Delivering expert knowledge to global counsel

International Law Office®

Arbitration - Switzerland

Supreme Court saves pathological arbitration clause

Contributed by Tavernier Tschanz

March 08 2012

Authors

Frank Spoorenberg

Isabelle Fellrath

The Supreme Court recently confirmed its practice of constructive interpretation of pathological or ambiguous arbitration clauses.(1)

Facts

A football club and a football agency entered into an agreement regarding the transfer of a footballer. The parties agreed that the transfer costs would be shared between them. The agreement contained the following dispute-resolution clause:

"*The competent instance in case of a dispute concerning this agreement is the FIFA Commission, or the UEFA Commission, which will have to decide the dispute that could arise between the club and the agent*."

A dispute arose between the parties in connection with the transfer fee payment, which the agency deferred to FIFA Players' Status Committee. On December 10 2008 the committee denied its jurisdiction to hear the claim due to the agency's lack of standing. The Court of Arbitration for Sport (CAS) Appeals Arbitration Division upheld the committee's jurisdictional decision in January 2009.(2)

The agency attempted to bring the case before a judicially appointed sole arbitrator who specialised in sport law; the sole arbitrator also denied jurisdiction stating that the parties had meant to refer the dispute to an institution specialising in sport law. The agency then filed for arbitration with the CAS.

The CAS, acting this time as the arbitral authority,(3) admitted its jurisdiction to hear the case, dismissed the agency's claims, denied jurisdiction on the club's counterclaim and decided on the arbitration costs.

The club challenged the award before the Supreme Court on the grounds of the CAS's lack of jurisdiction. The club argued that no consent to arbitrate could reasonably be inferred from the dispute-resolution clause, and that the said clause was invalid because it referred to two institutions which, based on their own internal regulations, had no authority to decide the case.(4)

Decision

The Supreme Court acknowledged the CAS's jurisdiction and upheld its award. It pointed out that, while the primary written consent to arbitrate(5) had imperatively to reflect the parties' converging agreement on all key elements of arbitration, it did not necessarily need to include other non-essential points.

Written consent to arbitrate necessarily requires:

- the parties' unambiguous intent to submit their legal dispute to an arbitral tribunal *in lieu* of the domestic courts for a binding determination;
- the identification or reasonable possibility to identify the dispute to be submitted to arbitration; and
- the identification or reasonable possibility to identify the parties consenting to arbitration.

Conversely, no consent is required on other non-essential elements of arbitration, typically:

- the type, place and language of arbitration;
- the number of arbitrators;
- the composition of the arbitral tribunal; and
- the applicable procedural rules.

A lack of agreement on any of these secondary issues would not, in principle, affect the validity of the parties' primary consent to arbitrate;(6) rather, the arbitration agreement should be supplemented on the basis of the parties' hypothetical intention.(7)

In the case at hand, the Supreme Court acknowledged the existence of the parties' converging agreement on all key elements of arbitration. It considered that, although no reference to arbitration was made in the dispute-resolution clause, the wording of the clause clearly reflected the parties' intention to subject their case to an authority specialising in sport disputes.

The Supreme Court further considered that the reference to institutions that could not hear the claim based on their own internal regulations should not affect the validity of the arbitration clause, but should be remedied on the basis of the parties' hypothetical intention had they been aware of the impossibility of their chosen option. Considering that the parties' clear intention was to refer their dispute to an institution specialising in sport (in particular, football), the Supreme Court upheld the CAS's jurisdiction.

Comment

This decision is in line with the Supreme Court's general pro-arbitration stance, subject to clear evidence of the parties' primary consent to arbitrate. The underlying dispute confirms that parties should rely on the model arbitration clause proposed by the top tier arbitral institutions or arbitration rules to avoid situations that could potentially seriously delay the arbitral process, since they provide for mechanisms to fill the gaps of the clause to all possible extent.

For further information on this topic please contact Frank Spoorenberg or Isabelle Fellrath at Tavernier Tschanz by telephone (+41 22 704 3700), fax (+41 22 704 3777) or email (spoorenberg@taverniertschanz.com or fellrath@taverniertschanz.com).

Endnotes

(1) Supreme Court decision 4A_246/2011 in *X v Y Sàrl*, of November 7 2011. The full text of the decision, which will be published in the official reports of the Supreme Court's decisions, is available in German at www.bger.ch/fr/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm. See prior decision in the case 4A_433/2009 of May 26 2010, ground 2.4, excerpts in ASA Bulletin, 3/2011, p673.

(2) CAS rules in the 2004 version, R-47 *et s*.

(3) Ordinary arbitration division, CAS rules in the 2004 version, R-38 *et s*.

(4) Code of Obligations, Article 20(1).

(5) Private International Law Act, Article 178(1).

(6) Code of Obligations, Articles 20(1) and 2(1).

(7) Code of Obligations, Articles 20(2) and 2(2).