parties to a shareholders agreement concerning a company (**Everbread**) registered in the British Virgin Islands agreed to an arbitration agreement that provided that *'any party may submit the dispute to binding arbitration'.*

Following a dispute between the shareholders, Hermes One commenced litigation in the commercial court in the British Virgin Islands alleging unfairly prejudicial conduct in the management of the affairs of Everbread. Anzen and the other appellants (**Anzen**) applied for a stay of those court proceedings on the basis that the claims ought to be arbitrated. They did not themselves, however, commence arbitration proceedings. The application for a stay was rejected and that rejection was upheld on appeal for essentially the same reasons, namely that (1) the arbitration clause conferred an option upon any party to the agreement to submit a dispute arising under or relating to the agreement to arbitration; (2) if one party commenced litigation in respect of a dispute, the option to arbitrate was only exercisable by the other party by referring the identical subject matter to arbitration; and (3) because Anzen had not done this, but had merely sought a stay of the proceedings, it could not rely on mandatory stay provisions in the British Virgin Islands' arbitration law.

On further appeal, the Board of the Privy Council (**Board**) considered there were three ways to construe the phrase *'any party may submit the dispute to binding arbitration'*:

> (1) The words are not only permissive but exclusive if a party wishes to pursue the dispute by any form of legal proceedings. In other words, arbitration was the exclusive means by which the parties could pursue a dispute;
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> (2) The words are permissive, leaving it open to a party to commence litigation but giving the other party the option of submitting the dispute to binding arbitration either:
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> > (a) by commencing arbitration;
> > *or*
> > (b) by requiring the party that has commenced the litigation to submit the dispute to arbitration by making an unequivocal request to that effect and/or by applying for a corresponding stay.

After a detailed review of cases from Canada, England, Singapore, and the United States, as well as academic writings, the Privy Council rejected the first analysis. It held that clauses depriving a party of the right to litigate should be clearly worded. Consistent with authorities from a range of jurisdictions, it held that there is an obvious and important linguistic difference between *'may'* and *'shall'*. In line with cases such as *Lobb Partnership Ltd v Aintree Racecourse Co Ltd* [2000] CLC 431 (England), *Canadian National Railway and Others v Lovat Tunnel Equipment Inc* (1999),

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174 DLR (4th) 385 (USA), and *WSG Nimbus PteLtd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603 (Singapore), the word '*may*' was construed to confer on the parties an option to arbitrate. Once that option is exercised, a binding arbitration agreement comes into existence.

Having rejected the first analysis, the Board considered how a party who was a defendant in litigation could exercise the option to arbitrate: was it required itself to commence arbitration for determination of the issues that the other party had sought to litigate (the second analysis), or could it request that the dispute be arbitrated and/or seek a stay of litigation (the third analysis)?

The second analysis was ultimately rejected because it required the party that wished to arbitrate the matter, but that was a defendant in litigation in a state court, to incur the expense of commencing an arbitration merely for a declaration of no liability. Those expenses would include paying a nonrefundable filing fee to an arbitral institution on commencement of arbitration proceedings, plus further advances on costs as ordered by the institution, plus the legal costs of preparing the arbitration claim. Furthermore, the party electing to arbitrate may be required to satisfy various escalation provisions prior to commencing arbitration (in this case, the arbitration clause required the parties to negotiate for 20 days). The Board concluded that requiring the party that was a defendant to litigation but that wished to arbitrate the dispute to incur these costs and undertake such steps did not make commercial sense.

The Board was left with the third analysis. It concluded that this reflected the consensual approach to arbitration, recognising that such consent was the acknowledged hallmark of arbitration. On this analysis, a dispute could be pursued through the courts if neither party elected to submit it to arbitration. However, notice by either party would trigger a mutual agreement to arbitrate, at which point the claimant who had commenced litigation in court would have to either commence identical proceedings in arbitration or drop the suit. The defendant to such litigation would be entitled to a stay of the proceedings and would not be obliged to commence arbitration proceedings.

Comment

This case confirms the consensual approach to arbitration between commercial parties. The decision is noteworthy not only for its findings on how an option to arbitrate may be exercised, and how such an election gives rise to the right for a stay of litigation in favor of arbitration, but also because of the range of cases analyzed in support of the Board's conclusion, which were drawn not only from English authorities, but also from the United States and Singapore. Such an approach is consonant with an increasing harmonization of international arbitration jurisprudence, thereby promoting predictability and certainty for commercial parties.