

Kluwer Arbitration Blog

Res Judicata Effect of Judicial Decisions on Jurisdictional Objections due to an Arbitration Agreement?

Francisco Málaga (Linklaters) · Tuesday, June 2nd, 2015

The facts of the situation are simple: the claimant goes to the domestic courts and the defendant argues that there is an arbitral agreement. The court judge upholds the jurisdictional objection and refers the parties to arbitration but, once the arbitration proceedings are over, the claimant party appeals to have the award annulled on the grounds that the very same arbitral agreement is invalid or doesn't exist. Is the court judge's decision binding on the court that hears the annulment petition?

The problem described doesn't come up in countries like France, where the domestic courts have to decline jurisdiction and refer the parties to arbitration unless the arbitral agreement is manifestly invalid or inapplicable. However, it does arise in countries like Spain, where judges have full powers to analyse jurisdictional objections without any kind of restriction, which allows them to make findings in full detail on the existence, validity and applicability of the arbitral agreement.

In recent years, a number of Spanish courts have found in favour of the res judicata effect of judicial decisions to decline jurisdiction and higher court decisions upholding these on appeal. This was held, for example, by the regional courts (*Audiencias Provinciales*) of Madrid (Judgements of 26 June 2009, 26 October 2010 and 29 September 2011 and Order of 16 April 2010), Valencia (Decision by the 9th Panel on 27 January 2010) and Córdoba (Order of the 2nd Panel on 20 February 2003).

In my view, these precedents are wrong for two reasons:

On the one hand, because they are contrary to what it says in Article 222 of Spain's Civil Procedure Rules (*Ley de Enjuiciamiento Civil*, "LEC"), which limits the res judicata effect to judicial decisions (*sentencias*). Jurisdictional objections (including those on the grounds of submission to arbitration) are ruled on by orders (*autos*) which, as such, do not have that effect. Where Spanish law is intended to give orders the effect of res judicata, it does so explicitly (e.g. Article 743 LEC, on interim measures). Article 222 may be open to question and in fact I don't agree with it, but the Spanish civil process is governed by the principle of procedural legality and judicial decisions cannot go against the law.

On the other hand, to understand that judicial decisions on jurisdictional objections based on submission to arbitration have a res judicata effect is to invalidate the Kompetenz-Kompetenz principle. And this is because that effect, if it exists, would not be limited to the action to annul the

award. It would also extend to arbitrators' decisions on their own jurisdiction, precluding it. Article 22 of the Arbitration Act provides that arbitrators have the power to decide on their own jurisdiction, even on defences relating to the existence or validity of the arbitral agreement or any other objections that, if upheld, preclude looking at the merits of the case. This provision is incompatible with attributing the *res judicata* effect to decisions on jurisdictional objections.

It is clear that the solution *de lege ferenda* involves limiting the powers of countries' judges to revise arbitral agreements, as happened in France. However, until that occurs, the *res judicata* effect should at least be denied for decisions on jurisdictional objections. Otherwise, this could mean doubling or even tripling the oversight of the existence and validity of the arbitral agreement, with the consequent risk of contradictory findings. The last word, as is logical, will be had by the domestic court that rules on the possible petition for annulment of the award.

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