

Kluwer Arbitration Blog

Defective arbitration clauses

Francisco Málaga (Linklaters) · Tuesday, February 25th, 2014

Defective arbitration clauses are certainly uncommon, but do appear on a recurring basis in domestic and international arbitration practice. Many practitioners can go their entire professional lives without seeing any, while others encounter two or three cases over their career.

The types of defective arbitration agreements or clauses are varied. Obviously, in most cases the defect is due to the breach of some requirement under the law applicable to the arbitration agreement. This happened fairly often in Spain under the old Arbitration Act 1988, article 5 of which required parties to state their intention not only to take their disputes to arbitration but also to comply with the award. Although in the end the courts clarified that this was not a sacred text that had to be included in those terms, and could be omitted if the parties' intentions to go to arbitration were clear, in practice omitting that intention to comply led to numerous challenges against arbitrations and attempts to have awards annulled. Other examples are those cases where arbitration agreements refer to matters that cannot be arbitrated or are deficient in a way that makes them ineffective.

However, the most interesting defective arbitration clauses are those where parties submit their disputes to courts of arbitration that don't exist, or which are designated wrongly, making it impossible to know to which specific one they meant to refer. In a very recent, real case, the parties submitted their dispute to the "Madrid Arbitration Court". It was impossible to know which of the various courts of arbitration with a seat in Spain's capital they were referring to.

In Spanish courts, the majority view is that the inability to determine which arbitration court has been nominated by the parties means that the arbitration clause is void. This forces parties to resolve their disputes through the state courts. Examples of this can be found in the decisions by the Palencia Court of Appeal (*Audiencia Provincial*) on 10 April 2000 and Cantabria Court of Appeal on 23 July 2007, as well as the order by the Madrid Court of Appeal (10th panel) of 31 May 2005, which also dealt with a clause in which the parties referred to a "Madrid Arbitration Court" and its rules, neither of which exist.

Lately, however, the notion appears to be gaining ground that arbitration agreements would also prevail in these cases, the only difference being that parties should go to the courts of justice to appoint a new arbitrator. Cited for this purpose is article 15.3 of the Arbitration Act, which says that "if arbitrators cannot be appointed by the procedure agreed on by the parties, either of those parties may apply for the competent court to appoint arbitrators or, as applicable, to take the necessary measures for this".

Adduced to justify this solution are the principle of preserving the arbitration agreements and that what is really important is that the parties state their intention to submit to arbitration. Accordingly, if the intention is there, then the arbitration agreement should be considered to exist regardless of whether it refers to a court of arbitration that does not exist or is impossible to determine. As article 15.5 of the Arbitration Act only allows judges to refuse petitions for them to appoint a new arbitrator “when they can see that, from the documents provided, no arbitration agreement exists”, they should accept those requests in cases where parties have submitted to the arbitration of a court that doesn’t exist or is impossible to determine. The ruling by the Castilla y León High Court (*Tribunal Superior*) of 24 November 2011 would seem to point in this direction.

In my view, this is a questionable notion because it means seeing the intention to submit to arbitration as something abstract and separate from the specific arbitral institution chosen. The reality is that a lot of contracting parties are not willing to go to just any arbitration, only the institution that they freely choose, even if they might be misguided as to the type of institution, its name or its very existence when making that choice. To give a day-to-day example, it would be as if your decision to get a car – instead of taking public transport – were enforced irrespective of the model you choose, the type of car or its cost. And if this is the case for Spanish corporates, then perhaps it is even more so for foreign contracting parties, who can legitimately seek to avoid a domestic arbitration if it isn’t by the institution which they themselves chose on the advice of their lawyers.

Consequently, there are still reasons for maintaining the view that an arbitration clause that refers to a court of arbitration that does not exist, or which does not allow the arbitral institution chosen by the parties to be determined, is ineffective and clears the way for disputes to be taken to the courts of justice.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Tuesday, February 25th, 2014 at 9:00 am and is filed under [Applicable Law, Arbitration Agreements](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can skip to the end and leave a response. Pinging is currently not allowed.