ISSN 2706-6827 Vol. 5, Issue 16: 47-51, DOI: 10.25236/IJFS.2023.051608

Study on the Independence of Arbitration Agreements

Zhai Yingqi

Graduate School, The People's Public Security University of China, Beijing, China

Abstract: *The principle of the independence of arbitration agreement is regarded as the core principle of commercial arbitration, which occupies an important position in the theory and practice of arbitration. This principle applies not only to international arbitration but also to domestic arbitration. The in-depth understanding and interpretation of this principle intuitively shows our insight into the nature of arbitration and our firm support for arbitration. Due to the inherent characteristics of the arbitration system and the influence of international socio-economic and cultural factors, the principle of the independence of arbitration agreement is rejected or excluded to varying degrees in the major countries and regions of the world. Although there were still some differences in theory and practice regarding the independence of arbitration agreements, according to the current situation, most countries had developed strategies to support arbitration and had proceeded to perfect and innovate their arbitration laws, while relaxing various restrictions on arbitration. China's Arbitration Law also provides for the principle of the independence of arbitration agreement and affirms this principle as a special form independent of the autonomy of the other parties. Considering that the ultimate goal of the principle of independence of arbitration agreement is to ensure that the arbitration agreement can reach the highest level of validity, the original intention and intention of this principle should be respected and the principle of independence of arbitration agreement should be understood and applied from the point of view of supporting arbitration.*

Keywords: *arbitration agreement, independence, validity determination*

1. Overview of independence of the arbitration agreement

1.1. Establishment of the independence of the arbitration agreement

The independence of the arbitration agreement is disputed by the traditional view. The reason was that the arbitration agreement, which was part of the underlying contract, operated in relation to the legal relationship of the contract, and since the contract was null and void, the arbitration agreement attached to the contract therefore lost its basis of existence. More and more scholars began to criticize this traditional view, so that the traditional view of the independence of arbitration agreement was not only made it more and more difficult to resolve contractual disputes with arbitration agreement, but also lost its valuable basis as an efficient and quick way to resolve disputes. [1]Therefore, the theory of the independence of arbitration agreement is gradually established and developed accordingly. Therefore, some scholars believe that the independence theory, which is the hallmark of modern advanced arbitration law, arises not from legal reasoning but from practical needs.

The independence of an arbitration agreement, also known as the "severability" or "autonomy" of an arbitration agreement, regardless of its theoretical formulation, revolves around the idea that, although an arbitration agreement is entered into to resolve disputes arising from the underlying contract, once established, it is independent, being two separate or separate contracts formed with the underlying contract, the validity of which is not affected by the validity of the underlying contract. Another is an oral or written agreement between the parties as to the content and particulars of the arbitration. Although the underlying contract may be considered null and void, avoided, terminated or rescinded, the arbitration agreement, as an agreement between the parties to resolve the dispute over the underlying contract, remains independent and does not automatically invalidate or invalidate the underlying contract because of its invalidity or invalidity. [2]In the arbitration system, the arbitration agreement has an independent status. The independence of the arbitration agreement is in fact of a different kind of independence. Arbitration agreement can become an independent legal system because it has two functions, namely, to supervise the basic contract effectively and to guarantee the realization of the basic contract. On the one

ISSN 2706-6827 Vol. 5, Issue 16: 47-51, DOI: 10.25236/IJFS.2023.051608

hand, it is based on the signing of the basic contract, but with the completion of the basic contract; On the other hand, because it is formed separately from other contracts, it is different in content and form from other contracts. On the other hand, once it is established, it is legally separate from the effect of the underlying contract. Rather than losing its legal effect because the underlying contract was disputed or declared null and void, it was implemented in that way and functioned as a remedy. Therefore, the relationship between the arbitration agreement and the basic contract is not the same as the subject-subordinate contract relationship in the traditional contract theory: from the validity of the contract is completely dependent on the main contract, the main contract is null and void or invalidated, and from the contract of course void or invalidated; On the contrary, the effect of an arbitration agreement is independent of the underlying contract and does not invalidate or invalidate the underlying contract accordingly with its dissolution, termination, avoidance or invalidity

1.2. Development of the independence of arbitration agreements

With the accumulation of practical experience, the theory of independence of arbitration agreement has been gradually perfected. Although the degree of acceptance of the independence of the arbitration agreement varies from country to country, a complete independence theory should cover the following three core elements: the arbitration agreement should be independent from other provisions of the underlying contract; The nature of the arbitration agreement makes it essentially a contract independent of the underlying contract. (2) The validity of the contract does not affect the validity of the arbitration agreement; Arbitration agreements are independent of legal norms, but their contents can be invoked by the courts as a basis for litigation or non-litigation activities, thus producing a certain degree of legal and social effects. (3) The establishment of the contract does not affect the validity of the arbitration agreement. More specifically, the arbitration agreement is separate from other provisions of the contract, which are separate from the arbitration agreement, and their existence and effect do not affect the validity of the arbitration agreement; The effect of the arbitration agreement and the contract are independent of each other, and even if the underlying contract is deemed null and void, the arbitration agreement still has legal effect. If one of the parties challenged the validity of the underlying contract, that would not have a negative impact on the validity of the arbitration agreement; The existence of the arbitration agreement and the contract are independent of each other. The existence of the contract and its continued existence do not affect the validity of the arbitration agreement.

2. Theoretical basis for the independence of arbitration agreements

2.1. Analysis from the perspective of the role of the arbitration agreement

An arbitration agreement exists as a remedy in the event that the underlying contract cannot be performed or is not fully performed, which is the role of the arbitration agreement in relation to the underlying contract. Therefore, the arbitration agreement is concluded on the one hand because of the underlying contract and terminated with the full performance of the underlying contract; On the other hand, it is special and independent, and not only is it not invalid because of the dispute over the underlying contract, but it is being implemented accordingly, thus playing its role as a remedy. For, since the sole purpose of an arbitration agreement is to have a dispute between the parties arising out of a contract effectively resolved by arbitration in the future, the arbitration agreement as a remedy must play its part in the event of a dispute, the effect of which is for the arbitral tribunal to rule on the dispute and thus determine the rights and obligations of the parties. Therefore, it is necessary for arbitration agreement to exist independently of the basic contract as a remedy for the basic contract.

For the arbitration system, the arbitration agreement is the cornerstone of the entire arbitration system. If the underlying contract is null and void, even though the arbitration agreement itself has no other grounds for invalidity, it is automatically invalidated simply because the underlying contract is null and void, thereby depriving the arbitral tribunal of the basis of its jurisdiction and thus preventing the entire arbitral process from commencing and proceeding. Thus, by basing the jurisdiction of the arbitral tribunal on the validity of the underlying contract itself, with the arbitral process relying solely on the court's judgement on the validity of the underlying contract from commencement to final award, the underlying role of the arbitration agreement in the arbitration system has been vacated and its intended role has been lost. It can be seen that only by establishing the theory of the independence of arbitration agreement can the jurisdiction of the arbitral tribunal be realized and the arbitration system can exist and develop healthily.[3] In short, the effect of the arbitration agreement on the basic contract and the arbitration system determines that the validity of the arbitration agreement must be independent of the validity of

ISSN 2706-6827 Vol. 5, Issue 16: 47-51, DOI: 10.25236/IJFS.2023.051608

the basic contract, which is the inevitable requirement of the role of the arbitration agreement. It was generally held that a valid arbitration agreement not only bound the parties to the agreement, but also had effects on courts and arbitral tribunals, and was the basis for excluding the jurisdiction of courts and giving arbitral tribunals jurisdiction to arbitrate. In addition, an arbitration agreement was subject to the principle of contractual relativity and had no effect on third parties. However, with the increasing complexity of social and economic life and international commercial exchanges, and the development of arbitration practice, this relativity principle has been gradually broken through. "Many countries' legislation, judicial and arbitration practice and arbitration theory gradually recognize arbitration clauses as legally binding on non-signatory parties. To some extent, the "arm" of arbitration agreements is being `extended," 'one scholar pointed out.[4]

The value orientation of the arbitration system is the basis, reason and foundation of the existence of the arbitration system, and also the fundamental reason why the parties choose arbitration over litigation or other non-litigation dispute resolution methods. As for the value orientation of the arbitration system, there is a general dispute in the theoretical circles about which two important values are fairness and efficiency. The author thinks that efficiency should be more important. Basically, arbitration exists and thrives on the value criterion of efficiency, that is, it resolves disputes through the arbitration tribunal chosen by the parties voluntarily, without going against the public interest and using public authority or spending public money as much as possible, so as to achieve the orderly operation of the market and the rational allocation of social resources, so that both the parties and society can obtain greater benefits or avoid great losses. If the arbitration system loses its primary value objective of efficiency, then, at least procedural, the arbitration system is no more attractive than the litigation system, since the guarantees of impartiality and the certainty of the award are lower than the litigation system.

In the arbitration system, the efficiency value is reflected in the speed, flexibility and time saving brought by the arbitration process. If the independence of the arbitration agreement is denied, in a commercial transaction a party may invalidate the arbitration agreement by claiming that the underlying contract is null and void. This is done in order to prevent the other party from initiating arbitral proceedings, deprive the arbitral tribunal of its jurisdiction and relieve it of its obligation to participate in the arbitration, thereby delaying the resolution of the dispute and increasing transaction costs. At the same time, due to the lack of effective restriction on arbitration agreement, the arbitration institution abuses its arbitration power or improperly exercises it, leading to the annulment or rejection of the arbitral award. From this perspective, the speed, flexibility and time-saving advantages of arbitration could be seriously diminished, the efficiency and value sought by arbitration would disappear, the importance of recourse to arbitration for the settlement of civil and commercial disputes would be greatly reduced and the relevance of the arbitration system would disappear. On the contrary, with the recognition of the independent status of the arbitration agreement, the validity of the arbitration agreement can be restored, the arbitration activities can be conducted normally, the arbitration institutions and arbitrators can receive fair and reasonable remuneration, and the arbitration proceedings can be carried out smoothly. Obviously, it is of great legal significance to establish the theory of independence of arbitration agreement in order to safeguard the arbitration system and promote its further development.

2.2. Analysis of the value of the arbitration system

The value orientation of the arbitration system is the basis, reason and foundation of the existence of the arbitration system, and also the fundamental reason why the parties choose arbitration over litigation or other non-litigation dispute resolution methods. There is a general dispute in academic circles about the value orientation of the arbitration system and which of the two important values, fairness and efficiency, is more important. The author believes that efficiency is more important. Basically, arbitration exists and thrives on the value principle of efficiency, that is, it resolves disputes through tribunals chosen voluntarily by the parties without violating the public interest and without using public authority or spending public money, so as to achieve the orderly operation of the market and the rational allocation of social resources, so that both the parties and society can obtain greater benefits or avoid greater losses. In1992 Zimmer v. In the Cremascoli case, the Italian Supreme Court also stated that the combination of the principal and the assignment was not in itself sufficient to prove the assignee's automatic acceptance of the arbitration clause, which had to be found to be subject to the conditions of "provable, clear and unambiguous." [5]If the arbitration system loses its primary value objective of efficiency, At least procedural, the arbitration system was no more attractive than the litigation system, since the guarantees of impartiality and certainty of the award were lower than litigation systems.

In the arbitration system, the efficiency value is reflected in the speed, flexibility and time saving brought by the arbitration process. If the independence of the arbitration agreement was denied, in a

ISSN 2706-6827 Vol. 5, Issue 16: 47-51, DOI: 10.25236/IJFS.2023.051608

commercial transaction a party might invalidate the arbitration agreement by claiming that the underlying contract was invalid. This is done in order to prevent the other party from initiating arbitral proceedings, deprive the arbitral tribunal of its jurisdiction and relieve it of its obligation to participate in the arbitration, thereby delaying the resolution of the dispute and increasing transaction costs. At the same time, due to the lack of effective restriction on arbitration agreement, the arbitration institution abuses its arbitration power or improperly exercises it, leading to the annulment or rejection of the arbitral award. From this perspective, the speed, flexibility and time-saving advantages of arbitration could be seriously diminished, the efficiency and value sought by arbitration would disappear, the importance of recourse to arbitration for the settlement of civil and commercial disputes would be greatly reduced and the relevance of the arbitration system would disappear[6]. On the contrary, with the recognition of the independent status of the arbitration agreement, the validity of the arbitration agreement can be restored, the arbitration activities can be conducted normally, the arbitration institutions and arbitrators can receive fair and reasonable remuneration, and the arbitration proceedings can be carried out smoothly. Obviously, it is of great legal significance to establish the theory of independence of arbitration agreement in order to safeguard the arbitration system and promote its further development.

3. Regulation and Evaluation of Independence of Arbitration Agreement in China

3.1. Provisions of China's relevant legislation and arbitration rules

In terms of As early as the 1960s, the theory of the independence of arbitration agreement has been universally accepted and adopted by relevant legislation and arbitration rules of arbitration institutions in the world. China's legislation on the independence of arbitration agreements began in 1985, and the Foreign Economic Contract Law of the People's Republic of China, promulgated and implemented in 1985, is the first legislative provision concerning the independence of arbitration agreements in China. However, its provisions are still vague on the validity of arbitration agreement if the contract is invalid or does not exist, which is the core problem and essence of the theory of independence of arbitration agreement. If the Foreign Economic Contract Law of 1985 only vaguely establishes the independence of the arbitration agreement, then the third arbitration rule of the China International Economic and Trade Arbitration Commission, the Arbitration Rules of the China International Economic and Trade Arbitration Commission, as amended and adopted on March 7, 1994, makes clear provisions on the independence of the arbitration agreement for the first time, thus achieving a breakthrough in the theory of the independence of the arbitration agreement in China.

The Arbitration Law of the People's Republic of China (hereinafter referred to as the Arbitration Law), adopted on August 31, 1994 and implemented on September 1, 1995, is the first arbitration law in China's history. In amending its Arbitration Rules in 1995, this aspect was added over and above the relevant provisions of the existing Arbitration Act. "An arbitration clause in a contract shall be deemed to exist independently of the other terms of the contract, and an arbitration agreement attached to the contract shall also be considered to exist independently of the other terms of the contract. The modification, cancellation, termination, invalidity or invalidity of the contract and its existence shall not affect the validity of the arbitration clause or the arbitration agreement." At this point, the more thorough provisions on the independence of arbitration agreements have been fully reflected in China.

The China International Economic and Trade Arbitration Commission adopted a further revision of its Arbitration Rules on 11 January 2005, which came into force on 1 May 2005. The newly revised China International Economic and Trade Arbitration Commission Arbitration Rules, in article 5 (4), make more detailed provisions on the independence of the arbitration agreement, which further enrich the theory of the independence of the arbitration agreement and specify its scope of application in more detail, so as to be more convenient for the unification and concrete operation in practice.

3.2. Assessment of relevant legislation and arbitration rules on the independence of arbitration agreements

Although Chinese legislation has confirmed the independence of arbitration agreements and further improved them in the arbitration rules of the China International Economic and Trade Arbitration Commission, different arbitration institutions still have different views on the independence of arbitration agreements. The connotation and extension of the principle of independence of arbitration agreement have not changed substantially. China International Economic and Trade Arbitration Commission (CIETAC) and China Maritime Arbitration Commission (CMA), as two of China's early arbitration

ISSN 2706-6827 Vol. 5, Issue 16: 47-51, DOI: 10.25236/IJFS.2023.051608

entities, hold the same position on the independence of arbitration agreements. This is because both have an effective system to guarantee the independence of the arbitration agreement, thus safeguarding the legitimate rights and interests of the parties. However, since the Arbitration Law came into force in 1995, more than 100 arbitration institutions have sprung up on Chinese soil with different views and attitudes on the independence of arbitration agreements. Differences in the understanding of the independence of arbitration agreements among these arbitral institutions have led to confusion in the arbitral process, thus affecting the quality and impartiality of arbitral awards. In this regard, I personally feel that, given the independence and non-subordination of arbitral institutions, the solution to this problem requires a number of perspectives: first, by amending the Arbitration Act to provide an effective reference template for arbitral institutions in revising their arbitration rules; On the other hand, an effective arbitration supervision system should be established to ensure that arbitration activities are conducted in accordance with the law. Secondly, we look forward to the establishment of the China Arbitration Association, which will provide a place for arbitration institutions to learn and exchange with each other and provide an organizational platform for the unification and standardization of national arbitration institutions; The third point is that arbitration institutions need to continuously upgrade their theoretical knowledge and practical skills to ensure that the arbitration system can be truly applied and perfected in the actual arbitration process.

4. Conclusion

The actual operation of arbitration provides the impetus for the formation of independence theory. When independence theory is formally adopted as legal norm, it promotes the progress of arbitration practice on a broader level and improves the arbitration system further. The connotation and extension of the principle of independence of arbitration agreement have not changed substantially. The independence of the arbitration agreement ensures that the agreement not only plays a role in the validity of the underlying contract, but also plays the same role in the event of invalidity, invalidity or non-existence of the underlying contract, which should be included in the theory of the independence of the arbitration agreement in its entirety. Third parties independent of the parties are binding on the arbitration agreement, which ensures that the arbitration agreement is reflected at both the substantive and procedural levels, thus making arbitration an independent dispute resolution mechanism. The core idea of the independence of arbitration agreement in practical application is that the validity of arbitration agreement needs to be evaluated independently and not restricted by the validity of basic contract. This is also the original intention and goal of the theory of the independence of arbitration agreement, which is to maximize the effectiveness of arbitration agreement, so as to support and promote the further development of arbitration.

References

[1] Alan Redfern, Martin Hunt, Nigel Blackby, Editing by Konstantin Patterside Lin Yifei, translated by Song Lianbin. Law and Practice of International Commercial Arbitration, 4th edition [M]. Beijing: Peking University Press, 2005.09.
[2] By Xu Donggen. Trends in Private International Law [M]. Beijing: Peking University Press, 2005.01
[3] Edited by Ding Jianzhong. Foreign Arbitration Law and Practice [M]. Beijing: China Foreign Economic and Trade Press, 1992.08.
[4] Xueping Y .On the Independence and Impartiality of Party-Appointed Arbitrators in International Sports Arbitration: On the Case of Alejandro Valverde[J].Journal of Tianjin University of Sport, 2011.
[5] Daniel Girsberger, Christian Hausmaninger. Assignment of Rights and Agreement to Arbitrate (J). Arbitration International, Vol.8. 1992 (2).131.
[6] Song Lianbin, "My Ruminations on the Value Orientation of International Commercial Arbitration," in Chinese Yearbook of Private International Law and Comparative Law (2000), p. 155.