RESTATING THE IMPORTANCE OF ARBITRATION CLAUSES - ARAOZ & RUEDA

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Businesses need to be aware of the need to protect their data from loss or 'leakage' and understand that most issues arise internally rather than externally

Una reciente sentencia del tribunal de apelación ha sacado a la luz la validez de las cláusulas de arbitraje pero en lugar de perjudicarle ha ayudado a reafirmar su importancia, cree Cliff Hendel, Socio de Araoz & Rueda en Madrid.
A recent court decision, strictly interpreting a narrowly-drafted arbitration clause and authored by a judge widely-considered to be an ardent and informed advocate of arbitration as an alternative to

judicial determination of disputes, should serve as a prod to counsel to be more vigilant in their drafting of arbitration clauses and thus stimulate rather than hinder the growing Spanish arbitration culture, says Clifford Hendel of Araoz & Rueda in Madrid.

The clause in question expressly covered disputes "with respect to the interpretation" of the agreement in question; broader coverage of substantive matters such as "execution", "performance", "breach, " and broad "adjective" language along the lines of "arising out of, relating to, or in connection with…" or similar formulations were not included in the clause.

After one of the parties filed for arbitration seeking a declaration of breach and the assessment of damages, the arbitral tribunal issued an interim award concluding that it had jurisdiction to hear the matter notwithstanding the literality of the clause and its focus on "interpretation" of the agreement. But the court set aside the award on the grounds that the declaration of breach and assessment of damages sought were not within the scope of the arbitration clause and thus not within the jurisdiction of the arbitral tribunal.

Hendel notes that in an interesting twopage "aside", the court contextualised its decision, stressing the need to give primordial effect to the will of the parties, as expressed in their written reflection of that will. In so doing, the court simultaneously "tweaks" both counsel to remind them to be more careful (ie, more expansive and comprehensive) in the drafting of arbitration clauses, and arbitral tribunals themselves, so as to limit their ardour to grant themselves jurisdiction beyond the literal scope of the matters submitted clearly and unambiguously to arbitration.

According to Hendel, "So viewed, the decision – on first glance, is a splash of cold water on the growing Spanish arbitral culture, spurred by a 2003 arbitration law based on the UNCITRAL model and replacing an outmoded law generally regarded as rather hostile to the arbitral alternative – could well be viewed as more of a reminder that, precisely in order that the culture can grow in an environment of confidence and respect, parties, counsel and arbitrators should not forget first principles: what is written matters, and what is written with clarity trumps any need to delve into subject intent."