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A. Mather

MEANING OF A PROVISION THAT PARTIES "MAY" SUBMIT DISPUTES TO ARBITRATION

Estratto

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UNITED KINGDOM, Privy Council in *Anzen Limited and others (Appellants)* v *Hermes One Limited (Respondent) (British Virgin Islands)* [2016] UKPC 1, 18 January 2016 (Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath, Lord Hodge; judgment delivered by Lord Mance and Lord Clarke).

UK Privy Council - BVI Arbitration Ordinance 1976 - Arbitration agreements - Options to arbitrate - Whether exclusive or permissive - Stay of court proceedings - England - Canada - Singapore - United States - Shareholder disputes - Arbitrability.

The United Kingdom Privy Council considered the meaning and effect of an arbitration clause, which provided that, in the event of an unresolved dispute, «any party may submit the dispute to binding arbitration». At first instance, and in the BVI Court of Appeal, it had been held that this clause conferred on all the parties an option to require disputes to be submitted to arbitration. However, in order to exercise this right, a party had to commence arbitration proceedings. As the party seeking to rely on the arbitration agreement had not done this, it was not entitled to a stay. The Privy Council granted an appeal against this decision. It held that submitting a dispute to arbitration need not be inextricably linked to commencing arbitration proceedings. It might be difficult for a defendant in court proceedings to commence arbitration proceedings in which it sought positive relief. Therefore, it made more commercial sense for a party to be able to insist upon arbitration either by making an unequivocal request that the party that had commenced litigation refer the dispute to arbitration or by applying for a stay of the court proceedings. Accordingly, the appellant was entitled to a stay.

Factual Background. — The appellants and the respondent were shareholders in Everbread Holdings Ltd ("**Everbread**"), a BVI company, and parties to a shareholders' agreement executed in or around August 2012. In January 2014, the respondent issued court proceedings against the appellants in the Commercial Court in the BVI alleging, amongst other things, unfair prejudice and breach of the shareholders' agreement.

Clause 19.5 of the shareholders' agreement (the "**Arbitration Agreement**") provided that: "*... 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. Such arbitration will be conducted by a sole arbitrator designated by the International Chamber of Commerce (ICC) and will be in accordance with the ICC's arbitration rules...*"

The appellants argued that this was a valid and binding arbitration agreement and applied for a stay of the court proceedings under the relevant BVI legislation, namely section 6(2) of the Arbitration Ordinance 1976. This provides that: "*If any party to an arbitration agreement, other than a domestic arbitration agreement, or any person claiming through or under him, 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.”.

Importantly, the appellants did not refer the dispute to arbitration themselves before applying for a stay of the court proceedings.

It was common ground that an arbitration tribunal could not award all of the relief sought by the respondent, including, in particular, an order for the winding up of Everbread or for the appointment of a liquidator, but that the tribunal could determine disputes regarding underlying issues of fact or law relevant to the subsequent pursuit in court of such orders.

Meaning of a provision that parties “may” submit disputes to arbitration.

1. The first instance and Court of Appeal decisions. — 2. Possible interpretations of the Arbitration Agreement. — 3. The position in other jurisdictions. — 4. Exclusive or permissive? — 5. Did the appellants need to commence ICC arbitration in order to exercise the option to arbitrate? — 6. Conclusions.

1. *The first instance and Court of Appeal decisions.*

At first instance, Bannister J dismissed the application for a stay on the basis that the Arbitration Agreement conferred an option on any party to submit a dispute to arbitration but that this option was only exercisable by one party commencing arbitration proceedings. As the appellants had not done this, it could not be said that the parties had agreed to refer the dispute to arbitration and section 6(2) of the Arbitration Ordinance 1976 was not available to the appellants. This decision was upheld by the Court of Appeal for essentially the same reasons.

2. *Possible interpretations of the Arbitration Agreement.*

In the view of the Privy Council, there were three possible analyses of the Arbitration Agreement:

1 The words “*any party may submit the dispute to binding arbitration*” were “*exclusive*”. In other words, arbitration was the only means by which a dispute could be resolved. The Privy Council called this “**analysis I**”.

2 The words were “permissive”, meaning that a party could commence litigation but the other party would have the option to submit the dispute to arbitration. The party wishing to exercise this option could do so either by:

2.1 commencing an ICC arbitration, as the appellants argued and Bannister J and the Court of Appeal found (“**analysis II**”); or

2.2 requiring the party which had commenced litigation to submit the dispute to arbitration, by making an unequivocal request to that effect and/or by applying for a corresponding stay, as the appellants had done (“**analysis III**”).

3. *The position in other jurisdictions.*

As part of the process of deciding between these rival interpretations of the

Arbitration Agreement, the Privy Council considered authorities from a range of different jurisdictions.

England - In *Lobb Partnership Ltd v Aintree Racecourse Co Ltd* [2000] CLC 431, clause 13.1 of the relevant contract provided that "[d]*isputes may be dealt with as provided in paragraph 1.8 of the RIBA Conditions but shall otherwise be referred to the English courts*". The RIBA Conditions provided that disputes "*shall*" be referred to arbitration. One of the parties argued that this clause was too vague and that it contemplated arbitration only if both parties agreed to it once a dispute had arisen. Colman J rejected both these arguments for a number of reasons. Importantly in the context of *Anzen v Hermes*, he said that: "*If the* [clause] *had simply consisted of the first part or words to that effect such as 'disputes may be referred to arbitration', there could be little doubt that the meaning was that either party was to be entitled to refer a dispute to arbitration and, once he had done so, the other party would be bound to the reference. There would be no question of both parties subsequently having to agree to such a reference. Accordingly, in the absence of indications to the contrary, the first part of clause 13.1 would strongly indicate that it was to be open to either party to refer a dispute to arbitration if he chose to do so and that, if he did so, the other party would be bound to accept that reference.*".

In the earlier case of *Westfal-Larsen & Co A/S v Ikerigi Compania Naviers SA ("The Messiniaki Bergen")* [1983] 1 Lloyd's Rep 424, the relevant contract provided that any dispute "*shall be decided by the English courts...*", but continued: "*Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the Arbitration Act 1950 ... Such election shall be made by written notice ...*"

Bingham J held that this provision conferred an option on the parties, "*which may but need not be exercised*". If neither party exercised the option, there would be no agreement to arbitrate. However, once one of the parties had made an election to arbitrate, a binding arbitration agreement came into existence.

In *Union Marine v Government of Comoros* [2013] EWHC 5854 (Comm), article 8 of the contract provided for any dispute to be submitted to *"the competent national jurisdiction in the matter*", but article 9 then provided that "*notwithstanding"* the provisions of article 8 *"the parties are able to decide to submit any dispute between them to an arbitrator of their choice in London*". Leggatt J said (albeit obiter) that: "*Thus, article 9 gives either party the option of submitting a dispute to arbitration in London, with the result that a binding arbitration agreement comes into existence when that option is exercised by giving notice of commencement of arbitration, as Union Marine has done in the present case.*".

The Privy Council also referred to *NB Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC (Comm) 2001. In that case, the dispute was as to the meaning and effect of a unilateral arbitration clause. Such clauses are controversial in some jurisdictions but are enforceable as a matter of English law. In this case, the party in whose favour the option to arbitrate was drafted was able to stop a court action brought against it by exercising the option to arbitrate. Morison J held that the party that had issued court proceedings first could "*gain no advantage from 'jumping the starting gun'*".

Canada - In the Canadian case of *Canadian National Railway and Others v Lovat Tunnel Equipment Inc* [1999], 174 DLR (4th) 385, the relevant contract provided that: "*The parties may refer any dispute under this Agreement to arbitration, in accordance with the Arbitration Act of Ontario.*"

The Court of Appeal of Ontario held that the "*plain meaning*" of this provision was that either party could elect to have a dispute referred to arbitration. If (as had happened) one party issued court proceedings, the other party was presented with a choice between acquiescing in the decision to resort to the courts or electing binding arbitration. The result of either side electing arbitration was that it became mandatory. If neither party did this, the dispute could be resolved by the courts.

Singapore - The Singapore High Court reached a similar conclusion in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603. The relevant provision provided: "*In the event that the parties have a dispute over any term or otherwise relating to this Agreement they shall use their best endeavours to resolve it through good faith negotiations. In the event that they fail to do so after 14 days then either party may elect to submit such matter to arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules')...*"

The judge, Lee Seiu Kin JC, interpreted this provision as follows: "*In the event of a dispute, the parties are required first of all to use their best endeavours to resolve it through good faith negotiations. It is only if this is unsuccessful after 14 days that the right is given to either party to elect to submit the dispute to arbitration. Upon such an election, both parties are bound to submit to arbitration in Singapore... While it is true that..., there is no compulsion to arbitrate until an election is made, once a party makes such election, arbitration is mandatory in respect of that dispute.*".

United States - Thus it will be seen that the English, Canadian and Singaporean authorities all point towards a permissive interpretation of the Arbitration Agreement and, insofar as they covered the point, towards the conclusion that parties did not need to issue arbitration proceedings in order to exercise an option to arbitrate.

However, the position in the US is not so clear. The Privy Council referred to three cases (1) where provisions that the parties "*may*" refer disputes to arbitration, were in effect interpreted to mean that the parties "*shall*" refer disputes to arbitration. In three other cases (2), US courts reached the opposite conclusion.

The Privy Council also referred to two other cases which, in its view, demonstrated "*less than satisfactory reasoning*". In *Conax Florida Corp v Astrium*

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(1) *J C Bonnot v Congress of Independent Unions Local* 331 F 2d 355 (8th Cir 1964) ("*In the event the two parties do not agree ..., then either party may request arbitration and follow the following procedure*"); *Austin v Owens-Brockway Glass Container, Inc* 78 F 3d 875 (4th Cir 1996) ("*disputes ... may be referred to arbitration*"); *United States of America v Bankers Insurance Co* 245 F 3d 315 (4th Cir 2001) ("*If any misunderstanding or dispute arises ... such misunderstanding or dispute may be submitted to arbitration for a determination* [that] *shall be binding upon approval by the FIA*").

(2) *City of Louisa v Newland* 705 SW 2d 916 (Ky 1986); *Briggs & Stratton Corp v Local 232, International Union, Allied Industrial Workers of America* 36 F 3d 712 (1994); *Young v Dharamdass* 695 So 2d 828 (Florida Court of Appeal 1997.

Ltd 499 F Supp 2d 1287 [2007] (Florida District Court), the court rejected an argument that use of the word "may" in the relevant arbitration agreement meant that arbitration required the mutual agreement of the parties. However, it was not clear whether this was on the basis that arbitration was mandatory (analysis I) or on the basis that one party could insist upon it (analysis III). In *Retractable Technologies Inc v Abbott Laboratories Inc*, a decision of the Fifth Circuit on 2 June 2008 (Reference 07-40277), the majority held that the contract only provided for arbitration if there was subsequent mutual agreement to arbitrate. The Privy Council noted that it was not clear why all three of analyses I, II and III were rejected.

The Privy Council concluded, therefore, that US authority "*points... in inconsistent directions*". However, it noted that the authorities in which the word "may" had been taken to mean "shall" arose in a different, non-commercial, context and it took the view that they were less persuasive in the context of this particular case.

4. *Exclusive or permissive?*

The Privy Council accepted that there were some arguments in favour of the proposition that the Arbitration Agreement should be given an exclusive meaning. In particular, the parties had taken the time and effort in the Arbitration Agreement to identify the time for, place and scope of, and issues in the arbitration, and to deal with costs, confidentiality and appeals. The fact that the parties had *"gone to such trouble"* suggested that they had not *"contemplated that either party could commence litigation as an alternative form of dispute resolution*".

However, there were, in the Privy Council's view, more factors pointing towards a permissive interpretation. The following were important considerations:

1 Clear wording is required in order to deprive a party of the right to litigation (although "*the commercial community's evident preference for arbitration in many spheres makes any such presumption a less persuasive factor nowadays than it was once*").

2 There is an "*obvious linguistic difference*" between a promise that disputes "*shall*" be referred to arbitration and the statement in the Arbitration Agreement that "*any party may submit the dispute to binding arbitration*".

3 Use of the word "*may*" could be understood to mean that litigation is open, unless and until arbitration is elected.

4 The reasoning in the English, Canadian and Singaporean authorities described above.

5. *Did the appellants need to commence ICC arbitration in order to exercise the option to arbitrate?*

The Arbitration Agreement provided that "*any Party may submit the dispute to binding arbitration*". Although it accepted that this language could in some circumstances require the actual commencement of an arbitration, the Privy Council considered that this interpretation could give rise to "*evident incongruity*". This was because it could require the party that wished to exercise the option to arbitrate to commence arbitration proceedings in which it was seeking no positive relief.

The Privy Council doubted whether it would be possible for the party that wanted to arbitrate simply to refer the positive claims advanced by the other side to arbitration because the ICC Arbitration Rules "*postulate that a person requesting arbitration is itself a claimant making claims, to which the respondent will have to respond*". It would, therefore, be necessary to apply for a declaration of no liability in respect of any claim made by the other party in the litigation and to advance a positive case as to why the claims advanced in the litigation should be rejected. In addition, the party that wished to arbitrate would need to pay a non-refundable filing fee of US$3,000 and any advance requested by the ICC to cover the costs of the arbitration. This meant that the requirement to commence an arbitration could, in the view of the Privy Council, "*prove a substantial obstacle*". This did not make "*commercial sense*" and the "*better view*" was that submitting a dispute to arbitration was not "*inextricably linked*" to the actual commencement of arbitration. It followed that analysis III was to be preferred and a party could exercise the option to arbitrate either by making an unequivocal request that the party that had commenced litigation refer the dispute to arbitration or by applying for a stay of the court proceedings.

Relying on the House of Lords decision in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (3), the Privy Council also confirmed that section 6(2) of the Arbitration Ordinance 1976 gave the court the power to stay its proceedings even though the dispute had not been, and might never be, submitted to arbitration. Nor did it matter that the Arbitration Agreement required the taking of further steps (in this case attempting settlement or at least waiting 20 days after the dispute arose) before the commencement of any arbitration.

6. *Conclusions.*

In summary, the effect of a provision that the parties "may" refer disputes to arbitration was (at least in the context of this particular contract) that either party could insist on arbitration without first having to commence arbitration proceedings and irrespective of whether court proceedings were underway.

Whilst the decision recognises the "*obvious linguistic difference*" between the words "may" and "shall", the practical consequences of using either word are likely to be largely similar. In both situations, either party can insist on arbitration and, if both parties would prefer to resolve their dispute through court proceedings, they can agree to do so.

The only real difference between the two types of provision is that a "mandatory" arbitration agreement will contain an "*(often silent) concomitant*" (4) that neither side can issue proceedings in any other forum whereas, where there is an "optional" arbitration agreement, it will not be a breach of contract to commence court proceedings (if the option to arbitrate has not been exercised). However, it is

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(3) In this case, the wording of section 1(1) of the then English Arbitration Act 1975 was under consideration but the Privy Council said that this "*paralleled in material respects*" the language in section 6(2) of the Arbitration Ordinance 1976.

(4) See the decision of the UK Supreme Court in *AES UST-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 1 WLR 1889.

difficult to see how this initial freedom to commence court proceedings confers a significant practical benefit (at least within English law and Commonwealth jurisdictions). It will remain the case that any court proceedings can be stayed at the election of the defendant (unless and until the defendant submits to the jurisdiction of the court) and the claimant will still be liable for its own costs of bringing the proceedings. The defendant in the court proceedings will not have a contractual damages claim to recover the costs it incurs as a result of court proceedings initially being brought (as there would be no breach). Such costs are, however, likely to be minimal unless the claimant in the court proceedings resists an application by the defendant for a stay of the court proceedings, in which case one would expect the court (in jurisdictions where costs shifting rules apply) to award the defendant its costs of making the application and/or for a claim for breach of the arbitration agreement to then be available with respect to the costs incurred in pursuing the resisted application.

Furthermore, the meaning of a provision that the parties "shall" refer disputes to arbitration is likely in most cases to be beyond dispute. Whilst *Anzen v Hermes*, and the English, Canadian and Singaporean authorities referred to above, go some way towards establishing a consensus as to the meaning of a provision that parties "may" refer to disputes to arbitration, it remains possible that a court could reach a different conclusion in the context of a different contract set against a different factual background. The word "may" contains inherent ambiguities and this is unhelpful to commercial parties seeking certainty.

The logical conclusion is that parties would be unwise, in the future, to use optional arbitration clauses. To the extent that such clauses provide any extra flexibility, the practical benefits are largely illusory and, even after *Anzen v Hermes*, there remains scope for satellite litigation about the meaning of such clauses.

A. Mather