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An unusual arbitration clause and a misunderstanding of the *arbitrator*'s role. Only natural persons can be arbitrators

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In this note we discuss a decision of the High Cort of Catalonia dated 17 July 2024[1]. Although, according to the judgment, the case concerns the "removal" of the "arbitrator" nominated by the parties in dispute, in our view, the most interesting legal issue at stake is the effects of an unusual arbitration clause and a misunderstanding of the *arbitrator*'s role on the part of both the parties and the "arbitrator".

According to the arbitration clause the parties had to jointly appoint "an expert" and, failing that, they agreed to submit their dispute "to the arbitration of the consultancy firm [one of the Big Four]" that we will call "the accounting firm".

The accounting firm's service proposal to the parties referred not to arbitration but to "an independent expert opinion" or "arbitral report", following an "analysis" of "economic and financial" matters, "given these are the areas we specialize in". The proposal went on saying that (i) the services "will not concern in any way the legal aspects or consequences, which should be considered by the clients and their legal counsels" and (ii) "the addressees of the report are the clients and if applicable their legal counsels for the purpose of submitting it to the tribunal".

Following its appointment the accounting firm rendered a "report", but the party discontent with it sought the "removal" of the firm and the appointment of a new *arbitrator,* claiming the former was neither a natural person nor an arbitral institution within the meaning of the Spanish Arbitration Act (SAA)[2].

The other party submitted both the accounting firm and the two individuals it nominated to do the work had the capacity to serve as arbitrators. It also invoked estoppel on the part of the other party, because it only disputed the appointment when the accounting firm issued its "report".

The court dismissed the allegation of estoppel on unclear grounds; it found the accounting firm did not offer to issue or in fact rendered an arbitration award (according to the court, possibly due to a "misunderstanding" about the scope of the services). It also found that both parties had agreed to submit their dispute to arbitration because neither had questioned that over the course of the court proceedings.

Although the court was limited by the parties' submissions, it is surprising that neither the parties nor the court discussed whether an arbitration agreement existed despite the somehow confusing wording of the arbitration clause (the clause referred to an

[1] Judgment 37/2024, published recently.

[2] According to article 14 of the SAA, "public" and "not-profit" entities empowered to exercise "arbitral functions" according to their governing rules or by-laws can "administer arbitration proceedings" and "designate arbitrators".

"expert" in the first instance and, failing that, to the accounting firm as an "arbitrator"), the way the accounting firm referred to its own work in its proposal and the parties' acts (notwithstanding the accounting firm called its *deliverable* "a report", not an award, the parties proceeded to its appointment).

The court noted that, pursuant to articles 13 and 14 of the SAA, only (i) "natural persons can be arbitrators" and (ii) "public" and "not-profit" entities empowered to exercise "arbitral functions" according to their governing rules or by-laws can "administer arbitration proceedings" and, thus, found that the accounting firm did not meet the requirements to be an arbitrator or an arbitral institution, for it was neither a natural person nor a public or non-profit entity empowered to administer an arbitration.

Finally, the court declared that the work carried out by the accounting firm was not an arbitration award, "removed" the firm and decided to appoint a *new arbitrator*.