Supreme Court saves pathological arbitration clause

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March 08 2012

Facts

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

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; rather, the arbitration agreement should be supplemented on the basis of the parties' hypothetical intention.

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.

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Endnotes


(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).

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