

PRIVY COUNCIL REVERSES BVI COURTS' REFUSAL TO UPHOLD AN ARBITRATION AGREEMENT

Anzen Ltd v Hermes One Ltd [2016] UKPC 1

Introduction

In a decision handed down on 18 January 2016, the Privy Council allowed an appeal against decisions of the courts of the British Virgin Islands (“BVI”), holding that a party was entitled to an order staying litigation proceedings where there was an applicable arbitration clause which provided that either party “may” submit a dispute to arbitration. This was the case even where the party entitled to the stay of proceedings had not, in fact, made a reference to arbitration.

Background

The appellant and respondent were parties to a shareholders’ agreement (“the SHA”) relating to a company in the BVI. The SHA contained a tiered dispute resolution clause which stated, at Clause 19.5, that, where a dispute remained unresolved after the earlier stages of the proscribed dispute resolution arrangements, “any party may submit the dispute to binding arbitration”.

A dispute arose and the respondent initiated litigation. The appellants sought to uphold the arbitration agreement and applied to the BVI court for the litigation to be stayed pursuant to Section 6(2) of the Arbitration Ordinance 1976 (British Virgin Islands) (“the 1976 Ordinance”). At first instance, Judge Bannister QC dismissed the application for a stay on the grounds that Clause 19.5’s language indicated that it was essentially permissive or optional in nature; conferring merely an option to arbitrate upon each party as opposed to a binding agreement to submit disputes to arbitration. Thus, the defendant to the litigation could exercise the ‘option’ contained in Clause 19.5 only if the exact same subject matter of the dispute was referred to arbitration.

Judge Bannister QC’s decision was upheld in the BVI Court of Appeal. However, subsequently the BVI Court of Appeal granted permission to appeal to the Privy Council.

On appeal, the Privy Council was presented with three potential analyses for the proper interpretation of Clause 19.5:

1. the phrase “any party may submit the dispute to binding arbitration” was exclusive in that it prevented any party from starting litigation (“the First Analysis”);
2. the words “any party may submit the dispute to binding arbitration” had the effect of allowing one party the right to commence litigation, but only conferred an option of so doing to the other party (this had been Judge Bannister QC’s analysis) (“the Second Analysis”);

3. the words “any party may submit the dispute to binding arbitration” were permissive in nature and had the effect that a party was entitled to start litigation but the defendant would have the option to either commence arbitration proceedings or to apply to the court for a stay (as, on the facts of the instant case, had happened) (“the Third Analysis”).

Decision

The Privy Council (judgment given by Lord Mance and Lord Clarke) adopted the Third Analysis, thus allowing the appeal, concluding that the decisions of Judge Bannister QC and the BVI Court of Appeal were wrong and granting a stay of proceedings.

The Privy Council noted that arbitration clauses very commonly are phrased in mandatory language rather than permissive language (e.g. disputes “shall” be submitted to arbitration). It was desirable that arbitration clauses should be phrased in clear language and have clear meaning. Given that there was clearly a difference between “shall” (which makes it clear that resort to litigation is a breach of contract) and “may” (which runs the risk of leaving litigation as an available forum), the First Analysis had to be rejected in this case.

As regards the Second Analysis, the Privy Council found that this analysis “does not seem...to make much commercial sense”, as it would allow either party to commence litigation but then requires the matter to be arbitrated if the other party commenced an arbitration in which they sought no positive relief.

The Third Analysis was to be preferred “as a matter of general principle”, the Privy Council held. The Parties to an agreement to arbitrate were mutually obliged to do all things necessary for the arbitral proceedings to be pursued properly and expeditiously. The drafting of Clause 19.5 clearly contemplated a consensual approach and thereby required an analysis of a consensual scheme (consent being “the hallmark of arbitration”). Thus, it could not be the case, as the BVI courts had held, that the actual commencement of arbitration (or an insistence on arbitration before the litigation was commenced) was required.

Concluding Remarks

The decision in *Anzen* reaffirms some basic principles of arbitration, which will be important to the development of arbitration in the BVI – where the new Arbitration Act 2013 entered into force on 1 October 2014.

Khawar Qureshi QC appeared before the BVI Court of Appeal (on behalf of the appellants) on the application for permission to appeal to the Privy Council.

26th April 2016