

The Study on the Effectiveness of Arbitration Clauses in International Commercial Arbitration – From the Perspective of Contract Non-Formation

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This study belongs to a more specific project, aiming at exploring the issue of the validity of arbitration clauses in international commercial arbitration when the main contract is not established, and addressing the issue of determining the validity of arbitration clauses in transnational commercial disputes to provide commercial operators, arbitrators or judges with guidelines and references for their ideas. This study is based on the classical jurisprudence of private international law, common law, and international commercial arbitration. Furthermore, based on the customs of international commercial transactions and the contents of the cases, it conducts legal doctrinal analysis, comparative analysis, and case analysis. From different perspectives, these legal norms and issues reflect that the arbitration clause has considerable independence and can typically be established independently of the main contract. The validity of an arbitration clause is based on sufficient formal and substantive elements. The study points out that the determination of the validity of the arbitration clause has its logic of the decision, and it should also apply the process of conclusion of the contract, which includes the conditions of the voluntary agreement of the parties, the process of invitation and negotiation, and the true intention of the parties.

Keywords: *Autonomy of Will, Independence, Arbitration Clause, Contract*

Introduction

The arbitration agreement has been widely discussed, such as the form of the arbitration agreement, the invocation of the arbitration clause, the confirmation of the law applicable to the arbitration agreement, the expansion of the effect of the arbitration agreement, the impact of an arbitration clause in PPP agreement, the rules of interpretation of arbitration agreement, the incorporation of the arbitration clause of lease into the bill of lading, the arbitration agreement in non-liner transportation mode, and the introduction of an arbitration clause in the articles of association of listed companies. Regarding the independence of arbitration agreements, some commentators have argued that the agreement needs to be established without a final and valid signature of one of the parties to the main contract¹. In contrast, some commentators have argued that if the central arrangement is not shown due to the lack of the final and valid signature of one of

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¹Selvig (2022).

the parties, it should not be mechanically concluded that the arbitration clause therein needs to be established². Establishing an arbitration agreement should be judged from formal and substantive criteria.

Some scholars have also commented on the validity of arbitration agreements. Some scholars have studied the legal autonomy of arbitration agreements and pointed out that the rule neglects the dominance of the law of the place of arbitration over the validity of international commercial arbitration agreements. There is a great deal of uncertainty about its future development into a rule of universal significance³.

Regarding the procedure for court confirmation of the validity of arbitration agreements, some commentators have argued that, given the nature of non-litigation cases, and the public law contractual nature of arbitration agreements, it is essential for the courts to determine the validity of arbitration agreements⁴. Some commentators believe that the application for court confirmation of an arbitration agreement should be made in light of the nature of non-litigation cases and the public law contractual nature of arbitration agreements. Given the efficiency of arbitration procedures, and the need to save judicial resources, it is more appropriate to characterise the application for court confirmation of the validity of arbitration agreements as non-litigation cases⁵. Therefore, this procedure cannot be "litigated." However, due to the unique nature of such cases, it is necessary to give the parties more flexibility in the system's design.

Method

The study is based on the general principles and case studies of international commercial interactions. Modern researchers of international commercial arbitration generally believe that arbitration clauses have their independence, and this independence contains a sufficient jurisprudential basis behind it, such as the *Principle of procedural freedom* and the *Theory of autonomy of meaning*. The author adopts a case study approach. The case study method has become essential in management and social science research. With many scholars paying attention to the case study method, many excellent case study papers have emerged, and the technique has been improved. Case researchers can enhance the validity of their research by collecting data systematically, examining and interpreting it carefully, analysing it rigorously, and matching the research design and process to the extent and reliability of the research questions. This paper explores the path of finding arbitration clauses and supports the reasonableness of the conclusions by extracting critical jurisprudence from international commercial interactions. International commercial arbitration refers primarily to global economic and trade arbitration, but its broader scope includes arbitration arising from various commercial relationships. In addition to international economic and trade

²Alqudah (2016).

³Philip (1997) at 130.

⁴Schwartz (2014).

⁵Mann (1986).

arbitration, specialised arbitration such as transportation and maritime arbitration also falls within the scope of international commercial arbitration. A case study of Western countries with a more developed global retail arbitration industry shows that the independence of arbitration clauses has been recognised in the world's major developed countries, and their effectiveness has been judged separately in different situations.

Misconceptions about the Independence of Arbitration Clauses

The independence of the arbitration clause means that, as a clause of the main contract, the arbitration clause, although dependent on the main contract, can still exist independently by being separate from the other clauses of the main contract, i.e. the arbitration clause is not invalidated by the invalidity of the main contract, nor is it invalidated by the avoidance of the main contract. Many internationally renowned arbitration institutions have confirmed the arbitration clause's independence principle and are widely recognised in arbitration rules. The UNCITRAL Model Law on International Commercial Arbitration also clearly states: '*An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*'⁶ A growing number of countries have clarified their position by making the independence of arbitration clauses part of their arbitration laws. But in practice, the autonomy of the arbitration clause is often seen as simply being valid even if the main contract is not formed or invalid. There need to be more separate judgments for the process of clause formation.⁷

Absence of Determination of the Validity of an Arbitration Clause when a Contract is not established

The fact that the basis of arbitration is contractual is not in dispute, and *the power of the arbitrator to resolve the dispute rests on the common intention of the parties to the dispute*. Arbitration clauses are often considered *relatively independent* or *severable* from the parties' main contract. Regardless of the wording, simply put, all of this language focuses on the fact that "*the arbitration clause in a contract is considered to be independent of the main agreement of which it is a part*" and, therefore, remains in effect after termination of the contract. Suppose the parties claim the warranty and arbitration clauses are invalid. In that case, the meaning and purpose of each arbitration agreement are at risk of being unenforceable. The principle of independence has been reflected in most international documents, such as the UNCITRAL Arbitration Rules⁸ and the

⁶Article 16(1) of the Model Law.

⁷Wheeler (1969).

⁸Article 23 (1) of UNCITRAL Arbitration Rules: an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

UNCITRAL Model Law.⁹ The problem, however, is that the autonomy of the arbitration clause mainly refers to the invalidity, termination, or avoidance of the main contract. There needs to be more discussion of the freedom of the arbitration clause when the main contract is not formed.

The Theories and Practice of the Independence of Arbitration Clauses

The Meaning of Independence of the Arbitration Clause

The arbitration agreement is independent in terms of its characteristics, and the arbitration clause, which forms part of the contract, should be regarded as an agreement separate from the other contractual provisions so that the manner of commitment of the arbitration agreement is different from that of the general contractual obligation and is also independent. The terms "*arbitration agreement*" and "*arbitration clause*" must be analysed in their own words. In the Chinese context, an arbitration clause is the same as an arbitration agreement. According to the International Commercial Court of the Supreme Court in China, both types of arbitration clauses in contracts and stand-alone arbitration agreements are considered arbitration agreements, and the two are juxtaposed, as there are almost no parties who have both an arbitration clause in the main contract and a separate arbitration agreement. Therefore, the arbitration clause in Chinese law can be regarded as an arbitration agreement, and the legal provisions on arbitration agreements apply to the establishment and validity of the arbitration clause. In common law, whether an arbitration agreement is independent arises only if the arbitration clause is contained in a contract.¹⁰ Suppose the parties' agreement to arbitrate is contained in a separate agreement. In that case, this is often an agreement between the parties to resolve the dispute after it has arisen, in which case the arbitration agreement is independent. Hence, this article focuses on the situation where the arbitration clause is in the main contract.

Principle of Procedural Independence

Many modern scholars of procedural law advocate procedural independence, arguing that procedures have value and can stand alone without depending on the entity's existence. This doctrine has been recognised in the practice of domestic procedural law in most countries, where domestic law is mainly manifested in respecting the fundamental procedural rights of the parties to block the implementation of substantive law or to create new substantive law through litigation procedures. The arbitration clause's independence principle is also generally recognised and applied in international commercial activities. The primary purpose of the arbitration clause is to establish a straightforward

⁹Part Two of Model Law(Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006): Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract.

¹⁰Domke (1959).

procedure for settling disputes, which is entirely different from the provisions of the main contract regarding the content of substantive rights and obligations, and damages. Therefore, the separation of the arbitration clause does not violate the doctrine of the unity of the contract.¹¹

Theory of Autonomy of Meaning

Since an arbitration clause can also be considered a separate contract, the formation of the clause also requires the parties' agreement regarding arbitration. The fact that the primary contract may not be formed due to the parties' lack of understanding or may be voidable due to fraud or duress does not ipso facto affect the validity of the arbitration clause.¹² Because the arbitration clause merely expresses the parties' intent to resolve the dispute, the factors involved in this expression of intention are relatively simple. Only the place of arbitration, the institution, and the governing law need to be considered. Therefore, if the arbitration clause, which can be regarded as a separate contract, is the parties' true intention, its validity can be judged independently of the main contract.

Maintaining Order in Transactions

The purpose of establishing an independent and effective arbitration clause is to ensure that the parties, when entering into a contract, can agree to submit future disputes to the jurisdiction of an international, neutral arbitral tribunal, thereby excluding the improper intervention of a biased court in a domestic country. Parties to international commercial arbitration are generally commercial entities from different countries or regions. In the event of a dispute, it is often necessary to agree in advance on a straightforward method of dispute resolution in the contract. This ensures that the outcome of the debate is not influenced by the parties' attempts to find the most profitable way of dispute resolution and to ensure that the product is fair and unbiased. This is why most of the selected arbitration venues are arbitration institutions in London, New York, and Hong Kong, precisely based on the importance that common law regions attach to the order of transactions and the good faith of arbitration institutions in these regions. Therefore, establishing the principle of independence in the arbitration agreement is necessary to avoid excessive disputes over dispute resolution.

Developments in the Practice of Independence of Arbitration Agreements

Establishing the principle of independence of arbitration clauses in the international community has taken some time. The traditional view is that even if an arbitration agreement is considered to be independent, it is by its very nature a contract, which requires the familiar elements of contract formation. Likewise, an arbitration clause contained in the main agreement is not effective in the absence of a final commitment by one of the parties if the main contract has not been

¹¹Ranjbar & Dehshiri (2017).

¹²Ha (2019).

formed from the outset and neither is the arbitration agreement that was part of the contract that did not exist. In 1942, the English Court of Appeal judges in *Heyman v Darwins Ltd* held that if the contract never existed, neither did the arbitration agreement, which was part of the contract.¹³ Another view, autonomy, is that the independence of the arbitration agreement leads to a distinction between the elements of the formation of the arbitration agreement itself and the general contract and that the absence of the final formal commitment of the main contract does not affect the validity of the arbitration agreement if it can be shown that the parties have agreed to arbitrate. This view is now supported by most developed countries, except for the degree of independence of the arbitration clause.¹⁴

The conventional view is that, in principle, the invalidity of the main contract means that the arbitration agreement is invalid.¹⁵ However, in a considerable number of cases, German and Swiss courts have taken the lead in establishing that an arbitration agreement can be "independent" or, in common German terminology, "self-existent" and therefore, it can grant the arbitrator the right to decide on the validity of the main contract. The exclusivity of whether an arbitration agreement is "separable" (or independent) should be a matter of interpretation of the terms of the entire transaction, taking into account all circumstances that may indicate the "consent of the parties. The wording of the agreement itself does not matter. Most deals in court are couched in the following language: The arbitrator shall decide all disputes relating to or arising out of this contract. In one case, the arbitrator was expressly granted the power to determine the contract's validity. Still, on this point, while holding the agreement invalid on other grounds, the court denied the arbitrator jurisdiction in the case of a fraudulent discharge, apparently influenced by a lack of confidence in the prospective arbitrator." In the case of another equally broad arbitration clause, the arbitrator's jurisdiction over the fraud defence was recognised. However, the court only incidentally referred to the express provision extending arbitration to the validity of the main contract. Taken as a whole, the trend in German and Swiss courts is definitely toward the doctrine of independence. The courts have held that defences to fraud and error while determining the validity of the main contract should be delegated to the arbitrator. A similar result arises even when the defendant asserts that the operative part of the contract is impossible and that the object of the dispute is not within the parties' power of compromise and, therefore, unsuitable for arbitration. Where the conflict between the parties to a contract involves whether the main contract has been performed, courts have also held that the arbitrator's jurisdiction can cover the dispute.

Article 23.1 of the UNCITRAL Arbitration Rules provides that the arbitral tribunal has the power to rule on its jurisdiction, including any challenge relating to the existence or validity of the arbitration agreement. For this purpose, an arbitration clause forming part of a contract shall be deemed an agreement independent of the other provisions of the contract. A decision by the arbitral tribunal that the contract is invalid shall not automatically render the arbitration

¹³See *Heyman v Darwins Ltd*.

¹⁴Ware (2007).

¹⁵Nussbaum (1940).

clause invalid. The UN Model Law on International Commercial Arbitration makes a similar provision. Its article 16(1) provides that the arbitral tribunal may rule on its jurisdiction, including any objection to the existence or validity of the arbitration agreement.¹⁶ For this purpose, an arbitration clause forming part of a contract shall be considered an agreement independent of other contractual provisions. A decision by the arbitral tribunal that the warranty is void shall not legally invalidate the arbitration clause.

This principle is also generally established in the domestic laws of a significant number of developed Western countries. For example, Article 7 of the UK Arbitration Act 1996 provides that "*unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective, and it shall for that purpose be treated as a separate agreement.*" For this purpose, the arbitration agreement shall be deemed separate. Section 3 of the Swedish Arbitration Act 1999 provides that where the validity of an arbitration agreement constituting another agreement must be determined with the determination of the arbitrators' jurisdiction, the arbitration agreement shall be deemed a separate agreement.¹⁷ Section 104 of the German Code of Civil Procedure 1998 provides in paragraph (1) that "*the arbitral tribunal may determine its jurisdiction and at the same time decide on the existence and validity of the arbitration agreement*". Therefore, an arbitration clause forming part of a contract shall be regarded as an agreement independent of the other provisions of the contract. The LCIA Arbitration Rules express the same meaning.¹⁸

The arbitration clause's independence principle has been established in China through a process. Currently, China adopts the principle of full autonomy, i.e., in line with the views of arbitration institutions in countries such as the United Kingdom, the United States, and the International Chamber of Commerce, which accept the principle of the independence of a dispute resolution clause entirely and recognise the validity of the dispute resolution clause if the main contract is void ab initio or does not exist.¹⁹ This principle is also established in the rules of some well-known Chinese arbitration institutions, such as Article 5(d) of the CIETAC

¹⁶Article 16(1) of UNCITRAL Model Law: The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause

¹⁷Section 3 of The Swedish Arbitration Act (SFS 1999:116): Where the validity of an arbitration agreement which constitutes part of another agreement must be determined in conjunction with a determination of the jurisdiction of the arbitrators, the arbitration agreement shall be deemed to constitute a separate agreement.

¹⁸Article 23.1 of LCIA Arbitration Rules (2014) :For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause.

¹⁹Philip (2006) at 247.

Arbitration Rules, "The arbitration clause in the contract shall be regarded as a clause separate and independent from the other provisions of the contract, and the arbitration agreement attached to the contract shall also be regarded as a part separate and independent from the other provisions of the contract; the contract, the alteration, dissolution, termination, assignment, expiration, invalidity, non-effectiveness, revocation and establishment of the contract shall not affect the validity of the arbitration clause or arbitration agreement." Article V of the Beijing Arbitration Commission Arbitration Rules provides that "the arbitration agreement exists independently and its validity shall be judged separately; whether the contract is formed, changed, dissolved, terminated, invalidated, lapsed, not in force, or revoked, it shall not affect the validity of the arbitration agreement." Article 5(5) of the Shanghai International Economic and Trade Arbitration Commission provides that "the arbitration clause in the contract shall be deemed to exist separately and independently from the other provisions of the contract, and the arbitration agreement attached to the contract shall also be deemed to exist separately and independently from the other provisions of the contract; the alteration, dissolution, termination, assignment, invalidation, invalidity, non-validity, revocation and establishment of the contract shall not affect the validity of the arbitration agreement. Or the establishment of the arbitration agreement shall not affect the validity of the arbitration clause or the arbitration agreement."

Case Study on the Independence of Arbitration Clause

The most famous example of the principle of independence is the *Sojuznefteexport* case.²⁰ One of the subject matters discussed in that case was the arbitration clause's autonomy (i.e. separability). The contract was signed in Paris on November 17, 1976, between "Sojuznefteexport" and *Joc Oil Ltd* (hereinafter - *Joc Oil*). The contract has an arbitration clause. In case of any dispute, the arbitration proceedings will be conducted before the Foreign Trade Arbitration Committee of the Moscow Soviet Chamber of Commerce and Industry (FTAC) by FTAC's procedural rules. Sojuznefteexport caused the dispute due to a delay in delivery. *Joc Oil* objected to FTAC's jurisdiction because the contract did not meet the requirements of the Decree of the Central Executive Committee and the Council of People's Commissars of the USSR of December 26, 1935, which states that "in cases where the said (foreign trade) organisation must conclude foreign trade transactions [...] outside Moscow (whether in the USSR or abroad), such a transaction [...] must be signed by two persons who have received a power of attorney signed by the President of the Association." However, these requirements are not necessary for reaching an arbitration agreement. Therefore, the arbitration clause signed on the side of the contract by V.E. Merkulow and John Deuss, association president "Sojuznefteexport" in the name of the company "JOC Oil", was valid. In addition, *JOC Oil* challenged the applicability of the arbitration clause's autonomy principle, which was not explicitly reflected in the Soviet arbitration principles.

²⁰See *Sojuznefteexport (SNE) (USSR) v. Joc Oil Ltd*.

Upon review of the interpretation and position of the Court of Appeals in the 1989 case, Judge Alistair Blair-Kerr held that *'the AFT rules make no direct reference to the fact that an arbitration agreement (arbitration clause) is autonomous vis-à-vis the contract . [...] An analysis of the FTAC charter and its rules, which define the authority of the Commission, and the Commission's practice, permits the conclusion that the independence of the arbitration clause is not in doubt. Thus, the arbitration agreement was considered a procedural contract and not an element (condition) of a substantive legal contract in the decision of the FTAC of January 29, 1974, in a dispute between the Soviet Union and an Indian organisation'*. The FTAC Commission acted within its competence. Through the analysis of the above case, it can be said that this principle was successfully applied and led to the hearing of the case by the FTAC.

Another landmark decision occurred on October 17, 2007, when the Fiona Trust Court of the House of Lords ruled favouring the doctrine. The SCOTUS unanimously upheld the Court of Appeal's decision on the scope and effect of the arbitration clause. They noted two main issues: (1) The House of Lords emphasised the idea of the principle of independence and insisted that arbitration clauses should be "liberally construed without making subtle semantic distinctions between the relevant disputes. (2) The "arbitration clause" as defined by the House of Lords should be regarded as a "different agreement" from the main agreement and relevant to the arbitration clause itself only if the 14th award is invalid, " *even if the contract was entered into through fraud, misrepresentation or bribery, only the arbitral tribunal has jurisdiction to consider the validity of the contract*". The Fiona Trust decision is a further important affirmation that an arbitration clause is a separate contract that survives the termination of the main contract.

In a critical English decision, *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Company*²¹, Lord Diplock discussed the nature of an arbitration clause, stating that "*an arbitration clause constitutes a self-contained contractual collateral or an adjunct to the (underlying) contract itself*". Lord Diplock's statement was approved by two other members of the House of Lords. In France, in the classic Gosset decision, the French Court of Cassation held that the arbitration agreement has complete autonomy over the substantive contract in international arbitration.²²

Criteria for Determining the Establishment of an Arbitration Clause

The essence of an arbitration clause is a contract between the parties to settle a dispute, and must meet the necessary formation elements to have a legal effect between the parties. Typically, the features of an arbitration clause include formal and substantive aspects.

²¹See *Bremer Vulkan v South India Shipping*.

²²Mann (1986).

Formal Elements

In general, the basic principle is the written form of the contract, but with the development of science and technology, the validity of non-written agreements in the form of data messages has been recognised worldwide. After all, the essence of the truth of the contract is the truthfulness of the intention of the parties. Article 2(1) and (2) of the 1958 New York Convention provides that "*The parties agree in writing to submit to each other all or any disputes which have arisen or may arise between them if The Contracting States shall recognise such agreement when it relates to the determination of legal relations, whether contractual or not, which are capable of being settled by arbitration. The term 'written agreement' means a contractual arbitration clause or agreement entered into by the parties or contained in an exchange of letters and telegrams.*" As can be seen, the New York Convention provides for two forms of the arbitration agreement in writing: an arbitration clause or arbitration agreement signed by the parties, and a contractual arbitration clause or arbitration agreement set out in an exchange of letters between the parties. Paragraph (2) of Variant I provides that "*the arbitration agreement shall be in writing*" and paragraph (3) provides that "*the content of an arbitration agreement is in writing if it is recorded in any form, whether the arbitration agreement or contract is concluded orally, by conduct or otherwise.*" It can be seen that the Model Law while allowing for a variety of written forms for arbitration agreements, places greater emphasis on recognising the agreement to arbitrate²³. As time passes, arbitration agreements will become more and more diverse, including information that can be generated and stored by various electronic, magnetised, and optical means, which will require flexibility in practice.

The offer is the starting condition for the conclusion of a contract and is necessary for the formation of a contract. The core of a proposal is the clarity of the offeror's intention, whether it has been sent to the other party, and whether the other party has received it. In the case of arbitration clauses, which are contractual in nature, the above-mentioned primary conditions for an offer must also be met²⁴.

An offeree makes a representation that it has no objection to the content of the arbitration. There are several possible scenarios in which the offeree makes a non-objection to the scope of the arbitration. The arbitration agreement is uncontested when the offeree gives express written consent to the arbitration offer. The second is a cross offer. A cross offer is an offer by the parties to a contract to enter into a contract for the same content using a non-direct dialogue. Since both parties have the same intention, the law can presume that they must have the result of mutual commitment to establish the contract. If A sends a contract text to B, which includes an arbitration clause, and B sends a text with the same contract content to A simultaneously, then the contract can be deemed established because both parties have the same intention. Thirdly, the offeree makes a written counter-offer that does not object to the content of the arbitration. In this case, there is a dispute about whether the arbitration agreement has the necessary formal elements. In the author's view, if the offeree makes a written counter-offer that does not modify the

²³Gulerci (2008).

²⁴Ware (2007).

content of the arbitration and the parties do not change, amend or object to the scope of the arbitration before the dispute arises, the formal requirements for an arbitration agreement should be deemed to have been fulfilled. Based on the above analysis of the independence of the arbitration clause and the content of the main contract in the same contract, a counter-offer containing arbitration and other substantive rights and obligations made by the offeree to the offeror comprises two separate elements, one being a counter-offer of arbitration. The other is a counter-offer of substantive rights and responsibilities. In the case of a counter-offer of arbitration, if its content is identical to that of the offer, it is considered that the parties have written expression of intent to agree on arbitration, which is the necessary formal condition for forming an arbitration agreement. In other words, such a manifestation of the same intention is required to establish an arbitration agreement. For example, suppose one party provides a model contract or form clause containing an arbitration clause, and the other party does not make any representations about that clause or makes a counter-offer containing the same but does not expressly object to it. In that case, the formal requirements for forming an arbitration agreement cannot be considered met. At the same time, it is essential to emphasise that even if a counter-offer is made by one party with the same arbitration clause, as the arbitration clause is still like a counter-offer, a valid undertaking by the other party is still required to constitute a good arbitration agreement²⁵. Such an undertaking may, of course, be an act of fact other than a signature or a signature, such as the failure of one party to object to the jurisdiction of the arbitration or the validity of the arbitration agreement within the time limit prescribed by law after the other party has requested arbitration.²⁶

Substantive Elements

The substantive element for establishing an arbitration clause is that the expressions of intent are consistent and genuine. Substantive aspects refer to the substance of the arbitration agreement and the standard legal features that must be present.²⁷ Although international conventions and national legislation vary, the substantive elements of an arbitration agreement generally require an expression of intent to submit the dispute to arbitration and the matters to be submitted to arbitration. For example, the Model Law provides that 'arbitration agreement' means an agreement by the parties to submit to arbitration a defined contractual or non-contractual legal relationship between them. The Model Law provides that 'arbitration agreement' means an agreement by the parties to submit to arbitration all or some of the disputes that have arisen or may arise in a defined contractual or non-contractual legal relationship between them"; section 6 of the English Arbitration Act 1996 defines an arbitration agreement as "an agreement (whether contractual or not) to submit to arbitration a dispute which exists or which is to arise." French National Articles 1442, 1447 and 1448 of the Code of Civil Procedure and the arbitration laws of the Netherlands, Spain and Belgium are

²⁵Janicijevic (2007).

²⁶Shanghai Law Society (2022).

²⁷Gulerci (2008).

similar. The arbitration laws of the Netherlands, Spain and Belgium also contain similar provisions. As to whether the declaration of intent is accurate, it can be combined with the process by which the parties entered into the contract and judged comprehensively from the following two aspects:

First, there needs to be a consultation process. Consultation when entering into a contract is a critical process to judge the true meaning of the parties to the agreement; the two parties to consult on a matter, indicating that the two parties to the contract are equal and have sufficient opportunity to express their intention, rather than one party imposed on the other.

The second is the attitude of the parties to the arbitration clause. In the course of the conclusion of the contract, the party's opinions and statements on the arbitration clause are also essential criteria for determining the true meaning. Suppose both parties are aware of each other's views on arbitration before the eventual dispute arises, and neither party raises any objection.²⁸ In that case, a judgment should be made that the parties have reached a consensual agreement. If, on the other hand, the parties' offer and counter-offer consistently differ in their views on whether to arbitrate or on the content of the arbitration, then no agreement has been reached, and the arbitration agreement has yet to be formed.²⁹ In other words, it is essential to determine whether there is continuity and consistency in the parties' attitude to the content of the arbitration.

Results

An Arbitration Agreement in force should have the Consent of the Parties

The study's findings indicate that, in practice, national courts have established the independence of arbitration clauses in invalid contracts, fraudulent contracts, and illegal contracts, and there is less jurisprudence in cases where the agreement does not exist.³⁰ However, a jurisprudence study shows that the arbitration procedure should be applied as long as the parties have agreed to arbitrate and there is no objection to the arbitration clause. For example, in 1967, the U.S. Supreme Court held in *First Paint Co. v. Vlad & Conklin Manufacturing Co.*³¹ that if the issue in dispute concerned the validity of the main contract, the debate should be referred to arbitration and that the federal courts had jurisdiction only if the validity of the arbitration clause itself was at issue. Justice Schwebel summarised it as, "*When a contract is entered into which contains an arbitration clause, they enter into not one but two contracts, and the arbitration clause may still retain its validity.*"³² In the case of *Harbour Insurance Co. v. Kansa General International Insurance Co.*³³, the principle that an arbitration clause or agreement

²⁸Aaron (1990).

²⁹Zarubina & Katukova (2018).

³⁰Rogers & Launders (1994).

³¹See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*

³²Domke (1959).

³³See *Harbour Assurance Co. (UK), Ltd. v Kansa General International Assurance Co., Ltd.*

to arbitrate in a contract may exist in English law independently of the contract provided that the arbitration clause itself is not subject to direct allegations. The contract that is void ab initio can also be resolved through arbitration, provided the arbitration clause is not directly alleged to be void ab initio. Suppose it is a contract that has not been formed, judged by the principle of independence of the arbitration clause. In that case, the main contract and the arbitration clause can be considered two separate contracts, and the agreement remains valid. However, if there was fraud in the conclusion of the arbitration clause, or if the parties did not agree on the arbitration clause as a contract, then the arbitration agreement shall be void at that point. In other words, if it is considered that the arbitration clause cannot be applied, the validity of the arbitration agreement shall be denied if it is stated, *mutatis mutandis*, that there was no agreement or other invalid circumstances in the formation of the arbitration agreement.

The Route to Identifying Arbitration Clauses where a Contract is not formed

An arbitration clause, a dependent contract, should first be identified as to whether it is formed. The identification of the formation of an arbitration clause applies to the general elements of contract formation.

Generally speaking, the following elements are required to form a contract: (1) The existence of two or more contracting parties. The contracting party is the person who enters into the contract, either as a party to the contract or as an agent of the contracting party. (2) Consent to the main terms. The establishment of the contract is usually based on the consent of the parties, the consent that the parties to the contract mutually agreed to express their intentions. Consent is, in principle, the agreement of the parties to describe the contract's content and the objective deal on the terms of the contract. A contract is formed by the parties' agreement, and only in the case of a contract of service (e.g., custody) does the agreement require, in addition to the agreement, the delivery of goods or the completion of other payments. Suppose the agreement's content is inconsistent with the meaning of the inner effect. In that case, it is not a question of whether the contract is formed but whether it can affect its validity and be dealt with under a system such as material misunderstanding. If the parties to a contract do not agree on the content of the contract (disagreement), it is a "non-consent" contract. The contract is not formed because the parties need to reach a consensus.³⁴ Therefore, if there is no subject to the contract (which does not exist in practice) or the parties do not agree on the meaning of the contract, the contract is not formed. In common law, there are many cases of the contract not being included or not taking effect, such as no intention to create a contract; no consideration (lack of consideration); common error (a common mistake); completely uncertain contract (uncertainty); illegal contract (illegality), illegal duress (unlawful duress), etc., all of which can lead to the contract deemed as not formed or invalid from the onset.

As far as the general requirements for the formation of a contract are concerned, they are satisfied by the existence of a contracting party and the agreement on the main terms. For some special arrangements, other elements may

³⁴Ali & Almanasrah (2019).

be required for the contract to be formed. For example, in the case of contracts regarding pharmacological products, there must be the delivery of the goods in addition to the agreement; in the case of a contract in form, in addition to the agreement, there should be a specific manner, such as the use of the contract form. In addition, the traditional theory of the civil law system also considers the elements of contract formation to include the subject matter of the contract, and some scholars in China believe that the issue of the contract's subject matter belongs to the contract's validity³⁵. If the agreement is not established, the warranty has no contracting party, or the contracting parties disagree on the meaning between them. The contract that needs to be installed means that the parties have yet to reach an agreement on the main terms of the contract, such as the failure to make a commitment or the failure to reach a written agreement on a contract that is legally required to be in writing³⁶. If no agreement is reached during the conclusion of the arbitration clause, for example, if one of the parties does not sign the central contract or does not expressly appear to do so, or if it agrees with the main contract but objects to the dispute resolution, then this arbitration clause shall be deemed to be not formed and shall have no effect.

The General Elements of the Validity of a Contract with an Arbitration Clause

A contract as a legal, valid act means that it occurred entirely with the legal consequences expressed by the intention. The main elements are: (1) the parties have the corresponding contracting capacity when contracting. As a natural person should have the total ability, limited capability should be represented by the person's legal representative. (2) Truthfulness of the expression of intent. The main point is that the videographer's expression should reflect their inner meaning. The expression of intent contains the two elements of the effect of the meaning, and the act of expression is established but must be confirmed to be valid. (3) Not to violate public order and morals. In China's law, the primary meaning is that it does not violate the mandatory provisions of laws and administrative regulations and does not harm the state or public interest, while in international commercial acts, the meaning should be that it does not violate the prevailing practices and good customs in global commercial interactions³⁷. In general, the conclusion of an arbitration clause does not violate the two aspects of contracting subjects and public order and morals. The primary situation is that the arbitration clause does not take effect if the parties to the contract do not agree or are not free to express their intention.

Conclusion

The present study's findings highlight the importance of the logic of independent determination of arbitration clauses. In international commercial

³⁵Han (2022) at 35-41.

³⁶Darami Zadeh & Farhangpur (2018).

³⁷Jene (2017).

disputes, establishing the principle of the independence of the arbitration clause helps to maintain the stability of the order of transactions, reflects the inherent value of the procedure, and avoids the disinterest of one of the contracting parties in the outcome of the adjudication by subjecting the dispute resolution to the adjudication of a third country's judicial body. The legal consequences of the contract are the same in the cases of non-formation, formation without effect, and revocation, i.e., they are all not materially adequate. Arbitration clauses are all relatively independent, and the contract's invalidity does not necessarily lead to the invalidity of the arbitration clause. The agreement of the contract subject to the arbitration clause should be regarded as an independent contract, and the validity of the arbitration clause should be judged from the general constituent elements of the truth of the agreement.

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