Hilary Term

[2016] UKPC 1

Privy Council Appeal No 0041 of 2015

JUDGMENT

Anzen Limited and others (Appellants) v Hermes One Limited (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Mance

Lord Clarke

Lord Sumption

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

18 January 2016

Heard on 12 October 2015

Appellants	Respondent
Michael Black QC	Stephen Midwinter
Seamus Andrew	
(Instructed by S C Andrew LLP)	(Instructed by Forbes Hare LLP)

LORD MANCE AND LORD CLARKE:

Introduction

1.
This appeal raises short and interesting points on the interpretation of an arbitration clause in a shareholders' agreement providing that in the event of an unresolved dispute "any party may submit the dispute to binding arbitration". The respondent has commenced the present litigation in respect of an unresolved dispute, and the issue arises whether the appellants are entitled to a stay, under section 6(2) of the Arbitration Ordinance 1976 (Cap 6), without themselves having commenced an arbitration. Bannister J decided that they were not so entitled and the Court of Appeal upheld his decision. The

Board’s conclusion is that the decisions below were wrong, the appeal should be allowed and a stay granted.

The background in greater detail

2.
This can be taken from the agreed statement of facts. The appellants and the respondent are shareholders in a BVI business company known as Everbread Holdings Ltd (“Everbread”). Everbread was established to pursue the development of airline fare search software. The parties entered into a shareholders’ agreement dated July 2012 (the “SHA”).

3.
The arbitration clause is found in clause 19.5 of the SHA and it reads:

“This Agreement shall be construed in accordance with English law, without reference to its conflict of law principles. 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 arbitration will be held at a neutral site in London, England. The arbitrator will determine issues of arbitrability, including the applicability of any statute of limitation, but may not limit, expand or otherwise modify the terms of the Agreement. The arbitrator’s decision and award will be in writing, setting forth the legal and factual basis. The arbitrator may in appropriate circumstances provide for injunctive relief (including Interim relief). An arbitration decision and award will only be subject to review because of errors of law. Each Party will bear its own expenses in connection with the arbitration, but those related to the site and compensation of the arbitrator will be borne equally. The Parties, other participants and the arbitrator will hold the existence, content and result of arbitration in confidence, except to the extent necessary to enforce a final settlement agreement or to obtain and enforce a judgment on an arbitration award. The language to be used in the arbitration procedure shall be English.”

4.
The present proceedings were commenced by the respondent against the appellants and Everbread on 10 January 2014, claiming inter alia statutory remedies in relation to the appellants’ alleged unfairly prejudicial conduct in the management of the affairs of Everbread, damages and/or the appointment of a liquidator over Everbread amongst other forms of relief.

5.
On 18 February 2014, the appellants applied to stay the proceedings pursuant to section 6(2) of the Arbitration Ordinance 1976 on the ground that clause 19.5 is a valid and binding arbitration provision (the “Stay Application”). Section 6(2) of the Arbitration Ordinance reads:

“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.”

6.
On 6 March 2014, Bannister J dismissed the stay application on the basis that (i) clause 19.5 of the SHA conferred an option upon any party to the SHA to submit a dispute arising under or relating to the SHA to arbitration, (ii) if one party commenced litigation in respect of a dispute, the option under clause 19.5 was only exercisable by the other party by referring the identical subject matter to ICC arbitration, and (iii) since the appellants had not done this, but had merely sought a stay of the proceedings, they could not rely on section 6(2) of the Arbitration Ordinance. The Court of Appeal on 11 June 2014 dismissed the appellants' appeal, essentially for the same reasons.

The scope of the issues

7.
It is common ground that an arbitrator could not award all the relief sought by the respondent, including in particular an order for the winding up of Everbread or for the appointment of a liquidator. However, it is also common ground that an arbitrator could determine disputes regarding underlying issues of fact or law relevant to the subsequent pursuit in court of such orders: Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855; [2012] Ch 333. In the light of this common ground, and subject to appropriate reservation of the respondent's right to apply to the court for orders, after the making of any award on such underlying issues, the present appeal has been focused on the single question of the correctness of the decisions of the judge and Court of Appeal on the points summarised in para 6 above.

Analysis

8.
At the outset of the appeal, Mr Michael Black QC for the appellants argued that, even if any agreement to arbitrate depended upon the exercise of an option which had not been exercised, the language of section 6(2) of the Arbitration Ordinance could still entitle the appellants to a stay. That was and is, the Board considers, a hopeless submission. Even if one could in loose terms describe a conditional agreement to arbitrate as an arbitration agreement, the Board would not regard it as such within the meaning of section 6(2). In any event, unless and until any option required to be exercised has been exercised, there is no "matter agreed to be referred" within the language of section 6(2).

9.
On this basis, the key to this appeal lies in the construction of clause 19.5. The following possible analyses require consideration:

a.
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 I**).

b.
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:

i.
commencing an ICC arbitration, as the respondent submits and Bannister J and the Court of Appeal held (**analysis II**); or

ii.

requiring the party which 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, as the appellants have done (**analysis III**).

10.
What the respondent does not suggest is that its commencement of litigation pre-empts and prevents any exercise by the appellants of the option to arbitrate. Further, the Board understands the respondent to accept that, if the appellants had commenced (or perhaps do still in the future commence) an ICC arbitration in respect of the underlying disputes, the appellants would then also be entitled to a stay of the present proceedings.

11.
The appellants in turn were minded in oral submissions to accept before the Board that it would be possible for them to commence either an ICC arbitration in which they sought mirror image declarations of non-liability and/or made their own cross-claims against the respondent in respect of the same dispute. They went further, and, as the Board understood it, were prepared to concede that they could simply have submitted the respondent's claims against them to the ICC arbitrator, who would then under the ICC Arbitration Rules have been able to draw up terms of reference determining which party should act as claimant(s) and which as respondent(s) in the arbitration. The Board expressed doubt about the correctness of at any rate this latter concession, and it was effectively withdrawn by the appellants in a post-hearing exchange of written submissions on this aspect. The ICC Arbitration Rules postulate that a person requesting arbitration is itself a claimant making claims, to which the respondent will have to respond: see eg article 4.1.1, 1.3(c), (d) and (f) and 1.4 as well as article 5.1(c) and 23.1(c). To request ICC arbitration of the respondents' claims, the appellants would have to be prepared to specify why such claims should be rejected, and to seek negative declaratory relief. They would also have to pay a non-refundable filing fee of US$3,000 (under Appendix III article 1(1)), plus any advance to cover the costs of the arbitration which the ICC requested under article 36 of its Arbitration Rules.

12.
Arbitration clauses commonly provide that unresolved disputes "should" or "shall" be submitted to arbitration. The silent concomitant of such clauses is that neither party will seek any relief in respect of such disputes in any other forum: AES UST-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35; [2013] 1 WLR 1889, para 1; see also The Angelic Grace [1995] 1 Lloyd's Rep 87, where the Amended Centrocon arbitration clause provided: "[a]ll disputes from time to time arising out of this contract shall be referred to arbitration … in London", and Millett LJ said this in a well-known passage in relation to litigation begun outside the Brussels Regulation/Lugano Convention sphere:

"In my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendants have promised not to bring them."

However, even the words "should" or "shall" cannot be taken entirely literally. There is no obligation to commence arbitration, if a party decides to do nothing. But the words "should" and "shall" do make clear that it is a breach of contract to litigate.

13.
As with any issue of construction, the language and context of the particular agreement must ultimately be decisive. But clauses depriving a party of the right to litigate should be expected to be clearly worded - even though the commercial community's evident preference for arbitration in many

spheres makes any such presumption a less persuasive factor nowadays than it was once. The consequence of the appellants' case would, at least in theory, be that the respondent's commencement of litigation was a breach of contract, for which the appellants proving loss could without more claim damages - though the prevalence of clauses providing that arbitration "shall" take place and the infrequency of claims for their breach may again reduce the weight of this factor. The fact remains that there is an obvious linguistic difference between a promise that disputes shall be submitted to arbitration and a provision, agreed by both parties, that "any party may submit the dispute to binding arbitration". This clear contrast and the evident risk that the word "may" may be understood by parties to mean that litigation is open, unless and until arbitration is elected, are, in the Board's view, important pointers away from analysis I.

14.
This is not to say that there are no arguments that could be made in favour of analysis I. The very detailed nature of clause 19.5 is one. Would the parties really have gone to such trouble to identify the time for, place, scope of and issues in the arbitration, to limit any review to errors of law, to provide that each party would bear its own costs in the arbitration and share the arbitrator's, and that the existence, content and result of the arbitration should be held in confidence, if they had contemplated that either party could commence litigation as an alternative form of dispute resolution? Of course, it is common ground that a defendant to litigation has at the least an option, exercisable in accordance with either analysis II or analysis III, of forcing a claimant who commences litigation to arbitrate. But that could be unsatisfactory, if, as the respondent submits, analysis II applies and the appellants can only exercise such option by themselves initiating an arbitration. To do this, they would have to attempt settlement or at least wait 20 days, under the agreed provision about timing ("If a dispute arises … and … cannot be settled within … 20 business days, any Party may submit the dispute to binding arbitration).

15.
The Board turns to the authorities to see what guidance may be found. It was at one time thought that it was an essential ingredient of an arbitration clause that in order to be valid it must give bilateral rights of reference: Baron v Sunderland Corp [1966] 2 QB 56 per Davies LJ at 64. However that is no longer the case: Pittalis v Sherefettin [1986] QB 868, where the Court of Appeal held that that was wrong. As Fox LJ put it, parties are entitled, if they so choose, to confer a unilateral right to insist on arbitration. He said that he could see no reason why, if an agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration.

16.
There have been a number of subsequent English cases in which words introducing arbitration in terms of choice, election or option have been construed. In Lobb Partnership Ltd v Aintree Racecourse Co Ltd [2000] CLC 431, clause 13.1 of the contract provided:

"Disputes may be dealt with as provided in paragraph 1.8 of the RIBA Conditions but shall otherwise be referred to the English courts. The construction, validity and performance of this Agreement shall be governed by English law."

Paragraph 1.8 of the RIBA conditions provided:

"In England and Wales, … any difference or dispute arising out of the Appointment shall be referred by either of the parties to arbitration by a person to be agreed between the parties or, failing agreement within 14 days after either party has given the other a written request to concur in the

appointment of an arbitrator, a person to be nominated at the request of either party by the President of the Chartered Institute of Arbitrators provided that in a difference or dispute arising out of the conditions relating to copyright the arbitrator shall, unless otherwise agreed, be an architect."

17.
One party gave notice of intention to arbitrate and, when this was rejected, obtained the nomination of an arbitrator by the President of the Chartered Institute. Colman J rejected the other party's submissions both that the clause was too vague and that it contemplated arbitration only if both parties agreed at the time when a dispute arose. Significantly for present purposes, he said this, p 434:

"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."

Colman J also concluded that, although there was no reason in principle why parties to a contract should not agree to give either of them a unilateral option to elect to arbitrate or litigate any claim for relief so as to bind the other to arbitration or litigation, as the case might be, it was substantially more likely that it was the mutual intention that the words used should mean that, once a dispute had been raised, either party would be entitled to insist on its being dealt with in accordance with paragraph 1.8. He added that, while it was true that the first part of clause 13.1 was permissive, there was no reason why it should be permissive only in favour of the claimant.

18.
Other English authorities affirm the validity of a provision entitling either party to elect or opt for arbitration, but do so again in a context where (unlike the present) the contract expressly contemplated court proceedings, if neither party chose arbitration. Thus, in the earlier case of Westfal-Larsen and Co A/S Ikerigi Compania SA ("The Messiniaki Bergen") [1983] 1 Lloyd's Rep 424, cited by Colman J in Lobb Partnership, clause 40(a) of a charterparty provided for the application of English law while clause 40(b) provided that any dispute arising under the charter "shall be decided by the English courts to whose jurisdiction the parties agree", 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 concluded at p 426:

"The proviso is not an agreement to agree because upon a valid election to arbitrate (and assuming the clause to be otherwise effective) no further agreement is needed or contemplated. It is, no doubt, true that by this clause the parties do not bind themselves to refer future disputes for determination by an arbitrator and in no other way. Instead, the clause confers an option, which may but need not be exercised. I see force in the contention that until an election is made there is no agreement to arbitrate, but once the election is duly made (and the option exercised) I share the opinion of the High Court of Delhi in the Bharat case [Union of India v Bharat Engineering Corp (1977) 11 ILR Delhi 57] that a binding arbitration agreement comes into existence."

19.
Likewise, in NB Three Shipping Ltd v Harebell Shipping Ltd [2004] EWHC (Comm) 2001, clause 47, entitled “Law, jurisdiction and arbitration”, provided for English law and gave the owners the right to start proceedings in a wide variety of jurisdictions whereas the charterers’ right to commence proceedings was limited by clause 47.09 to the courts of England. Clauses 47.02 and 47.10 provided, so far as relevant:

“47.02 The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty but the Owner shall have the option of bringing any dispute hereunder to arbitration.

…

47.10 Any dispute arising from the provisions of this Charterparty or its performance which cannot be resolved by mutual agreement which the Owner determines to resolve by arbitration shall be referred to arbitration in London or, at Owner’s option, in another city selected by the Owner by two arbitrators, one appointed by the Owners and one by the Charterers who shall reach their decision by applying English law. If the arbitrators so appointed shall not agree they shall appoint an umpire to make such decision.”

20.
Only the owners could therefore bring arbitration proceedings. The charterers sued and the owners sought a stay in favour of arbitration under clause 47.10. Unsurprisingly, Morison J held that “Charterers can gain no advantage from ‘jumping the starting gun’”, as he put it. More specifically, he said (para 11):

“It seems to me that clause 47.02 gives owners a right to stop or stay a court action brought against them, at their option.”

Unless the owners took a step in the action or led the charterers to believe on reasonable grounds that the option to stay would not be exercised. He went on (para 12) with reference to clause 47.10 and section 9(1) of the Arbitration Act 1996:

“The arbitration stream [clause 47.10] satisfies the requirements of an arbitration agreement since a one sided choice of arbitration is sufficient. The words of section 9(1) ‘in respect of a matter which under the agreement is to be referred to arbitration’ are to be applied when the application for a stay is applied for. Are these disputes under the agreement to be referred to arbitration? Yes, once the option which Owners have has been exercised. These are disputes which, at Owners’ option they wish to be arbitrated under the arbitration agreement. Neither the fact that the proceedings were properly brought nor that the terms of section 9(1) only applied after the option was exercised affects the conclusion. A party might commence an action in the belief that the other party would not exercise a right to apply for a stay; his action may have been proper. So here, if Owners had decided not to exercise their option. I would be sorry if any other conclusion had to be reached. Apart from anything else, one of the fundamental objectives of the 1996 Act is to give the parties’ autonomy over their choice of forum. On my view of the contract, once Owners exercise their option the parties have agreed that the disputes should be arbitrated. By refusing a stay the court would not be according to them their autonomy.”

21.

More recently, 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”. A question arose whether this gave a unilateral option or merely contemplated that both parties might agree on arbitration when a dispute arose. All that Leggatt J in the event had to decide was that the former was sufficiently arguable to justify him appointing an arbitrator. But he did express some views obiter. He said that he had concluded on the basis of the material before him, not only that there was an arguable case that there was an arbitration agreement but that there appeared to be no realistic prospect of successfully arguing the contrary, and in this connection he remarked (para 17):

“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.”

22.
A clear authority against analysis I is the Canadian case of Canadian National Railway and Others v Lovat Tunnel Equipment Inc (1999), 174 DLR (4th) 385. Section 11 of the relevant contract, entitled “DISPUTES”, provided:

“The parties may refer any dispute under this Agreement to arbitration, in accordance with the Arbitration Act of Ontario.”

The respondent sued the appellant for damages for breach of contract. The appellant elected arbitration and sought a stay of the action. The application was refused at first instance by MacFarland J. The appellant appealed to the Court of Appeal for Ontario. The only substantive judgment was given by Finlayson JA, with whom Austin JA and S Borins JA agreed. In a section of his judgment entitled “Analysis” he said this:

“12. It appears to me that the plain meaning of section 11 of the contract is that either party to the contract may elect to have a matter in dispute that is covered by the contract referred to arbitration. In this case, since the respondents had initiated proceedings in the courts, the appellant was presented with a choice between electing binding arbitration or acquiescing in the respondents’ decision to resort to the courts.

13. To suggest otherwise is to render the clause surplusage. As the appellant points out, the parties to a dispute can always refer the matter to arbitration if they can agree between themselves to do so. The respondents, on the other hand, submit that the court would have to read ‘may’ as ‘shall’ to obtain the result sought by the appellant. However, this interpretation would remove all choice. The parties would be restricted to one avenue of dispute resolution that might not in every case be to the advantage of either.

14. In my view, the correct interpretation of the clause is that ‘parties’ means ‘either party’. Thus either party may refer a dispute to binding arbitration and arbitration then becomes mandatory. Failing such an election by one of the parties, the matters in dispute can be resolved in the courts.”

23.
The decision of the Singapore High Court in WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka [2002] 3 SLR 603 is also against analysis I. Clause 19 of the relevant agreement, entitled “LAW/ ARBITRATION”, was in terms not dissimilar to those of clause 19.5 in the present case. It read:

“This Agreement shall be governed by and construed in accordance with the laws of England and Wales. 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’) for the time being in force which rules are deemed to be incorporated by reference with this clause to the exclusive jurisdiction of which the parties shall be deemed to have consented. Any arbitration shall be referred to three arbitrators, one arbitrator being appointed by each party and the other being appointed by the Chairman of the SIAC and shall be conducted in the English language.”

The Board of Control had commenced proceedings in the Colombo High Court in Sri Lanka, and WSG Nimbus sought an anti-suit injunction from the Singapore High Court. The Board of Control argued that the words “may elect” in clause 19 conferred on the parties a wide discretion enabling either of them to elect for arbitration or go to court, and that it had elected to litigate when it commenced the Colombo Court action.

24.
The judge, Lee Seiu Kin JC, rejected this argument, saying:

“In my view, this submission hinges on taking the word ‘may’ out of the context of clause 19 and, after associating that word with notions of discretion and a lack of any mandatory meaning, these notions are then linked with the word ‘arbitration’ to arrive at the conclusion that there is no compulsory arbitration clause. But in order to arrive at the proper construction of clause 19 it is necessary to consider the provision in its entirety and see how the words relate to one another to convey the intention of the parties. Taking this approach, the first sentence deals with the governing law which is to be English law. The remainder of the clause relates directly to arbitration and on a plain reading, this is what it provides. 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 in accordance with the Arbitration Rules of the SIAC for the time being in force. Arbitration shall be conducted by three arbitrators with each party to appoint one and the SIAC Chairman to appoint the third. While it is true that under clause 19, 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.”

25.
United States authority points on the other hand in inconsistent directions. One strand of authority would assimilate clauses providing that there “may” be arbitration with those providing that there “shall” be arbitration: that is as reflecting analysis I or, put bluntly, a choice between “arbitrate or abandon”. See for example:

a.
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”);

b.
Austin v Owens-Brockway Glass Container, Inc 78 F 3d 875 (4th Cir 1996) (“disputes … may be referred to arbitration”); and

c.
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”).

The Board notes that none of these three cases was in a conventional commercial context. Bonnot and Austin were decided under collective bargaining agreements, a point on which emphasis was placed in the reasoning. The third case, Bankers Insurance, expressly endorsed the first two and was a claim by the United States against an insurance company for breaches of a Financial Assistance/Subsidy Arrangement entered into to enable insurance companies to provide flood insurance under the National Flood Insurance Program, administered by the Federal Insurance Administration. Further, the reasoning given in Austin, at p 879, and quoted in the Bankers Insurance for treating the word “may” in the relevant clauses as equivalent to “shall” was that this would render the arbitration provision “meaningless for all practical purposes”, since parties “could always voluntarily submit” to arbitration. That reasoning answers any submission that the word “may” makes subsequent mutual agreement on arbitration necessary. But it does not support analysis I, when the relevant choice is between analyses I, II and III.

26.
Other United States cases point away from analysis I. See:

a.
City of Louisa v Newland 705 SW 2d 916 (Ky 1986), where the clause provided that “all claims, disputes and other matters in question arising out of, or relating to, the CONTRACT DOCUMENTS … may be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association”. The Supreme Court of Kentucky held:

“In regard to the use of the word ‘may’ in the arbitration provision, it is the holding of this court that the arbitration clause makes arbitration compulsory once either party demands it.”

b.
Briggs & Stratton Corp v Local 232, International Union, Allied Industrial Workers of America 36 F 3d 712 (1994), where the clause provided that should the grievance procedure have been exhausted “either party may submit such grievance or grievances to arbitration within 60 days”. The clause was construed as providing an option to arbitrate.

c.
Young v Dharamdass 695 So 2d 828 (Florida Court of Appeal 1997), where the clause provided that, if the parties did not agree on two issues, “either party may make a written demand for arbitration”. The court treated this as “permissive, not mandatory”.

27.
Two further United States cases appear to the Board to contain less than entirely satisfactory reasoning. In Conax Florida Corp v Astrium Ltd 499 F Supp 2d 1287 (2007) (Florida District Court), the clause provided that in the event of a dispute the parties “shall undertake to make every reasonable effort to reach an amicable settlement” and continued:

“Failing such settlement, a controversy or claim arising out of or relating to this Subcontract may be finally settled by arbitration in accordance with the rules then in effect of the International Chamber of Commerce.”

The location of any arbitration was to be London, and the defendant commenced an arbitration there. The plaintiff argued that arbitration was optional and required mutual agreement. The court disagreed in these terms:

“Contrary to the plaintiff’s contention, the word ‘may’ does not give one party the right to avoid arbitration. See Ziegler v Knuck, 419 So 2d 818, 819 (Fla App 1982) (the use of the word ‘may’ in an arbitration clause ‘is little different than the use of the compulsory language - it creates in either party the right to insist upon arbitration; it creates in neither party the right to resist arbitration insisted upon by the other.’); Allis-Chalmers Corp v Lueck, 471 US 202, 204 n 1, … 1985) (‘The use of … ‘may’ is not sufficient to overcome the presumption that parties are not free to avoid the contract’s arbitration procedures.’); Deaton Truck Line, Inc v Local Union 612, 314 F 2d 418, 422 (5th Cir 1962) (‘Clearly, … ‘may’ should be construed to give either aggrieved party the option to require arbitration.’); see also Webster’s Third New International Dictionary (unabridged ed 1981), p 1396 (‘may’ is defined as ‘shall, must - used esp in deeds, contracts and statutes’). Thus, the United States Supreme Court, the former Fifth Circuit, and a Florida appellate court have all concluded that, notwithstanding the use of the word ‘may’ in an arbitration provision, either party has a right to insist upon arbitration.”

The court’s conclusion was that “in sum, the arbitration provision creates the right of a party to submit the matter for arbitration”. Its reasoning fluctuates between analyses I and III.

28.
Finally, in Retractable Technologies Inc v Abbott Laboratories Inc, a decision of the Fifth Circuit on 2 June 2008 (Reference 07-40277), the contract provided that any dispute between the parties “shall” be presented to the presidents of the parties or their designees but that, if that failed, the dispute “may” be resolved by arbitration in the manner described in an attached document, which did not contain any right for either party to demand or initiate arbitration. The majority held that the contract only provided for arbitration if there was subsequent mutual agreement to arbitrate, adding that the word “may” preserved other options to resolve disputes, including litigation. Why all three of analyses I, II and III were rejected is unclear. The dissenting judge, on the other hand, said that there had been “dozens of cases” in which courts had held that “may” is synonymous with “shall” or “must”, adding that both parties unambiguously had given their permission for the other to initiate arbitration if that party so desired and that only if neither party desired arbitration could litigation take place.

29.
The Board was referred to a number of academic writings on the significance of the word “may”, mostly directed to the suggestion (not raised in relation to clause 19.5) that the word should be understood to require subsequent mutual agreement. But Born’s International Commercial Arbitration, Volume 1 International Arbitration Agreements, 2nd ed (2014), notes (at p 789) in general terms, though with reference in footnote 853 to the English cases of Westfal-Larsen and NB Three Shipping, that:

“In many instances, courts reason that the arbitration clause creates an option permitting (but not requiring) either party to initiate arbitration, and that, if the option is exercised by either party, both parties are then bound to arbitrate.”

Born then deals separately with the United States cases. Still more to the point, David Joseph QC in Jurisdiction and Arbitration Agreements and their Enforcement, 2nd ed (2010), paragraph 4.31, states, with reference to both Lobb Partnership and to WSG Nimbus that:

“Words such as ‘disputes may be referred to arbitration’ will give either party the right to refer disputes to arbitration. Once the right is invoked, however, the parties are both obliged to proceed with the reference and abide by the award.”

He also notes, appositely, that the position in the United States is not so clear-cut.

30.
Taking stock here, the Board considers that there are a number of significant pointers against analysis I. They include primarily (a) the considerations identified para 13 above and (b) the reasoning in English authority, particularly Lobb Partnership, in the Canadian case of Canadian National Railway and in the Singapore case of WSG Nimbus. But a background consideration is (c) the frequency with which the word “may” is used by the commercial community when arbitration is intended as an express alternative to litigation, and the absence in any common law jurisdiction, outside the United States, of any suggestion that it has ever been seen as mandatory, prior to either party insisting on arbitration. A number of United States authorities on commercial arbitration in fact point in the same direction, while the United States authorities reading “may” as “shall” come from a different non-commercial context and adopt reasoning which is less persuasive at any rate in the present commercial context.

31.
These considerations all lead up to the conclusion that analysis I should be rejected. But, before confirming that conclusion, it seems desirable also to look at the alternatives, analyses II and III. Strictly, if analysis II is rejected, it is, on the particular facts of this case, immaterial which of analyses I and III applies. On analysis I, the court proceedings should not have been begun at all. On analysis III, they were properly begun, but they should be stayed, as regards all the arbitrable claims that they raise, now that the appellants have invoked arbitration. However, any choice between analyses I and III is of potential general importance and it is right for the Board to reach a decision on it.

32.
The choice between analyses II and III depends upon the meaning to be attached in the context of clause 19.5 to the concept of submitting a dispute to binding arbitration. In other contexts, this might no doubt connote and require the actual commencement of an arbitration. But the Board does not consider that it must always do so. Analysis II is in the Board’s view capable of giving rise to evident incongruity. Like analysis III, it purports to give each party a right to have an unresolved dispute submitted to arbitration. But it not only allows one party to commence litigation, it then only requires the dispute to be arbitrated if the other party commences an arbitration in which that other party may seek no positive relief. The party commencing litigation may have no interest in pursuing or ability to pursue arbitration in the manner or forum prescribed here by clause 19.5. If unable to litigate, it might have let matters lie. Nonetheless, according to analysis II, the other party could only end the litigation by itself commencing an arbitration. All it may be able to seek in any such arbitration would be a declaration of no liability in respect of any claim made by the first party in the litigation. But in practice the requirement to commence an arbitration might prove a substantial obstacle, for reasons like those applicable in the present case and mentioned in para 11 above. Analysis II does not therefore seem to the Board to make much commercial sense, and, as Lord Clarke said in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900, para 30: “… where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense.”

33.

The better view of the words “any Party may submit the dispute to binding arbitration” is therefore that they are not inextricably linked to the actual commencement of arbitration. There is no doubt that the court has under section 6(2) of the Arbitration Ordinance power to order a stay pending arbitration, even though neither party has actually submitted, or will necessarily ever submit, the dispute to arbitration, and even though the clause postulates some further step (such as here attempting settlement, or at least waiting, for 20 days after the dispute arises) before commencement of any arbitration. This was decided by the House of Lords in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334, under the wording of section 1(1) of the then English Arbitration Act 1975, which paralleled in material respects that of section 6(2) of the Arbitration Ordinance. In that case, the arbitration agreement actually provided for further steps to be taken (by way of remitting the dispute to a panel of three experts), after which (it went on) either party, if dissatisfied with the decision of the panel, “may” notify the other “that the dispute … is to be referred to arbitration”. So here, section 6(2) is wide enough to permit a stay, even though neither party may actually submit the dispute to arbitration.

34.
In the Board’s view, analysis III is also to be preferred to analysis II as a matter of general principle. The hallmark of arbitration is consent. In Bremer Vulkan Schiffbau und Maschinenefabrik v South India Shipping Corp Ltd [1981] AC 909, the House of Lords drew a significant distinction between litigation and arbitration. Parties to an agreement to arbitrate are, it held, under mutual obligations to one another to cooperate in the pursuit of the arbitration. Section 40(1) of the current English Arbitration Act 1996 makes the duty express, by providing that: “The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings”. Of course this duty postulates that arbitral proceedings are already on foot. But it seems to the Board that a similar conception can and should influence the construction of clause 19.5, which contemplates a consensual approach, first involving negotiation for at least 20 business days to see if any dispute which has arisen can be resolved amicably and then, if negotiations are unsuccessful, enables either party to submit the dispute to arbitration. An analysis whereby notice will trigger the mutual agreement to arbitrate a dispute appears to the Board to fit better into a consensual scheme than one which requires the artificial construction, and commencement of arbitration in respect of, a cross-claim.

35.
A rejection of analysis II provides further reinforcement of the Board’s view that analysis I must be rejected, leaving analysis III as the correct analysis. Analysis III has none of the disadvantages of analysis II. It enables a party wishing for a dispute to be arbitrated, either to commence arbitration itself, or to insist on arbitration, before or after the other party commences litigation, without itself actually having to commence arbitration if it does not wish to. It comes close in effect to analysis I, save that, unless and until one party insists on arbitration, there is no promise by the other party not to litigate.

Conclusion

36.
The Board will for these reasons humbly advise Her Majesty that the appeal should be allowed, and a stay of the present proceedings should be ordered, with the reservation indicated in para 7 above.