

BRITISH VIRGIN ISLANDS COURT OF APPEAL

Anzen Ltd and others -v- Hermes One Ltd BVIHCMAP 2014/0013

INTERLOCUTORY APPEAL - ARBITRATION - OPTION TO ARBITRATE - CONSTRUCTION OF ARBITRATION CLAUSE IN SHAREHOLDERS' AGREEMENT - APPLICATION BY APPELLANT IN COURT BELOW UNDER SECTION 6(2) OF ARBITRATION ORDINANCE FOR STAY OF PROCEEDINGS COMMENCED BY RESPONDENT - WHETHER LEARNED JUDGE ERRED IN REFUSING TO STAY PROCEEDINGS - WHETHER PARTIES OBLIGED TO REFER TO DISPUTES FALLING UNDER SHAREHOLDERS AGREEMENT TO ARBITRATION

A shareholders agreement ("the SHA") contained an arbitration clause which stated that: "*If a dispute arises out of or relates to this Agreement or its breach ... any party may submit the dispute to binding arbitration*". Following a dispute, the claimant commenced proceedings without referring the dispute to arbitration. This case concerned an application for a stay of proceedings pursuant to Section 6(2) of the Arbitration Act which states that: "*If any party to an arbitration agreement ... commences any legal proceedings in any court against any other party to the agreement ... any party to the proceedings may at any time after appearance ... apply to court to stay the proceedings*". The Learned Judge dismissed the application on the grounds that neither party was obliged to refer a dispute falling under the SHA to arbitration and the failure to exercise such an option was fatal.

The Defendants appealed and the Court of Appeal was required to decide: (1) whether the clause obliged the parties to refer disputes under the SHA to arbitration; and (2) if the clause is bypassed by one party whether the other party is entitled to a stay of proceedings.

In dismissing the appeal, the Court held that an arbitration clause which provides for an option to arbitrate did not create an immediately binding contract to arbitrate. However, as soon as one of the parties invoked the arbitration clause by referring the dispute to arbitration, there was a binding agreement to arbitrate.

If the arbitration clause is bypassed, the other party still has the option to invoke the arbitration clause, refer the matter to arbitration and apply for a stay of the court proceedings. If the party against whom the court proceedings were brought does not refer the matter to arbitration, or submits to the Court's jurisdiction, the dispute will proceed under the Court's jurisdiction.

Because the Appellants did not refer the disputes to arbitration, there was no binding agreement and therefore a stay was not available.

Accordingly, the Court of Appeal has re-affirmed the point that parties seeking to rely on an arbitration clause must ensure that the language of the clause is one which makes resolution of disputes by arbitration mandatory. If the language is optional a

party may issue proceedings which will only be stayed if arbitration proceedings have been commenced.

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