The Conflicts and Coordination of the arbitration jurisdiction and judicial jurisdiction

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***Abstract*—The arbitration jurisdiction and judicial jurisdiction is the most important two kinds of jurisdiction of civil and commercial dispute settlement mechanism, and there is overlap in terms of the admissibility of the case scope; In the arbitration jurisdiction and judicial jurisdiction of mutual relations, it has experienced the stage that the judicial jurisdiction excessively intervene and control arbitration jurisdiction and experienced the stage of support and encouragement, in which, jurisdiction theory has played a positive role in easing the conflict between the arbitration jurisdiction and judicial jurisdiction.**

Keywords- Arbitration Jurisdiction Judicial

I. INTRODUCTION

General sense, jurisdiction refers that the legal confers an agency to deal with specific matters qualifications or authority and it is the specific permissions and division of labor of the legal to determinate process between different agencies on matter.

By way of litigation to resolve civil disputes are typical mechanisms of state power to resolve civil disputes. In the legal community, it is the orthodox position. [2]To establish universal jurisdiction law is an important symbol of modern society, and the legal country limit the rights of people to realize their right to self-determination through self-help approach, while giving the rights of holders may be based on the fact of a civil dispute, the right to damages and others to require the State of the Judiciary to exercise the right of the jurisdiction over disputes referee, that the right to appeal. Correspondingly, the judiciary enjoys the broad powers of acceptance, resolving civil disputes submitted by the parties, namely the jurisdiction. Jurisdiction based on the law, is a sign of national jurisdiction and is the most important tool for the country to safeguard social fairness and justice. But at the same time, the state is based on respecting party autonomy allowing the parties a certain range (civil and commercial disputes), have an agreement to ruling their disputes by their own choice of private law tube, arbitration is governed. Since the arbitration proceedings and the proceedings are both dealt with civil and commercial disputes, and couple with that their programs are very similar, such as they both have the stage of the case of the prosecution (application), receiving, hearing, finding facts of the case, the applicable law, the final decision phases and so on, whatever in both theoretical and practical action, it is a very important issue about how to deal with the relationship between arbitral jurisdiction and the jurisdiction.

II. THE ARBITRATION JURISDICTION AND CHARACTERISTICS

Arbitration is a most important extra-judicial dispute resolution system of civil and commercial matter in pluralistic Relief Settlement Mechanism. When using arbitration to hear the case, the most important issue that the tribunal faces is that whether it owns jurisdiction for the case. Arbitral jurisdiction is a power that the tribunal enjoys to hear and make rulings for certain civil and commercial disputes that are agreeably submitted by the parties. It is mainly determined by the autonomy of arbitration, belonging to voluntary jurisdiction, in essence, the arbitration jurisdiction is the dispute jurisdiction that is given to the arbitration tribunal by the parties through agreement. But at the same time, state law also has jurisdiction over the arbitration role of supervision and regulation. In arbitration of legislation and practice, it is a very important issue.

It features mainly for the following aspects.

A. The desirability of the jurisdiction agreement

From the perspective of the jurisdiction of the view, the arbitration jurisdiction is based on the wishes of the parties, that the arbitration agreement is agreed by the parties belonging to jurisdiction agreement, and believes that "no consensus, no jurisdiction." In practice, whether the tribunal has jurisdiction over a case, and to what extent the parties have jurisdiction over the arbitration agreement is governed by the constraints. It will not take effect on the law when the arbitral tribunal exceeded the scope of the parties' agreement of exercise jurisdiction.

B. The authorization of the arbitration clause

From the scope of the arbitration, the arbitration process in case is the civil and commercial case that the parties can dispose of their own, which is mainly the civil and commercial contract disputes, The parties often take the form of an arbitration clause contained in the contract to empower arbitration institutions to have arbitration power.

C. The end of the mandate of arbitrary

Since the parties may authorize the tribunal to exercise jurisdiction, they can also desire to recover this authorization by the form of express or implied at any stage, so that it make the tribunal has no jurisdiction over the arbitration. For example, in 1999, "the Swedish Arbitration Act" stipulates that the acts that the parties do not specify the arbitrator or pay the costs of arbitration of required and others are deemed to the implied behavior of waiving the arbitration agreement. As long as the other party prosecutes to the appropriate court then the arbitration agreement was deemed to have waived, and the jurisdiction of the arbitral tribunal would be gone;

D. Restricting consensual sex of parties

The exercise of jurisdiction is restricted by the parties of the arbitration desirable. The arbitration jurisdiction runs only in accordance with the jurisdiction of the arbitration agreement between the parties setting, or in accordance with the Arbitration Rules of the agreement to determine the set of arbitration proceedings, and violating this kind of program effectiveness will result in damage awards.

E. Disposal of private rights

The parties to the extent permitted by law, it is a contractual arrangement in the nature of the behavior of the parties using the power to resolve the dispute through arbitration consensual judges to the private sector on its trust, reflecting the principle of autonomy of the parties in their own private rights of action. Thus, the exercise of jurisdiction over the arbitration has been greatly restricted, and had to resort to the assistance of competent jurisdiction. Such as the implementation of arbitration property preservation, preservation of evidence and other measures, the compulsory attendance of witnesses, and the recognition and enforcement of arbitral awards and other aspects, it needs the support and assistance of competent jurisdiction.

III. JURISDICTION AND CHARACTERISTICS

In essence, the jurisdiction achieve the purpose of resolving disputes of private rights by the form of public power for private national power of intervention, and the jurisdiction is determined by emphasis on the involvement of national force to ensure the realization of the rights of the parties, therefore, with strict standardized, mandatory and extensive features.

A. The normative judicial jurisdiction

Normative jurisdiction mainly perform that it directly comes form the low, without authorization parties, so its exercise and operation has strict normative. Every aspect of the process has strict regulations to limit the arbitrary and maintain fair. Unless the law expressly provides that the agreement may not be changed by the parties, it shall be arbitrarily disposed of by the judge.

B. Mandatory jurisdiction

Compulsory jurisdiction of the first in the compulsory jurisdiction of the Civil Procedure Law provide that all countries, as long as the party sued, and meet the conditions for prosecution, the court will gain the jurisdiction over the case, regardless of whether the consent of the other party; In addition, in the proceedings, in order to ensure the smooth implementation of the jurisdiction of the court, the court enjoys broad powers to take enforcement measures.

C. Extensive jurisdiction

Extensive jurisdiction mainly perform in the range of case acceptance, as long as the property in dispute and personal relations between equal entities generated the court shall have jurisdiction. Because of this, along with the development of society, the emergence of new types of social contradictions mostly is properly resolved through legal channel.

IV. THE ARBITRATION JURISDICTION AND THE JURISDICTION OF THE MUTUAL RELATIONSHIP BETWEEN THE HISTORY - JURISDICTION TO ARBITRAL JURISDICTION OVER THE INTERVENTION AND CONTROL

According to the traditional theory of jurisdiction, the jurisdiction given by the state law is the exclusive powers of the judiciary, and it has important significance on the fair protection of fundamental rights of citizens. Thus, although it is a autonomy of behavior that the parties independently deal with the private right by arbitration sanction to resolve disputes, there is no doubt that it should be subject to supervision and control of jurisdiction, and the supervision and control can not be excluded by the agreement of the parties. In the presence of the parties having agreement or disagreement on the validity of arbitration, it shall be governed by a court of competent jurisdiction rather than the arbitral tribunal, and should make a decision on the parties' opposition. According to this theory, the basis of the tribunal to exercise jurisdiction is consensual arbitration, and When the parties have argument on the existence of the arbitration agreement or whether the arbitration agreement is effective or not, the arbitration tribunal's jurisdiction also cannot be determined, if the arbitration tribunal is allowed to review on the existence of the arbitration agreement or whether the arbitration agreement is effective or not, and make a decision that the agreement does not exist or is not effective. Then once the arbitral tribunal finds that there is no agreement, the arbitral tribunal accordingly has no jurisdiction on the case. Based on the above understanding, at the beginning of the arbitration system recognized, most national courts hade biased on arbitration and jurisdiction has multifaceted intervention on arbitration jurisdiction to strengthen judicial control on arbitration. [3]

Such as, Britain has pursued the principle that the jurisdiction is inalienable for a long time, and Swedish courts often set jurisdiction of the arbitral tribunal of conferred by the parties to disregard and force the decision that the courts directly have jurisdiction over the civil and commercial disputes between the parties, so that the overriding jurisdiction in the absolute power of jurisdiction over the arbitration. [4]It can be said, at this stage, that the arbitration

jurisdiction is strictly supervised and controlled by jurisdiction, in a subordinate position.

V. THE NEW DEVELOPMENT OF THE MUTUAL RELATIONS BETWEEN THE ARBITRAL JURISDICTION AND THE JURISDICTION - SUICIDES JURISDICTION

Although the jurisdiction to interfere with the jurisdiction and control of the arbitration proceedings consistent with the traditional theory, but the situation that the jurisdiction excessively intervenes the arbitration jurisdiction is against the wishes of the parties after all, and it is not conducive to achieving the target value of arbitration and interfere with the advantages of arbitration to fundamentally solve the play, which is not conducive to civil and commercial disputes. Since the 20th century, the rapid development of the world economy and trade, and the arbitration system that highly fits the market economy kernel, begin to receive the widespread attention around the world. In this case, the laws of various countries gradually begin to recognize that the parties have the right to let their disputes be delivered to their own selected referee to arbitrate by the arbitration agreement in the scope of self-government, and the arbitral jurisdiction will be given more and more attention. In 1923, "the Geneva Protocol on Arbitration Clauses," as a symbol, the arbitration jurisdiction gradually gained relatively equal footing with the jurisdiction. After, 1958, "New York Convention" and 1985, "the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration" were introduced, which greatly strengthened the exercise of jurisdiction of the arbitration, to the mid-1990s, with a worldwide trend of modification of Arbitration Law, including the 1996 "British Arbitration Act", 1998 "German Arbitration Law" (Chapter 10, "German Code of Civil Procedure"), and in 1999, "the Swedish Arbitration Act" and others, many countries have modified their national arbitration law, and a number of arbitration legislation that is more responsive to the development trend of the arbitration award and more in line with the concept of the arbitration shows in front of people, and it gradually formed a theory of the independence of the arbitration clause and the jurisdiction of the arbitral tribunal suicides, etc. Therefore, the theoretical system of the relationship between arbitration jurisdiction and judicial jurisdiction has been formed.

Suicides jurisdiction theory believes that in the course of the arbitral tribunal exercising jurisdiction of the arbitration, for the parties to the arbitration jurisdiction objection, the arbitration tribunal shall make the decision, which is the part of the arbitration jurisdiction. This power is given by the parties through the arbitration agreement, and it and the entity have the power to award the arbitral tribunal disputes which should be considered as the basic rights that is inherent to the arbitral tribunal and is essential to cut disputes.

The practice of the suicides jurisdiction arises in the 1950s, when the High Court of the Federal Republic of Germany made a decision about the argument that aims at "the parties the possibility of granting an arbitrator by agreement of its jurisdiction to make binding decisions have the power to", and the debate ruling confirmed the arbitrator that is entitled to judgment the scope of its authority as the basis of a decision of the arbitration agreement. [5]Prior to the decision about the validity of an arbitration agreement the court only enjoyed. Since then, the British judge leather • Devlin (per Devlin) in Christopher Brown Ltd. V. Genossenschafft Oesterreichischer Waldbesitzer Holzwirtschafbetribe a case jurisdiction of the arbitral tribunal has made a convincing reasoning for "law does not require that when the arbitrator was opposed or questioned in his jurisdiction he can refuse to perform their duties. Law also does not require that the court can make a decision before the Court of jurisdiction on the issue to arbitration and the arbitrator may not make a substantive objection to the jurisdiction of the arbitrator to investigate and make a ruling, but continued to arbitration, leaving the jurisdiction to a court of competent jurisdiction to decide. Arbitrators have no obligation to take any of the above approach. Arbitrator is entitled to examine whether they have jurisdiction on the issue, and the purpose is not to draw any conclusions that are binding on the parties, but as a question in advance to the parties that they should precede with the arbitration".[6] 1955 International Chamber of Commerce of Court of Arbitration officially applied suicides of the jurisdiction of the doctrine to the arbitration practice in its "ICC Rules". [7]Then, in 1961, "the European Convention on International Commercial Arbitration," 1966 "European unification Arbitration Law" and other European legislation clearly states: the jurisdiction of the arbitrator has not been determined, they have the right to proceed with the arbitration, and make their own jurisdiction decisions, and decide the arbitration agreement or the contract including arbitration agreement on the existence of the arbitration agreement or whether the arbitration agreement is effective or not, but shall be subject to subsequent judicial oversight required by the law of arbitration. [8]The above shows that the legislative jurisdiction of the arbitral tribunal suicides has been recognized at the international level. In 1965, "the Washington Convention" also confirmed: one on objections raised by the dispute believed that the dispute does not fall within the jurisdiction of the Centre or it does not belong to the competence of the court for other reasons, so the court should consider and decide whether it is a precedent problem that should be dealt with, or deal with the substantive issues of the dispute together. [9]The "CITES" as a universal convention recognized that the jurisdiction suicides has the importance of its development, and it makes suicides jurisdiction developed in Europe be promoted in a greater range and be recognized by more countries.

In 1985, the "Model Law" had accepted the jurisdiction of the suicides theory, and "the Model Law" Article 16 had the detailed specification of the jurisdiction of the arbitral tribunal. That the arbitral tribunal may rule on its own jurisdiction, including making a decision on any objections existence or validity of an arbitration agreement. About the relationship between the question of jurisdiction and jurisdiction, "the Model Law" also stipulates that the arbitral tribunal have the power to rule on the validity of the arbitration agreement as well as its own jurisdiction. Moreover, in the specific operation, the tribunal can either

make a preliminary ruling on the validity of the arbitration agreement and its jurisdiction in the arbitration proceedings or make a decision on the issue in the final award. "Model Law" of these provisions has greatly enriched the content of the jurisdiction of the suicides, which has become the most representative and the most classic formulation on suicides jurisdiction and then it has been adopted by reference or a number of international and domestic arbitration legislation as well as major international arbitration institutions. Make it become an important development in modern international commercial arbitration law. [10]

Currently, the suicides jurisdiction of the arbitral tribunal has been widely adopted by international and domestic arbitration legislation and arbitration practice, and the tribunal has the right to decide an arbitration agreement and the effectiveness of its own jurisdiction, which is known as an important achievement of modern arbitration and has become a basic principle of arbitration law.[11]

VI. THE ROLE OF SUICIDES JURISDICTION IN THE COORDINATION OF JURISDICTION AND THE JURISDICTION OF ARBITRATION

The Suicides jurisdiction from the arbitration practice, because it has adapted to the needs of civil and commercial arbitration practice and activities, so it is widely accepted. The suicides jurisdiction theory makes the arbitral tribunal no longer have to interrupt the arbitration proceedings, recourse to the jurisdiction, and can determine their own jurisdiction alone for a party to challenge the validity of an arbitration agreement in the arbitration proceedings. This allows the arbitration proceedings can smoothly and favorably run under the control of the parties and the arbitrator, so that it can make the arbitration resolve disputes on the relatively independent basis of autonomy. For the jurisdictional issues often encountered in the practice of arbitration, such as a party submits to arbitration under the arbitration agreement on the dispute, and the other party challenges the validity of the arbitration agreement, the arbitral tribunal has the power to make a ruling on the opposition parties. In fact, the arbitral tribunal usually has two options, namely making a preliminary ruling or deciding in the final ruling. While in accordance with the provisions of the arbitration legislation in most countries, if the arbitral tribunal makes a preliminary ruling, while the other party refuses to accept this award, within a certain time limit prescribed by law, it may appeal to the Judiciary, and this objection to jurisdiction will be reviewed and finally decided by the Judiciary. And if the arbitral tribunal makes a decision in the final ruling of the opposition, then the court can only review at the end of the arbitration proceedings. But if the parties do not raise objections to the jurisdiction of the arbitral tribunal and directly raise to the court at the start of the program or before arbitration, of course, the court has the right to make a decision based on the jurisdiction, and the core of the problem is that the parties to the court objection to jurisdiction does not affect the normal conduct of the arbitration proceedings, as long as the arbitral tribunal considers himself to have jurisdiction of the case, it may continue the proceedings.

Powers of the arbitral tribunal and the validity of an arbitration agreement of its own jurisdiction to rule, which is not absolute and no restriction of powers, And any possible abuse of power of the tribunal will be supervised by the courts of arbitration, enforcement of judgments and the revocation of applying. For example, "the Model Law" in the provisions of Article 16, "The arbitral tribunal may rule on its own jurisdiction to make a decision, including any objections to the existence or validity of an arbitration agreement," while also stipulates that "after receive a ruling notification, any party may ask the court to make a decision on this issue within 30 days." That is the final decision on this issue is still in the hands of the courts. In fact, the arbitration legislation in most countries of the world is requiring that the court has the power for judicial review for the validity of an arbitration agreement under certain conditions. For example, Swiss law stipulates that the arbitral tribunal declares that they have no jurisdiction or intermediate ruling, and the parties may file a lawsuit to the court ruling invalid immediately.[12]

As Professor Gordon • Van • Berg (AJvan den Berg) has pointed out: the key to suicides jurisdiction is not whether to give the arbitral tribunal final effect of the decision, nor whether determine to the complete exclusion of the jurisdiction of the arbitral authority, but rather limits the time and conditions of court intervention arbitration jurisdiction. [13]The theory does not mean that "as long as there is an arbitration agreement between the parties given, the court shall submit the dispute to arbitration to resolve, and the court has no right to intervene that the arbitration agreement exists or is effective or not. The court on the admissibility of the dispute, as a defense the disputes shall be submitted to arbitration as long as there is prima facie evidence of the existence of the arbitration agreement in court, we should give priority to the jurisdiction of the arbitral tribunal, and the arbitration tribunal shall decide whether or not effective under its jurisdiction." [14]In fact, we believe that these ideas are clearly not consistent with the basic theory of jurisdiction. For example, after the Court has accepted the case related to the arbitration agreement, a party challenges the court's jurisdiction on the grounds of the existence of to an arbitration agreement, in the case that the Court makes no substantive examination, that order the parties to submit to arbitration; While after the arbitral tribunal hearing if he thinks the arbitration agreement is invalid or the arbitral tribunal does not have jurisdiction, the parties can only be filed in court again; And if the arbitral tribunal considers the arbitration agreement is valid and makes a verdict after hearing, but the other party grounds that the arbitration agreement is invalid or tribunal no jurisdiction for rescission of the award, and the court finally confirms that the arbitral tribunal does not have jurisdiction after hearing, and ultimately revoked the arbitration award. So toss coming and going, the parties will inevitably spend more time and money.

In fact, the effect of the suicides jurisdiction of the arbitral tribunal is not whether it has excluded the jurisdiction of the court but it just breaks through the

traditional jurisdiction of the theory, gives the arbitral tribunal the power to determine their own jurisdiction, and makes the court delay the time of intervention in the arbitral process, thus greatly improves the efficiency of the arbitration proceedings.

REFERENCES

[1] Hou Denghua, male, Shanxi Xiaoyi people, (1966,5 -), Han, China University of Politics and Law, Dr. lawsuit, now unit: Beijing University of Science and Technology, Associate Professor of Law, research direction: the judicial system, the Arbitration Law, Civil Procedure Law; Zhao Yingxue, female, Shihezi person (1989,11 -), Han, Master of Laws 2013 Beijing University of Science and Technology (Law) Graduate

[2] Jiang Wei editing: "the principle of civil law," the People's University of China Press, 1999 edition, page 10

[3] Zhao Jean writing: "International Commercial Arbitration judicial supervision", Law Press, 2000 edition, page 18

[4] [English] Shimituofu book, Zhao Xiuwen translation, "International Trade anthology" Encyclopedia of China Publishing House, 1993, pp. 605-608

[5] A. Samuel Jurisdictional Problems in International Commercial Arbitration, Sweet & Maxwell (1989), at 179

[6] Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration, Sweet & Maxwell Third edition (1999), at 265

[7] Zhao Xiuwen book: "International Commercial Arbitration and applicable law research", Peking University Press, 2002, page 41

[8] 1961 "The European Convention on International Commercial Arbitration" Article 5, 1966 "European unification Arbitration Law" Article 18

[9] Article 41, paragraph 2, 1965 "to resolve his country and disputes between nationals of the Convention on investment."

[10] Strychnine Song Lianbin: "Assessment of the jurisdiction of the International Commercial Arbitration principles" set out in the "Law Review" 2000 Section 2, page 96

[11] Zhao Jian writing: "International Commercial Arbitration judicial supervision", Law Press, 2000 edition, page 89

[12] [English] Shimituofu book, Zhao Xiuwen translation, "International Trade anthology" Encyclopedia of China Publishing House, 1993 edition, page 644

[13] Albert Jan van den Berg, Commentary on the UNCITRAL Model Law on International Commercial Arbitration, Kluwer Law & Taxation Publishers (1990), at74

[14] Song Lianbin writing: "International Commercial Arbitration Jurisdiction research", Law Press, 2000, pp. 212-213