May 29, 2024

California appellate court finds WeChat users are bound by arbitration agreement under equitable estoppel theory but remands for trial court to determine arbitrability

by Stephanie N. Bedard

Takeaway: In *Citizen Power Initiatives for China, et al. v. Tencent America LLC, et al.*, Nos. H049519 & H049717, 2024 WL 2266070 (Cal. Ct. App. May 20, 2024), a California appellate court found that WeChat users were bound by an arbitration agreement in WeChat's terms of service under an equitable estoppel theory by asserting claims dependent upon and inextricably intertwined with those same terms of service. But the court rejected the argument that arbitrability had been delegated to the arbitrator and instead remanded for the trial court to determine arbitrability.

Defendants Tencent America LLC and Tencent International Service Pte. Ltd. (together, "Tencent") operate WeChat, a social media application primarily used in the Chinese-speaking world. 2024 WL 2266070, at *1. The plaintiffs, six anonymous WeChat users who live in California as well as the non-profit Citizen Power Initiatives for China (described by the California appellate court as a non-profit organization dedicated to advancing democracy in the People's Republic of China), alleged Tencent's 2018 terms of service, privacy policy, and WeChat Help Center contained vague and ambiguous privacy provisions that violated the right to privacy in the California Constitution and the California Invasion of Privacy Act, Pen. Code §§ 610, *et seq*. ("CIPA"). *Id.* at *1-2. The plaintiffs brought eleven different causes of action against Tencent in the Superior Court of Santa Clara County, California, including for violations of statutory and constitutional rights to privacy, free speech, and equal protection, and sought certification of a class of WeChat users who reside in California. *Id.* at *2.

Tencent moved to compel arbitration under the terms of its 2018 terms of service, which require all disputes to be arbitrated before the American Arbitration Association ("AAA"). *Id.* The plaintiffs opposed arbitration, arguing that they had not agreed to arbitrate because they created their WeChat accounts several years before the terms of service were revised in 2018 to include an arbitration clause. *Id.* The trial court denied Tencent's motions to compel arbitration, and Tencent appealed. *Id.* Although Tencent filed a separate motion to compel arbitration based on an earlier version of the terms of service requiring arbitration before the Hong Kong International Arbitration Centre, the trial court found it lacked jurisdiction to rule on that motion because of the appeal from the denial of the first motion to compel arbitration. *Id.*

The Sixth District Court of Appeal reversed the lower court's decision in an unpublished opinion, finding that the plaintiffs were equitably estopped from challenging the 2018 terms of service containing the arbitration clause. *Id.* at *3. Even though it was undisputed that neither the plaintiff nonprofit entity nor the six California WeChat users had agreed to the 2018 terms, the California appellate court found that the plaintiffs had chosen to rely on and seek enforcement of certain terms in the 2018 terms of service that benefitted them when they filed their lawsuit. *Id.*

Under the doctrine of equitable estoppel, a "'party who has not signed a contract containing an arbitration clause may nonetheless be compelled to arbitrate when he seeks enforcement of other provisions of the same contract that benefit him.'" *Id.* (citing *Metalclad Corp. v. Ventana Env't Organizational P'ship*, 109 Cal. App. 4th 1705, 1713, 1 Cal. Rptr. 3d 328, 334 (2003)). Equitable estoppel applied because the plaintiffs, even though they had not explicitly assented to the 2018 terms of service, elected to bring claims that were "dependent upon, or inextricably intertwined with," those terms. *Id.* (citing *JSM Tuscany, LLC v. Superior Ct.*, 193 Cal. App. 4th 1222, 1239, 123 Cal. Rptr. 3d 429, 443 (2011)).

But the *Citizen Power* court rejected Tencent's argument that the agreement delegated arbitrability disputes to the arbitrator and remanded for the trial court to rule on the plaintiffs' arbitrability arguments, including whether arbitration would be unconscionable and whether their claims for public injunctive relief were prohibited from being sent to arbitration under *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 961, 393 P.3d 85, 94 (2017). *Id.* at *3-4. The Sixth District rejected the argument that incorporating the AAA's Commercial Arbitration Rules sufficed to delegate arbitrability disputes to the arbitrator because the arbitration agreement also contained a relatively standard "severability" provision that referred to "'a court hold[ing] that [Tencent] cannot enforce [a] part of these Terms,' suggesting at least some limitation on delegation." *Id.* at *4.

Conclusion: While *Citizen Power* reiterates that parties will be estopped from relying on the terms of an agreement containing an arbitration clause while simultaneously asserting that the arbitration provision itself should not apply, it nevertheless illustrates the divergence between California state courts and virtually all federal courts (including the Ninth Circuit) on the important question of whether incorporation of the AAA Rules suffices to delegate arbitrability disputes to the arbitrator. *Cf. Patrick v. Running Warehouse, LLC*, 93 F.4th 468, 480–81 (9th Cir. 2024) (explaining that "'[v]irtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability'") (quoting *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013)).