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Research on the Objection to the Jurisdiction of International Commercial Arbitration

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ABSTRACT
The jurisdiction of international commercial arbitration is the prerequisite of international commercial arbitration procedure and the foundation and condition for the smooth proceeding of arbitration procedure. The determination of arbitration jurisdiction is of great significance to the smooth proceeding of international commercial arbitration and the recognition and enforcement of arbitration awards. Therefore, the study of the objection to the jurisdiction of international commercial arbitration has become a branch of the jurisdiction of international commercial arbitration and has been paid more and more attention by scholars and legal practitioners in recent years. Discussion of the international commercial arbitration jurisdiction, the arbitration tribunal will inevitably involve the court and the arbitration in international commercial arbitration jurisdiction objection to trial jurisdiction of conflict and coordination problems, for international court and the arbitration tribunal and arbitration institutions in the jurisdiction of the court to judge the position of each of the relevant theory is developed with the continuous development of arbitration practice. The development and establishment of jurisdiction and jurisdiction theory is also a process from negation to affirmation of the right to decide the objection to the jurisdiction of the arbitral tribunal. In addition, countries have different views on different issues concerning the adjudication of objection to jurisdiction. By analyzing and comparing the provisions of various countries, international treaties, and the practices of various arbitration organizations, this paper draws reasonable conclusions, to promote the development of international commercial arbitration and make it better serve international trade.

Keywords: *international commercial arbitration; arbitral jurisdiction; objection to arbitration jurisdiction; competence-competence principle.*

1. INTRODUCTION

Benefiting from the flexibility, high efficiency, confidentiality, and other advantages, international commercial arbitration is becoming a significant method to resolve international commercial disputes. The jurisdiction of International Commercial Arbitration is the premise and basics of International Commercial Arbitration. People must research the relative questions about the objection to the jurisdiction since it is beneficial to arbitral tribunal hear cases more judicially and improve the efficiency of resolving the dispute.

The jurisdiction of international commercial arbitration is the power granted to the arbitration tribunal by the parties through the arbitration agreement to resolve specific disputes. For international commercial arbitration, jurisdiction is very important and be executed. Article 5 of the New York Convention provides that "recognition or enforcement of the award may be refused if the dispute dealt with is not the subject or not covered by the terms of the award， or if the award contains a decision that falls outside the scope of the arbitration". On the other hand, if the parties in the jurisdiction of international commercial arbitration want to take remedial measures to negate the compulsory effect of the award after the arbitration award is made, the arbitration jurisdiction is an important reason. In other words, the objection to the jurisdiction of international commercial arbitration is to deny the jurisdiction of the arbitration institution or the arbitration tribunal by raising a defense against the authority of the arbitration institution or the arbitration tribunal to hear the case and make the ruling.

2. SELF-ADJUDICATION JURISDICTION THEORY

The core of the theory is that the arbitration organization has the right to make a ruling on the effectiveness of the arbitration agreement and the jurisdiction of the arbitration organization. The theory of self-adjudication jurisdiction comes from the principle of autonomy of will between the parties and the laws of the relevant countries which is generally established in the legislation and practice of various countries [1].

2.1.Court determinism

This theory is based on the relevant provisions of the court exercising jurisdiction over matters falling within its jurisdiction following its national law. The main contents include: before the commencement of the arbitration proceedings, the court may exercise jurisdiction following the law over the dispute under the arbitration agreement. After the arbitration proceedings have begun, the parties may, following the law, bring a suit to the court against the validity of the arbitration agreement and the objection to the jurisdiction of the arbitration institution or the arbitration tribunal. After the arbitral tribunal makes an arbitral award, the parties may, under certain conditions, still have the right to request the court to cancel or reject the arbitral award, recognize and enforce the award.

2.2.The relationship between self-adjudication jurisdiction theory and court determinism

First, arbitral jurisdiction is supported by the relevant arbitration legislation and is practiced by each country. Arbitral institutions or arbitral tribunals have the right to make decisions on their jurisdiction. The jurisdiction of the arbitration tribunal comes from the agreement between the parties. When a dispute arises under an arbitration agreement, the parties shall refer the dispute to the arbitration committee following their agreement in the arbitration agreement. Second, if the parties have any objection to the validity of the arbitration agreement and the jurisdiction of the arbitration tribunal made by the arbitration institution or the arbitration tribunal, they may file a lawsuit with the court of the relevant country, and the court shall make a ruling on the matter. The court's decision is final.

3. THE BASIS OF OBJECTION TO THE JURISDICTION OF INTERNATIONAL COMMERCIAL ARBITRATION

The jurisdiction of arbitration comes from the agreement reached by the parties in a "consensual" manner, but the validity of the agreement is limited by laws and regulations enacted by various countries. From the perspective of legislation and practice of various countries, effective arbitration jurisdiction generally depends on the following factors: First, whether there is an effective and enforceable arbitration agreement between the parties. Second, whether the disputed matter is arbitrable. Third, whether the disputed matters are within the scope of acceptance by the arbitration institution or the arbitration tribunal. Fourth, whether the arbitration institution, the arbitration tribunal or the parties to the arbitration are eligible. Fifth, whether the arbitral Tribunal has properly exercised its jurisdiction [2].

Then, as the objective basis of arbitral jurisdiction, the above factors of confirming effective jurisdiction should be considered in reverse.

3.1.The objection to the arbitration agreement

An arbitration agreement is a written document in which the parties agree to submit their future or existing disputes to an arbitration tribunal for adjudication. The arbitration agreement is the basis for either party to submit the dispute to arbitration. On the one hand, a dispute within the scope of the arbitration agreement occurs, the parties shall not unilaterally bring a lawsuit to the court for the same dispute. On the other hand, the arbitration agreement is also the basis for the arbitration institution and the arbitration tribunal to accept the dispute case and is one of the necessary conditions for the arbitration institution to obtain jurisdiction. Therefore, an effective arbitration agreement directly affects a series of issues such as the jurisdiction of the arbitration tribunal to accept the disputed case, the validity of the arbitration award, and the recognition and enforcement of the award, which is also known as the cornerstone of international commercial arbitration [3]. For example, Article 4, Paragraph 3 of the International Chamber of Commerce Arbitration Rules (1998) expressly stipulates that the parties must submit an arbitration agreement when applying for arbitration; Article 3 of the United Nations Commission on International Trade Law Arbitration Rules (1976) stipulates: Arbitration submitted by the claimant shall include the arbitration articles or the separate arbitration agreement stipulated separately. Therefore, the core role of the arbitration agreement is to establish and safeguard arbitration jurisdiction. The objection to the arbitration agreement, as one of the grounds for the defense of the arbitration jurisdiction, is mainly that the parties propose that the arbitration agreement does not exist or is invalid, and this objection is also the main and most common reason to prevent the arbitration jurisdiction. All countries believe that the validity of an arbitration agreement should be determined by the applicable law of arbitration, but under normal circumstances, the effective effectiveness of arbitration must have at least two elements: form and substance. The objection to the arbitration agreement is usually raised for the lack of

formal or substantive elements of the arbitration agreement. As to the lacking of substantive elements of the arbitration agreement, there are mainly reflected in the following three aspects: (1) The parties to the arbitration agreement do not have the legal qualification and capacity. (2) The parties do not indicate intent to submit the dispute to arbitration3. The subject matter of commercial arbitration agreement is not arbitrable. In the third term, according to the arbitration legislation and practice of various countries, arbitrable matters generally refer to commercial disputes, which are described as "contractual and non-contractual commercial disputes" in the New York Convention. The 1923 Geneva Protocol on Arbitration Clauses limits the matters of an arbitration agreement to "commercial issues or other issues that can be settled by arbitration". The 1958 New York Convention provides for commercial reservations. A State Party may exclude non-commercial disputes from the application of the New York Convention by declaring that "the Convention applies only to disputes arising out of legal relations, whether contractual or not, which are commercial under its law". Signatories, including major trading nations such as the United States, Canada, South Korea, and China, have adopted the reservation. It can be seen that these universal treaties do not specify the boundary between arbitrability and non-arbitrability, but stipulate the scope of arbitrable matters as "commercial legal relations", and each country has the right to interpret the "commercial legal relations" according to its law. Therefore, the arbitrable matters vary from country to country.

3.2.Objection to the scope of accepted cases by arbitration agencies

There are various arbitration institutes in the world. Whether they are permanent or not, they can be divided into permanent arbitration institutions and temporary arbitration. The former is called permanent arbitration institutions by comparison with temporary arbitration. Permanent arbitration institutions play an important role in international commercial arbitration. It has its name, charter, fixed office, and its own arbitration rules. For example, ICC International Court of Arbitration, ICSID, International Center for Settlement of Investment Disputes, LCIA London International Court of Arbitration, CIETAC China Foreign Trade Arbitration Commission, etc. The latter is not a fixed or permanent arbitration institution, but an arbitration form in which the parties directly organize an arbitration tribunal to arbitrate the disputes between the parties through an arbitration agreement. This institution has flexible procedures and is generally responsible for hearing certain specific types of cases. According to the categories of disputes, it can be divided into comprehensive arbitration institutions and industrial arbitration. The former refers to the comprehensive scope of cases, so long as the arbitrable disputes can be submitted to them for settlement. The latter is a specialized arbitration service provided by the international specialized industry organization. Under normal circumstances, the arbitration legislation of various countries does not make specific provisions on the scope of accepted cases by arbitration institutions, but the arbitration rules of each arbitration institution itself provide the scope of accepting cases. For example, Article 1 of the International Chamber of Commerce Arbitration Rules in 1998 defines the function of the ICC Court of Arbitration to settle international commercial disputes by arbitration, but according to the arbitration agreement, the COURT of Arbitration also deals with non-international commercial disputes. The Arbitration Rules of the World Intellectual Property Organization Arbitration Center in 1994 did not specify the scope of accepting cases. The Center can accept not only international intellectual property disputes between private parties but also other disputes. The scope of accepting a case for arbitration is determined by the arbitration organization itself. If the arbitration organization accepts a dispute beyond its competence, the other party may consider the dispute unarbitrable for the arbitration organization, and the arbitration organization does not have jurisdiction.

3.3.Objection to the eligibility of the arbitration institution and the parties

In practice, due to various reasons, although the parties of the arbitration organization in the arbitration agreement or an arbitration tribunal made the convention, there still is controversy whether to accept the arbitration institution or the arbitration tribunal as prescribed by the arbitration institution or the dispute of the arbitration tribunal, if not sure of the arbitration institution accepts the case or the arbitration tribunal is stipulated in the arbitration agreement. The arbitral award may be deemed invalid or not recognized and enforced by the court. Therefore, the objection to the fitness of the arbitration institution is also one of the objections to the determination of arbitration jurisdiction. For example, in the case of the applicant confirming the arbitration agreement of Beijing Mindi Daily Chemical Industry Company and the case of the Invalidation of the arbitration agreement applied by Beijing Enlightenment School, the parties signed the arbitration agreement containing arbitration clauses in 1995 and 1996 respectively, and the arbitration committee selected as Beijing Arbitration Commission. After the dispute occurs between the two parties, the applicant submits the dispute to Beijing Arbitration Commission for arbitration. The respondent considers that the provisions of the arbitration agreement are unclear and invalid because the arbitration commission selected in the arbitration agreement is one more word "city" than the arbitration commission accepted. At that

time, there were two arbitration institutions in Beijing, one was CIETAC and the other was Beijing Arbitration Commission. However, due to the dual-track arbitration system in China at that time, the former handled foreign-related disputes while the latter handled domestic disputes. Therefore, the court held that there was only one arbitration commission in Beijing that accepted domestic arbitration cases at that time, namely Beijing Arbitration Commission, and the objector had submitted a defense to the arbitration commission, so it could be concluded that the arbitration commission stipulated by the parties in the arbitration clauses was a clear conclusion and rejected the objection of the objector's.

4. THE RESOLUTION MECHANISM OF JURISDICTION DISPUTES

To solve the existing problems of jurisdiction, this chapter provides reasonable suggestions to improve the jurisdiction system in global dispute settlement from the perspective of the current successful legislative experience and practices of countries all over the world [4].

The Competence/Competence Principle, also known as the Competence Principle, is mainly developed in the European continent, the last century began to be popular in the 1980s. The theory is thought to stem from a debate in former Federal Germany in the 1950s over whether parties could by agreement give arbitral tribunals the power to make binding decisions about their jurisdiction. Before this principle, once the respondent filed an objection to jurisdiction, the objection had to be brought to court. In this case, the arbitral tribunal can only wait for the court's decision, since the arbitral tribunal has no power to rule on matters of its jurisdiction. In the beginning, when the principle of arbitral tribunal self-adjudicating jurisdiction was put forward, there were many disputes about whether the arbitral tribunal should decide its jurisdiction, or to what extent it has the right to decide its arbitral jurisdiction, and whether it should accept the principle. In 1955 the German High Court held that arbitrators had the power to make final decisions on the scope of the arbitration agreement on which their competence was based. However, the ruling was widely criticized. In 1977, another court of the same court held a different attitude, holding that the parties could only sign an independent agreement to give the arbitrator the power of jurisdiction, and the validity of the agreement still needed to be reviewed by the court. At the same time, English judge P.Devlin gave the judgment in Christopher Brown Ltd v. Gennossenschaft Oesterreichischer Waldbesitzer Holzwirstschafbetribe The law does not require an arbitrator to refuse to perform his duties if his jurisdiction is challenged or questioned. The law also does not require the arbitrators not to make substantive investigations and rulings on the objection before the competent court makes a judgment on the arbitral Tribunal jurisdiction. Instead, the arbitrators continue the arbitration and leave the question of jurisdiction to the competent court. The arbitrator shall not take them either way. The arbitrator is entitled to review the question of his jurisdiction and is not intended to reach any conclusion binding upon the parties. For they don't have this right, instead, to solve the previous problem to prove to the parties if they should continue to arbitrate. However, before the enactment of the United Kingdom Arbitration Act in 1996, many people believed that the competence-competence principle was not universally accepted. Therefore, from the traditional point of view, the parties have an objection to the validity of the arbitration agreement and the jurisdiction of the arbitration tribunal should be decided by the court rather than the arbitration tribunal itself.

With the continuous development of arbitration practice, arbitration, as a highly autonomous commercial dispute settlement mechanism, has been widely adopted and accepted by the international community. To ensure the efficiency and autonomy of arbitration, the traditional views and views of the arbitral tribunal have changed, and the legislation and practice of international commercial arbitration have gradually confirmed the existence of the principle of self-arbitration jurisdiction. For example, the 1961 European Convention on International Commercial Arbitration (hereinafter referred to as the 1961 European Convention) has fully adopted and expanded this principle. In the case where jurisdiction has not been determined, Article 5 (3) of the Convention stipulates that the arbitrator has the right to continue the arbitration and decide on his jurisdiction. While examining the legal effect of the arbitration agreement or determining the validity of the arbitration agreement or the combination of the arbitration agreement as a part thereof. The uniform European Arbitration Act of 1966 took the same approach as the convention. In addition to the Continental European, several worldwide conventions have also adopted this principle [5]. In 1965, for example, the solution to the nation and other countries national investment disputes convention (hereinafter referred to as the Washington Convention) was the first to use the principles of the international convention, the convention according to Article 41, one object to the dispute, think that the dispute does not belong to fall under the jurisdiction of the center, or for other reasons does not belong to the scope of authorization center, should be taken into consideration by the arbitration tribunal, and decide whether to deal with it as a preliminary issue or in conjunction with the substance of the dispute. Subsequently, the Arbitration Rules of the United Nations International Trade Commission and the 1985 Model Law on International Commercial Arbitration (hereinafter referred to as the Model Law) have made

the principle accepted by the major international commercial arbitration bodies and their host countries and become an important principle of modern international commercial arbitration law.

The competence-competence principle is a theory about the power of the arbitral tribunal to decide the objection to jurisdiction, and its main meaning is that the arbitral tribunal has the right to decide its competence. Although today most countries in some form acknowledged the "competence-competence" principle, behind in this agreement, however, as countries for the acceptance of different competence-competence principles, the principle caused many disputes and misunderstandings, and become a problem is quite differences between different legal systems.

However, it should roughly include the following aspects in summary:

(1) The arbitral tribunal shall exercise the decision of objection to the jurisdiction of arbitration on the basis that the arbitration agreement is valid after preliminary or superficial examination, as stipulated in the International Commercial Arbitration Rules of 1998 [6]. The rules prescribed in paragraph 2 of article 6, if the applicant for the existence, validity, or scope of the arbitration agreement, the arbitration court thinks, on the surface, according to the international commercial arbitration rules of the arbitration agreement may exist, the arbitration procedure of the arbitration court may decide to continue, but will not affect the entity and whether should be adopted. As a result, it can be seen that the arbitration agreement is invalid, fails, or cannot implement the arbitration jurisdiction of the court after the preliminary examination was founded by the arbitration organization, arbitration institution will inform the parties to the arbitration procedure cannot take place, in this case, the arbitration tribunal cannot be formed, not to mention to make a judgment to the jurisdiction of the court.

(2) The arbitration tribunal shall have the power to determine its jurisdiction.

The court shall suspend the relevant proceedings until the arbitral tribunal decides on the objection to jurisdiction. Under the "competence-competence" principle, the arbitral tribunal may continue the arbitration proceedings (until a final award is made) if a party contests the existence and validity of the arbitration agreement. That is to say, once the arbitral tribunal decides that it has jurisdiction, it can continue to hear the case until it makes an award. Even if a party objects to the jurisdiction of the court, the arbitration procedure can still be carried out before the court makes a decision [7].

(3) The arbitral tribunal has limited power to decide the objection to the arbitral jurisdiction.

The arbitral tribunal has the right to decide on the objection of jurisdiction raised by the parties. This does not mean that the arbitral tribunal decides the jurisdiction of the arbitration under any circumstances, and the jurisdictional decision of the arbitral tribunal is not final and must be reviewed by the court.

5. SUGGESTIONS ON RESOLVING DISPUTES OVER JURISDICTION IN INTERNATIONAL COMMERCIAL ARBITRATION ARE

5.1. Expand the acceptability of the competence-competence principle

The United States has led the world in affirming this principle, " the combination of the will of the parties and the requirement for effective arbitration led to the acceptance of the jurisdiction/jurisdiction principle." America's First O/tions decision rules will be more entrenched by jurisdiction/jurisdiction principle one step further, its breakthrough lies in for the free agreed by the parties by the arbitrator shall make a final decision provides a possible problem of jurisdiction, there is no doubt that when this possibility into reality can be further meet some biggest desire to save time and cost by the parties. Of course, some scholars worry that the arbitrator's award will get rid of the effective judicial supervision, so that it can not be corrected even if the award is wrong. Such worries are unnecessary. Because for those parties who do not wish to put the jurisdiction issue completely under the control of arbitrators, they still enjoy the freedom not to conclude the above agreement and the right to obtain court relief. Since a party (especially an experienced businessman) voluntarily left the matter entirely to the arbitrator, he must be prepared to suffer adverse consequences, and neither the tribunal nor the court has any reason to violate and interfere with his (and the other party's) will [8]. Specific to different individuals, more attention may be paid to the benefits brought by certain risks, namely, the improvement of efficiency. Within the scope permitted by law, granting more autonomy to the arbitration field is conducive to giving play to the superiority of arbitration. Moreover, to prevent misunderstanding of the parties' intentions, First O/tions judgments require that "clear and obvious" evidence must be provided for the determination of the parties' intentions, which also protects the parties to a large extent. As for the determination of "clear and obvious", although different courts do have differences, American scholars have pointed out that the current judicial interpretation on this issue is tending to be consistent, that is, to the requirement of "clear and obvious" [9].

5.2. Relax the constraints on the substantive elements of an arbitration agreement

As for the content of an effective arbitration agreement, the laws of various countries generally do not make specific provisions [8]. According to the practice of most countries, an arbitration agreement is valid as long as the parties show their willingness to arbitrate. Take the United Kingdom as an example, the British courts have affirmed the validity of the following arbitration clauses: (a) arbitration clauses indicating the will and place of arbitration; (b) a floating arbitration clause specifying which party to choose; (c) An arbitration agreement appointing a non-existent arbitration institution or a wrong arbitration institution. It can be seen that the legislative provisions on the essential elements of arbitration agreements are more about assistance and support for arbitration, rather than strict conditions to restrict it. However, the provisions of China's arbitration law reflect the opposite idea. For example, article 16, Paragraph 2 of China's Arbitration Law stipulates that: "An arbitration agreement shall contain the following contents: (a) expression of intent to request arbitration; (b) matters for arbitration; (c) Selected Arbitration committee "From the above provisions, the substantive elements of China's arbitration agreement must have the above content, one of the three elements is indispensable". "Expression of intention to request arbitration" and "matters to be submitted for arbitration" are the necessary contents of the arbitration agreement recognized by the arbitration systems of various countries, while China has special provisions on the requirement of "selecting an arbitration committee". Article 18 of the Law stipulates: "Where the arbitration matters or the arbitration commission are not prescribed or clearly prescribed in the arbitration agreement, the parties may supplement the agreement; If no supplementary agreement can be reached, the arbitration agreement shall be invalid." Such strict rules run counter to the general practice of the international community [10]. Although, in the judicial practice to this problem has a certain degree of softening treatment, but only in the case of the treatment, therefore, on the provisions of the essential elements of the arbitration agreement, in addition to the parties have a clear arbitration intention, the other content should be submitted to pawn.

6. CONCLUSION

The objection of the jurisdiction in international commercial arbitration is a precursor issue faced by international commercial arbitration. The proper settlement of this issue is an important guarantee for the smooth progress of international commercial arbitration. This paper analyzes the issues related to the objection of the jurisdiction in international commercial arbitration from multiple perspectives and draws corresponding conclusions. First of all, the theoretical basis of determining The jurisdiction of The arbitral tribunal is described, and then The different types of objections to the jurisdiction of international commercial arbitration are described. Second from the Angle of jurisdiction/jurisdiction principles of international commercial arbitration jurisdiction objection to the decision of the attribution is analyzed, through the analysis of the practice, it is concluded that the jurisdiction/jurisdiction principle is widely adopted by countries, reasonable distribution of international commercial arbitration jurisdiction objection handling the conclusion of the ownership principle. Finally, from the perspective of comparison and practice, this paper analyzes the objection of the jurisdiction in international commercial arbitration, deduces that the objective of the more reasonable arbitration of objection of the jurisdiction in international commercial arbitration should be to encourage and support arbitration, and puts forward that competence-competence principle should be expanded through the analysis of the modes of international commercial arbitration in some countries, and should relax the constraints on the substantive elements of an arbitration agreement.

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