

Kluwer Arbitration Blog

Mind the Gap: A Dutch Example of Interpreting an Ambiguous Arbitration Agreement

Caroline Deves, Thomas de Bekker (Houthoff) · Tuesday, May 14th, 2024

On 21 February 2024, the District Court of Amsterdam (“the court”) rendered a [decision](#) in summary proceedings. The key question that arose from this decision was: Can parties facing an unclear arbitration agreement ask the national courts to resolve their disputes instead? The issue of ambiguity surrounding arbitration agreements is not a novel phenomenon (see, for example, the Dutch *ForFarmers* and *Marijampolés* cases). However, what is of interest in this case is that the ambiguity does not result in the invalidity or non-applicability of the arbitration agreement. Instead, it raises fundamental questions regarding the interpretation of the arbitration agreement.

Factual Background

The parties, Subway International B.V. (“Subway”) and an agent (anonymized), had entered into an agreement back in 2008 which included the following dispute resolution clause:

“The parties will arbitrate any Dispute the parties do not settle under the discussion procedures above, and any Dispute which this Agreement provides will be submitted directly to arbitration, (...). The arbitration shall be administered by an arbitration agency, such as the American Arbitration Association (“AAA”) or the American Dispute Resolution Center [“ADRC”] [emphasis added], in accordance with its administrative rules including, as applicable, the Commercial Arbitration Rules of the AAA, (...) in accordance with its administrative rules (...). The arbitration hearings shall be held in Bridgeport, Connecticut, or such other location as the parties may mutually agree in writing, and shall be before a single arbitrator, not a panel. (...).”

While the wording of the arbitration agreement makes it clear that parties intended to have their disputes resolved through institutional arbitration, which institute should administer the dispute was left open to discussion. Through the inclusion of language like “an arbitration agency”, “such as”, and two examples of arbitral institutes, it seemed the parties intended to leave open which arbitral institute would administer the dispute and which arbitration rules would apply. Another point that could create grounds for discussion is the fact that the parties stated that the “arbitration

hearings” would take place in Bridgeport, Connecticut. Whether the parties meant that this would also be the formal seat of arbitration is unclear.

In any event, this dispute resolution clause lay dormant until December 2023, when Subway terminated the agreement. The agent did not agree with this termination, which led the agent’s lawyer to notify Subway in January 2024 of the agent’s intent “(...) *to arbitrate before the Dutch Arbitration Institute (NAI) in the Netherlands.*” Subway disagreed with this and stated that arbitration could and would only take place in the United States.

One month later, the agent applied for summary proceedings before the Dutch courts. The agent’s first and second requests addressed the substantive claims on the basis of [article 1074d of the Dutch Code of Civil Procedure](#) (“DCCP”), pursuant to which the Dutch interim relief judge has jurisdiction if the requested decision cannot be obtained in a timely manner in arbitration. The agent argued that this was the case due to the ambiguity in the arbitration agreement and the disagreement between the parties as to which institute should administrate the dispute. The third request saw to the “*appointment of the NAI as arbitral institute*” pursuant to [article 1027\(3\) of the DCCP](#). It seems that what the agent really sought in this case was the court’s guidance on how to approach this ambiguous arbitration agreement. Subway, on the other hand, argued that the decision requested by the agent could have been obtained in a timely manner in arbitration since interim injunction could be requested from those arbitral institutes, and urgent proceedings could have been initiated before the [AAA](#) or [NAI](#).

The court ruled that the parties did not dispute that they had agreed to arbitration. The court also ruled that “*the mere fact that it has not been determined to which arbitration institution the arbitration should be submitted and that the parties have not been able to reach an agreement on this, does not mean that [the agent] could not have initiated arbitration.*” The court held that the agent could have obtained the requested decision in arbitration in a timely manner and that the fact that the agent merely did not attempt to do so cannot lead to its jurisdiction. The court therefore declared itself incompetent. Lastly, the court rejected the request to appoint the NAI as the arbitral institute based on the fact that article 1027(3) of the DCCP is only applicable in pending arbitrations.

The Court’s Implicit Interpretation of the Arbitration Agreement

While the court did not appoint the NAI as the arbitral institute as requested by the agent, the court seems to implicitly acknowledge that the agent could have brought its dispute before an arbitral institute such as either the AAA, the [ADRC](#) or the NAI: “*Instead of actually initiating arbitration with the AAA, the ADRC or the NAI, [plaintiff] initiated this summary proceedings by summons dated January 30, 2024.*” In a sense, the court thus answered the question of whether the agent could initiate arbitration proceedings at the NAI without directly ruling such. This may have been due to the fact that the agent’s claim was formulated in a way in which the court was unable to directly rule on the matter. However, in the end the answer seems clear: the agent could have initiated arbitration proceedings at the NAI.

The arbitration agreement also did not clearly determine the seat of the arbitral proceedings. That however did not prevent the court from ruling that “[i]t follows from Article 10.02 of the [arbitration agreement] *that arbitration takes place outside the Netherlands.*” Should this be read

as an acknowledgment by the court that the arbitration clause must be understood as including an agreement that the arbitration should be seated in the US, even though the arbitration agreement only states that the hearing (not the seat) should take place in Bridgeport, Connecticut? By reading the decision of the court, this seems to be the conclusion it drew from the language of the arbitration agreement. Whether this was also the parties' intent is not quite so clear in our opinion.

Who Should Interpret the Arbitration Agreement?

As mentioned by [Gary Born](#), when the arbitration agreement only provides for “institutional arbitration” without specifying which institute and the parties are unable to agree upon an arbitral institute to administer the arbitration, either the arbitral tribunal or a national court can select a neutral and competent arbitral institute, effectively filling the gap in the parties' agreement. This, however, raises a question: Are national courts *or* arbitral tribunals the proper forum to interpret unclear arbitration agreements?

By asking the court to fill this gap, a claimant turns to a neutral forum to decide on this preliminary issue. Court proceedings are generally cheaper than arbitration. Also, since the court of the seat might also rule on this issue in potential setting aside proceedings, it might be interesting to hear how the court would interpret this agreement. However, at least in the Netherlands, it is unclear on which ground such a gap-filling request could be formulated. Asking the court first, clearly adds an extra step to the proceedings since the claimant will have to initiate arbitral proceedings in any event (wherever that may be). Furthermore, there could also be a debate on which court (i.e., which jurisdiction) should have the power to answer such question and which law that court should apply. In short, there are quite some uncertainties and possible inefficiencies that this route brings with it.

Asking the arbitral tribunal to interpret the arbitration agreement is of course in line with the Kompetenz-Kompetenz principle, which has also been codified in [article 1052\(1\) of the DCCP](#). The question is, however, before which institute should the arbitration be initiated and pursuant to which rules should the arbitrators be appointed? In the case at hand, one way to understand the language used in the arbitration clause is that the parties agree to leave the choice of the arbitral institute to the party who initiates the arbitral proceedings. This also seems to be the court's understanding of the wording of the arbitration clause. While this may seem clear with hindsight, we do understand the agent's hesitance with initiating an arbitration without full clarity on the arbitration agreement's meaning. If the arbitral tribunal finds that the petitioned institute is the incorrect forum, the party who initiated the proceedings will be faced with high costs and will in fact be back at square one, needing to initiate new arbitral proceedings.

Conclusion

When the parties' choice for arbitration is undisputed, as was the case here, but serious doubts still exist about key elements of the arbitration clause, we believe that the arbitral tribunal is best placed to interpret the agreement between the parties. The parties unequivocally agreed that arbitrators should decide on any dispute between the parties. In doing so, no special caveat is made for questions regarding the interpretation of the arbitration agreement. As such, the arbitral tribunal should also fill the gaps. In this case, this seems to be the approach taken by the court. Although it gives the parties a hint that arbitration could have been initiated at the NAI, by not clearly ruling on


this specific point, the court forces the parties to ask an arbitral tribunal to interpret the arbitration clause. For the sake of efficiency in costs and time, we believe that in a situation such as the one the agent found itself in, the most effective method to fill the gap would have been to take the plunge and initiate arbitration proceedings where they saw fit, presumably at the NAI. While we believe that self-expression is to be welcomed in all areas, to avoid uncertainty, using a model arbitration clause might not be a bad idea after all.

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

Access 17,000+ data-driven profiles of arbitrators, expert witnesses, and counsels, derived from Kluwer Arbitration's comprehensive collection of international cases and awards and appointment data of leading arbitral institutions, to uncover potential conflicts of interest.

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



Newly updated

Profile Navigator and Relationship Indicator Tools

Request your free trial now →

This entry was posted on Tuesday, May 14th, 2024 at 8:49 am and is filed under [Arbitration Agreement](#), [Arbitration clause](#), [Arbitration institution](#), [Europe](#), [Netherlands](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.

