

Insights

FIRST CICC RULINGS RECOGNISE SEVERABILITY OF ARBITRATION AGREEMENTS

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SUMMARY

On 18 September 2019, the China International Commercial Court (“CICC”) of the Supreme People’s Court of China published its first three rulings regarding the validity of arbitration agreements. The arbitration agreements in question were in the form of arbitration clauses in relation to a share transfer transaction. The CICC recognised the well-established principle of severability of the arbitration agreement and held that the arbitration clause stood as a valid arbitration agreement despite the fact that the underlying contract had never been executed.

Introduction

The CICC was established in 2018 to adjudicate international commercial cases. The first three cases ([(2019) Zui Gao Fa Min Te 1], [(2019) Zui Gao Fa Min Te 2] and [(2019) Zui Gao Fa Min Te 3] The Supreme People’s Court of the People’s Republic of China Civil Ruling) it decided were all connected and concerned the issue of whether a valid arbitration agreement existed when the underlying contractual documents had never been signed by the parties. The CICC considered that this series of connected cases had great legal significance on the consistent application of the law by the CICC in the future.

The dispute

The dispute arose from a transfer of shares listed on the China Beijing Equity Exchange which eventually fell through. The respondent in the arbitration intended to purchase shares of a listed company which were held by the claimant. After payment of a security deposit by the respondent, the parties began to negotiate the contract via email communications.

During the course of the negotiations, the claimant provided a version of the contract documents, referred to by the parties as the “initialed version”, to the respondent. The “initialed version” of the contractual documents contained an arbitration clause. The respondent affixed its seal to the “initialed version” and delivered the sealed contracts to the claimant. Subsequently, although the

parties continued to negotiate on various of the terms of the contract, they did not raise any dispute regarding the arbitration clause.

The negotiations eventually fell through for reasons unrelated to the arbitration clause. The claimant sought to cancel the transaction. The “initialed version” was signed only by the respondent, and the parties never proceeded to execute the formal contracts for the equity transfer.

The respondent applied to the Shenzhen Court of International Arbitration for arbitration in accordance with the arbitration clause contained in the “initialed version”. The claimant then applied to the Shenzhen Intermediate People’s Court of Guangdong Province for confirmation that no arbitration agreement existed.

The CICC ruled that the arbitration clause existed independently of the underlying contract

The CICC took over the review of the issue of whether the arbitration clause was valid and operative. When considering whether or not an arbitration clause existed to bind the parties, the CICC recognised and confirmed the fundamental legal doctrine that an arbitration agreement, whether in the form of an arbitration clause or a standalone agreement, is separable and independent from the main transaction contract. Under the relevant law of the People’s Republic of China (PRC), paragraph 2 of Article 10 of the Interpretation of Arbitration Law of the People’s Republic of China, an arbitration agreement can still be valid even if the underlying contract is not established.

The CICC said that, in judging whether the parties in fact reached an agreement on arbitration, the usual rules on offer and acceptance applied. The claimant’s sending of the “initialed version” of the contractual documents constituted offer; and the respondent’s sealing and delivering of such documents constituted acceptance. The arbitration agreement in the form of a clause came into existence by way of the above conduct. There was no further dispute or negotiation between the parties in respect of the arbitration clause after the arbitration agreement had been formed. Accordingly, the arbitration clause stood as valid and binding although the claimant never affixed its seal on the latest contractual documents.

It also is noteworthy that although no single contract containing the arbitration clause named all connected parties in the transaction as parties to the contract, the CICC’s decisions in the three rulings appeared to treat all such connected parties to have agreed to the arbitration clause.

BCLP’s comment

This decision should be welcomed by the general legal community, for it confirmed that PRC law recognises the separability of arbitration agreements. With a separately enforceable arbitration clause, issues related to the other aspects of the underlying contract (including whether such underlying contract is validly constituted) can be dealt with in arbitration. Also, the CICC appears to

have taken a broad brush and robust approach when deciding whether or not the parties agreed to arbitrate.

This approach taken by the PRC Court encourages disputes to be resolved privately using arbitration. The PRC Court appears ready to uphold the parties' intention to arbitrate. If the separability of the arbitration agreement is applied consistently by the PRC Courts in the future, the certainty and efficiency of dispute resolution is likely to improve with more substantive disputes being resolved in arbitrations.

RELATED CAPABILITIES

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MEET THE TEAM



Glenn Haley

Co-Author, Hong Kong SAR

glenn.haley@bclplaw.com

[+852 3143 8450](tel:+85231438450)

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