SPC Guiding Case No. 196: Application by Yunyu Co., Ltd. and Shenzhen Zhongyuancheng Commercial Investment Holding Co., Ltd. to Confirm the Validity of an Arbitration Agreement

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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Keywords

Civil litigation / application to confirm the validity of an arbitration agreement / formation of an arbitration clause

Holding

1. Where a party requests confirmation that no arbitration agreement exists on the ground that an arbitration clause has not been formed, the people's court shall review it as a case of application to confirm the validity of an arbitration agreement.

2. An arbitration clause exists independently, and its formation and validity are independent of and severable from the other clauses of the contract. Where the parties negotiated the arbitration clause and reached a consensus on submitting disputes to arbitration at the time of concluding the contract, whether the contract is formed shall not affect the formation and validity of the arbitration clause.

Basic Facts

China Tourism Group Co., Ltd. (hereinafter "CT Group"), formerly known as China Tourism Group Corporation and China Hong Kong CTS (Holdings) Corporation, is a wholly state-owned company. Hong Kong CTS (Holdings) Co., Ltd. (hereinafter "Hong Kong CTS") is a wholly-owned subsidiary of CT Group, registered in Hong Kong. Yunyu Co., Ltd. (hereinafter "Yunyu Company") is a wholly-owned subsidiary of Hong Kong CTS, registered in the British Virgin Islands. Xinjin Company is a wholly-owned subsidiary of Yunyu Company, also registered in the British Virgin Islands.

On March 24, 2016, CT Group issued the Reply on Approving the Listed Transfer of 100% Equity Interest in NEWPOWER ENTERPRISES INC., approving Yunyu Company's lawful and compliant transfer of the 100% equity interest it held in Xinjin Company. On March 29, 2017, Yunyu Company publicly listed for transfer, through the Beijing Equity Exchange, the 100% equity interest it held in Xinjin Company. Shenzhen Zhongyuancheng Commercial Investment Holding Co., Ltd. (hereinafter "Zhongyuancheng Company"), as an intended transferee, engaged in negotiations with Yunyu Company and others over the signing of the equity transaction contract and other matters of the project in issue.

On May 9, 2017, Zhang Xin, manager of the Investment Management Department of CTS Hotels Co., Ltd. (a wholly-owned subsidiary of CT Group), sent an email to Zhang Ruirui of the Risk Control and Legal Affairs Department of Shenzhen Tailong Financial Holding Group Co., Ltd. (the superior group company of Zhongyuancheng Company). The attachment to the email, the Equity Transaction Contract, was a standard text provided by the Beijing Equity Exchange, stating that Party A was Yunyu Company and Party B was Zhongyuancheng Company, and that the parties, pursuant to the Contract Law, the Interim Measures for the Administration of the Transfer of State-Owned Property Rights of Enterprises, and other relevant laws, regulations, and rules, entered into the Equity Transaction Contract for Yunyu Company's transfer to Zhongyuancheng Company of the 100% equity interest in Xinjin Company it owned. Article 16 of the contract, on jurisdiction and dispute resolution: 16.1 This contract and the acts in the equity transaction shall

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all be governed by the law of the People's Republic of China; 16.2 If a dispute arises between the parties concerning the interpretation or performance of this contract, it shall be resolved through negotiation between the parties; if negotiation fails, it shall be submitted to the Beijing Arbitration Commission for arbitration. Article 12 of the Debt Settlement Agreement attached to the aforesaid email provided: This agreement shall be governed by the law of the People's Republic of China. If a dispute arises between the parties concerning the interpretation or performance of this agreement, it shall be resolved through negotiation between the parties; if negotiation fails, any party shall have the right to submit it to the Beijing Arbitration Commission for resolution by arbitration.

On May 10, 2017, Zhang Ruirui sent an email to Zhang Xin and Liu Zhen, stating: "The attachment is our company's amendment opinion on the contract. Please carefully consider and confirm it based on the principles of equality, fairness, and the principle of validity after contract signing." In the attachment to that email, Article 16 of the Equity Transaction Contract text, "Jurisdiction and Dispute Resolution," was amended to: "16.1 This contract and the acts in the equity transaction shall all be governed by the law of the People's Republic of China. 16.2 If a dispute arises between the parties concerning the interpretation or performance of this contract, it shall be resolved through negotiation between the parties; if negotiation fails, it shall be submitted to the Shenzhen Court of International Arbitration for arbitration"; and Article 12 of the Debt Settlement Agreement text was amended to: "This agreement shall be governed by the law of the People's Republic of China. If a dispute arises between the parties concerning the interpretation or performance of this agreement, it shall be resolved through negotiation between the parties; if negotiation fails, any party shall have the right to submit it to the Shenzhen Court of International Arbitration for resolution by arbitration."

At 13:42 on May 11, 2017, Zhang Xin sent an email to Zhang Ruirui and Li Jun, a senior manager of Zhongyuancheng Company, responding to the amendment opinions proposed by Zhongyuancheng Company on the two contract texts, and stating: "The revised initialed version of the contract is hereby sent to your company. Please reply with your opinions as soon as possible after receiving the attachment. The contract confirmed between your company and our company will be submitted to the Beijing Equity Exchange and our company's internal approval process, and may be signed only after final confirmation by the Beijing Equity Exchange and our group company (if there are amendments, our company will confirm with your company again)." In the attachment to that email, Article 16 of the Equity Transaction Contract (initialed version), "Jurisdiction and Dispute Resolution," and Article 12 of the Debt Settlement Agreement (initialed version) were identical to the relevant content in the attachment to the email sent by Zhang Ruirui to Zhang Xin and Liu Zhen on May 10. At 18:39 on the same day, Zhang Ruirui sent an email to Zhang Xin, stating: "The attachment contains the scanned copies of the Equity Transaction Contract (initialed version) and the Debt Settlement Agreement (initialed version) that our company has signed, and the project signing explanation letter. Please check and reply." In the attachment to that email, the content on jurisdiction and dispute resolution of the Equity Transaction Contract (initialed version) and the Debt Settlement Agreement (initialed version) was identical to the relevant content in the attachment to the email sent by Zhang Xin on the same day. Zhongyuancheng Company affixed its seal to the contract and delivered the text to Yunyu Company.

On May 17, 2017, Zhang Xin sent an email to Li Jun, stating: "For the Shenzhen project, our company's group final approval process is currently underway. If approval proceeds smoothly, the signing ceremony is planned to be held this Friday morning at the Beijing Metropark Lido Hotel. The specific situation will be notified to your company after our company confirms it. The to-be-signed versions of the Equity Transaction Contract and the Debt Settlement Agreement are hereby sent to your company in advance for verification." Attachment 1 to that email was the Equity Transaction Contract of the Equity Transfer Project (to-be-signed version), and Attachment 2 was the Debt Settlement Agreement of the Equity Transfer Project (to-be-signed version). The arbitration clauses in the aforesaid two contract texts remained identical to the initialed version.

On October 27, 2017, Yunyu Company sent a letter to Zhongyuancheng Company canceling the transaction. On April 4, 2018, Zhongyuancheng Company, pursuant to Article 16.2 of the Equity Transaction Contract (initialed version) and Article 12 of the Debt Settlement Agreement (initialed version), filed an arbitration application with the Shenzhen Court of International Arbitration, listing Yunyu Company and others as co-respondents. Before the hearing of the arbitral tribunal, Yunyu Company and others separately filed actions before the Shenzhen Intermediate People's Court of Guangdong Province, applying for confirmation that no arbitration agreement existed. The court filed the case on September 11, 2018, forming this case and two other related cases. During the court's review, the Supreme People's Court held that this case and the related cases were of great legal significance, and that review by the international commercial court was conducive to the uniform application of law and to improving the efficiency of dispute resolution. Therefore, pursuant to paragraph 1 of Article 38 of the Civil Procedure Law and item 5 of Article 2 of the Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of International Commercial Courts, it ruled that this case be reviewed by the First International Commercial Court of the Supreme People's Court.

Judgment

On September 18, 2019, the Supreme People's Court rendered Civil Ruling (2019) Zui Gao Fa Min Te No. 1, dismissing the application of Yunyu Co., Ltd.

Reasoning

The Supreme People's Court held: After Zhongyuancheng Company applied for arbitration, Yunyu Company applied to the people's court for confirmation that no valid arbitration clause existed between the parties on the ground that the arbitration clause had not been formed. Although this differs from requesting confirmation that an arbitration agreement is invalid, whether an arbitration agreement exists and whether it is valid both directly affect the method of dispute resolution and both constitute preliminary questions that need to be resolved. Therefore, a request to confirm that no arbitration agreement exists between the parties also falls within the broad sense of an objection to the validity of an arbitration agreement. Paragraph 1 of Article 20 of the Arbitration Law provides: "If a party has an objection to the validity of the arbitration agreement, it may request the arbitration commission to make a decision or request the people's court to make a ruling." Accordingly, where a party requests confirmation that no arbitration agreement exists on the ground that the arbitration clause has not been formed, this falls within a case of application to confirm the validity of an arbitration agreement, and the people's court shall file and review it.

When confirming the validity of an arbitration agreement, the governing law must first be determined. Article 18 of the Law on the Application of Laws to Foreign-Related Civil Relations provides: "The parties may agree on the law applicable to the arbitration agreement. If the parties have not chosen, the law of the place where the arbitral institution is located or the law of the place of arbitration shall apply." At the court's inquiry, all parties expressly stated their agreement to apply the law of the People's Republic of China to determine the validity of the arbitration agreement in issue. Therefore, the arbitration agreement in this case shall be governed by the law of the People's Republic of China.

Paragraph 1 of Article 16 of the Arbitration Law provides: "An arbitration agreement includes arbitration clauses contained in a contract and agreements reached in other written form before or after a dispute arises requesting arbitration." It can be seen that both arbitration clauses in a contract and independent arbitration agreements belong to arbitration agreements, and the determination of the formation and validity of an arbitration clause likewise applies the legal provisions on arbitration agreements.

The independence of arbitration agreements is a widely recognized fundamental legal principle, meaning that the arbitration agreement and the main contract are severable and mutually independent, and that their existence and validity, as well as the governing law applicable to them, are all severable. Since an arbitration clause is the main type of arbitration agreement, and the arbitration clause and other clauses of the contract

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appear in the same document, endowing the arbitration clause with independence is of greater practical significance than emphasizing the independence of a separate arbitration agreement; it can even be said that the independence of arbitration agreements mainly refers to the severability of the arbitration clause from the main contract. With respect to the independence of arbitration agreements, both the law of the People's Republic of China and judicial interpretations provide for it. Paragraph 1 of Article 19 of the Arbitration Law provides: "An arbitration agreement exists independently, and the modification, rescission, termination, or invalidity of the contract shall not affect the validity of the arbitration agreement." From the contextual relationship, this article prescribes the independence of the arbitration agreement after Article 16 of the Arbitration Law clarifies that an arbitration clause belongs to an arbitration agreement. Therefore, the arbitration clause is independent of the contract. As to whether the arbitration clause can be formed completely independently of the contract, the provisions of the Arbitration Law seem not particularly clear, and are not as explicit as the provision that the modification, rescission, termination, or invalidity of an already-formed contract shall not affect the validity of the arbitration agreement. In judicial practice, the question of whether a contract is formed and the question of whether the arbitration clause therein is formed are often entangled. However, the opening part of paragraph 1 of Article 19 of the Arbitration Law, "an arbitration agreement exists independently," is a general and overarching expression, and should cover the question of whether the arbitration agreement exists, that is, whether it is formed; the subsequent expression further emphasizes that the several enumerated circumstances likewise cannot affect the validity of the arbitration agreement. Paragraph 2 of Article 10 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China further clarifies: "Where the parties reached an arbitration agreement on the dispute when concluding the contract, the failure of the contract to be formed shall not affect the validity of the arbitration agreement." Therefore, when determining the validity of an arbitration clause, including whether the arbitration clause is formed, the validity of the arbitration clause itself may first be determined; only when necessary shall consideration be given to determining the validity of the entire contract, including whether the contract is formed. This case likewise follows this rule and first determines, based on the specific circumstances of this case, whether the arbitration clause was formed.

Whether an arbitration clause is formed mainly refers to whether the parties had the consensus to submit disputes to arbitration, that is, whether an arbitration agreement was reached. An arbitration agreement is a kind of contract; to determine whether the parties reached a consensus on arbitration, the provisions of the Contract Law on offer and acceptance shall apply. From the negotiation circumstances of this case, the parties had consistently and jointly accepted that disputes would be submitted to arbitration for resolution. The earliest Equity Transaction Contract in this case was a standard text provided by the Beijing Equity Exchange, and together with the Debt Settlement Agreement was sent by Yunyu Company and others to Zhongyuancheng Company; both contracts contained a clause submitting disputes to the Beijing Arbitration Commission for arbitration. Thereafter, the parties negotiated over the arbitral institution. The arbitration clause in the initialed version of the contract sent by Yunyu Company and others had already designated the Shenzhen Court of International Arbitration as the arbitral institution. As to the arbitration clause, this was an offer made by Yunyu Company and others. Zhongyuancheng Company affixed its seal to the initialed version of the contract, indicating agreement, and delivered the sealed contract text to Yunyu Company on May 11, 2017; this was Zhongyuancheng Company's acceptance. Pursuant to Articles 25 and 26 of the Contract Law, an acceptance becomes effective when the notice of acceptance reaches the offeror, and the contract is formed when the acceptance becomes effective. Therefore, the arbitration clauses in the Equity Transaction Contract and the Debt Settlement Agreement were respectively formed between the parties to the two contracts on May 11, 2017. Thereafter, the parties negotiated over certain other matters of the contract, but never had any dispute over the arbitration clause. Given that Yunyu Company and others did not assert that the arbitration clause fell within any statutory circumstance of invalidity, it should be determined that a valid arbitration clause existed between the parties, and the dispute between the parties should be arbitrated by the Shenzhen Court of International Arbitration. Although Yunyu Company and

others did not affix their seal to the final contract text, and their legal representative did not sign the text, which did not conform to the requirement that a contract take effect after being signed and sealed by the legal representatives or authorized representatives of both parties, pursuant to paragraph 2 of Article 10 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China, even if the contract is not formed, the validity of the arbitration clause shall not be affected. Under circumstances where the parties have already reached an arbitration agreement, the question of whether the contract in this case was formed need not be further determined, and that question should be resolved in arbitration. In summary, Yunyu Company's grounds and claims could not be established, and the people's court dismissed its application.

Relevant Legal Provisions

Articles 16, 19, and paragraph 1 of Article 20 of the Arbitration Law of the People's Republic of China.

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