研究ノート

Appointment of Arbitrators on the UNCITRAL Model Law on International Commercial Arbitration

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1 Introduction

This note aims to review the court decisions on appointing of arbitrators contained in the Draft Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration（hereinafter referred to “Model Law”）which was introduced in the Law Centre for European and International Cooperation（R.I.Z.)/ United Nations Commission on International Trade Law（UNCITRAL)/ German Institution of Arbitration（DIS）- Conference Officially Presenting the ”Draft Digest on the UNCITRAL Model Law on International Arbitration” held on 3－4 March 2005, Cologne, Germany.(1)

The review on the court decisions extends to such issues as appointment of arbitrators,(2) appointment of substitute arbitrators(3) and irregular-

ity in the composition of the arbitral tribunal as a ground for setting aside and refusal of recognition or enforcement of an arbitral award.(4)

2　General View on the Appointment of Arbitrators

Article 11 of the Model Law ensures party autonomy in the procedure of appointing arbitrators as well as court assistance to a party in the appointment of arbitrators so that the arbitration proceeds smoothly and effectively towards settlement of the dispute between the parties. The court decisions in Germany confirm such autonomy and allow for a broad interpretation of the provisions of the Model Law on court assistance in appointing arbitrators in order to avoid a deadlock in the establishment of an arbitral tribunal.(5)

In connection with the appointment of arbitrators, one court decision in Australia concerning the substitution of an arbitrator under Article 15 confirms that an arbitrator appointed by a party can resign without the agreement of the other party and the appointing party can appoint a replacement unilaterally.(6) In this case, a dispute about a reinsurance contract between plaintiff and defendant was referred to arbitration pursuant to the agreement of the parties. Three arbitrators were appointed and a date for hearing was fixed. However, the arbitrator appointed by the plaintiff advised the plaintiff that he could not attend the hearing at its date and mentioned in his fax that “I would of course be prepared to resign the appointment to enable the appointment of another arbitrator if this were to be preferred. I await your further advices.” The plaintiff accepted the resignation and proposed to nominate a new arbitrator. On the other hand, however, the defendant re-

jected such resignation and it was an issue whether an arbitrator can resign unilaterally or not. The court held that "Reading the model law as a whole, and particularly article 15 as a whole,…It seems to me that an arbitrator may take steps that might have the effect that he or she will withdraw from office and that if this happens the party appointing that arbitrator is then able to appoint a fresh arbitrator unilaterally." The Court further held that "As I read the model law, an arbitrator nominated by party A might offer to withdraw and make that offer to party A alone and party A, acting alone, might accept that offer to withdraw. It does not seem to me that the agreement of party B is necessary or that party A is obliged to consult party B about the matter at all." It is worthy of attention that the court confirms the position of the Model Law that an arbitrator can resign without good cause.(7) In connection with the appointment of substitute arbitrator, the court in Australia confirms that the mandate of an arbitrator can be terminated only by agreement of the parties.(8)

In addition, it is generally recognized that if a party does not raise a timely objection to the irregularities of the composition of the arbitral tribunal, it will lose its right to object in subsequent court proceedings such as the enforcement of the arbitral award, and this view is supported by the court decision in Hong Kong.(9)

With respect to the above points, there seems to be no particular issue to be raised for further consideration. Instead, the issues to be considered in the court decisions on the appointment of arbitrators can be found in the area of the court proceedings of the appointment of arbitrators and are summarized below.

3　Review on the Existence of a Valid Arbitration Agreement in the Appointment of Arbitrators by the Court

If, pursuant to Article 11(3) and (4) of the Model Law, a party requests the court to appoint an arbitrator, which, in most cases, involves a party seeking the appointment of an arbitrator of the opposing party, there is an issue as to the extent to which the court should review the existence of a valid arbitration agreement between the parties, particularly in comparison with the case in which the court on the merits is faced with the same issue if a defendant, alleging that there is a valid arbitration agreement between the parties, challenges the jurisdiction of the court.

It is found in the court decisions in Hong Kong that the court does not engage in a full review of the existence of a valid arbitration agreement between the parties and appoints an arbitrator and based upon such positions, in order to obtain from the court assistance in appointing an arbitrator, the party is not required to prove such existence. In Pacific International Lines (Pte) Ltd and Another v Tsinliens Metals and Minerals Co (HK) Ltd,[10] the dispute over charterparty arose and the plaintiff requested the court to appoint an arbitrator on behalf of the defendant pursuant to Article 11(4) of the Model Law and the defendant invited the court not to appoint an arbitrator on the ground that there was no arbitration agreement in writing between the parties as required by Article 7(2) of the Model Law. The court held that "[i]f I am satisfied that there is a plainly arguable case to support proposition

that there was an arbitration agreement which complies with Article 7 of the Model Law, I should proceed to appoint the arbitrator in the full knowledge that defendants will not be precluded from raising the point before the arbitrator and having matter re-considered by the court consequent upon that preliminary ruling," and then proceed to allow the dependent 7 days to appoint their own arbitrator before appointing such arbitrator.

On the other hand, it can be argued that without a valid arbitration agreement between the parties, no arbitration can proceed and that if the court assists the party in appointing an arbitrator, it must first ascertain whether a valid arbitration agreement exists between the parties. In such a case, the court will conduct a complete review of the existence of a valid arbitration agreement. In fact, the German court has such a position.(11)

It is submitted that the position taken by the court in Hong Kong is correct because the task which the court is requested to undertake is not to determine the existence of a valid arbitration agreement, but instead to assist the party in appointing an arbitrator. The determination of the existence of a valid arbitration agreement is incidental to the appointment of an arbitrator and where the appointment of arbitrators is sought, it would be unnecessary for the court to devote considerable amounts of time and money to a complete review of the existence of a valid arbitration agreement.(12)

As explained in the above Hong Kong court decision, if the existence or validity of the arbitration agreement is at issue at the time when the appointment of an arbitrator is sought from the court, it sho-

uld be dealt with in the framework of arbitral proceedings. Under Article 16[(13)] of the Model Law, the arbitral tribunal will make its decision on this issue, and thus the party objecting to the existence or validity of the arbitration agreement will not be precluded from raising this point before the arbitral tribunal, and the decision affirming its jurisdiction can be reviewed by the competent court. Thus, it is concluded that the appointment of an arbitrator made by the court is so essential that an arbitral tribunal must determine the existence or validity of the arbitration agreement. In addition, it should be noted that there are no express provisions in Article 11 of the Model Law that the court can assist a party in appointing arbitrators only if it finds that there is a valid arbitration agreement between the parties.

On the contrary, in a case in which the court on the merits is faced with the issue of the existence or validity of an arbitration agreement, the decision on this issue is crucial because it will determine the way that the dispute is settled, whether or not the dispute should be referred to arbitration. In such a case, as a rule, the court will conduct a complete review on the existence of a valid arbitration agreement.[(14)]

It is concluded that in the case where the court assists a party in appointing an arbitrator, a complete review of existence of a valid arbitration agreement should not be made and instead only a prima facie review should be allowed.

4　Costs for Appointment of Arbitrators by the Court

In the court proceedings of the appointment of arbitrators, there is an issue concerning the circumstances in which the court grants the

cost order on an indemnity basis instead of an ordinary basis. The court in Hong Kong holds the position that the cost order on an indemnity basis is granted if the conduct of the opposing party refusing to appoint an arbitrator can be categorized as abuse of process, vexatious or frivolous.[15] This position seems appropriate and if the party fails without good reason to cooperate in the appointment of an arbitrator, it will bear the blame for such conduct and the cost order on an indemnity basis should apply. Thus, if it is clear and beyond doubt that there is a valid arbitration agreement between the parties, there is no compelling reason for the party not to cooperate, and the party cannot make any excuses. It is submitted, however, that if it is neither clear nor beyond doubt that there is a valid arbitration agreement between the parties, the party in default of appointing an arbitrator can not be held accountable for refusing to cooperate in the appointment because such obligation may arise only from the existence of a valid arbitration agreement. Under such circumstances, even if the opposing party takes no part whatsoever in the arbitral proceedings, it would be unreasonable to impose on the defaulting party to cooperate in the appointment of an arbitrator, and thus, the cost order on a normal basis should apply.

Under Article 11(5), the decision of appointing an arbitrator made by the court is subject to no appeal, but the Hong Kong court properly held that appeal for the decision could be allowed if it was made on the cost order in connection with the court proceedings of appointment of an arbitrator where the existence of a valid arbitration agreement was at issue in the dispute between the parties.[16]

5　Considerations by Court on Appointment of Arbitrator

In appointing an arbitrator on behalf of the defendant, under Article 11(5) of the Model Law, the court in Hong Kong provided the defendant a final chance to appoint their own arbitrators, consisting of three arbitrators, thereby avoiding a situation in which a defendant feels unfairly treated, which might adversely impact the entire arbitration process, and the court refrained from appointing an arbitrator to whom the defendant might object, thus ensuring that there is no sense of grievance.[17] If the court appoints an arbitrator on behalf of the party, such measures are not expressly provided for in the provisions of Article 11(5), but it is a rightful exercise of the discretion by the court and thus reasonable, so that the party should be satisfied with the arbitrator, whom it originally had the right to appoint, as appointed by the court.

In the practice of international arbitration, the nationality of the third arbitrator or a sole arbitrator is of extreme importance, and it is usually the case that nationals from a third country are appointed. Thus, based on the lesson from the Canadian case,[18] in case of appointing an arbitrator under Article 11(5), the court should follow this practice and appoint an arbitrator whose nationality is different from those of the parties involved, unless otherwise agreed by the parties.

As noted above, it is submitted that if the court appoints an arbitrator under Article 11, it should exercise its discretion to appoint the most suitable arbitrator for the case.

6 Conclusion

As noted above, with respect to the appointment of arbitrators under the Model Law, the case law has been developed in the Model Law jurisdictions and among them, it seems to be most important and controversial to what extent the court reviews the existence of a valid arbitration agreement in the proceedings of the appointment of arbitrators. There are two differing views, one is a full review and the other is a prima facie review of the existence of a valid arbitration agreement and it is concluded that the latter position is appropriate because what the court is sought from the party is not to determine the existence or validity of the arbitration agreement but to assist the party to appoint an arbitrator in order to proceed with the arbitral proceedings.

Lastly, the court decisions even on the appointment of arbitrators is not so sufficient as to find common rules from them and we should continue to see further development of the case law in the Model Law jurisdictions.

（1） The author was one of the discussants in this conference and reported on appointment of arbitrators. This paper is prepared based upon his oral presentation in the conference.

（2） Article 11 of the Model Law provides for appointment of arbitrators:

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitra-

tor or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject

to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

（3） Article 15 of the Model law provides for appointment of substitute arbitrators:

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

（4） Article 34(2)(a)(iv) of the Model Law provides for irregularities in the appointment of the arbitral tribunal as a ground for setting aside of an arbitral award:

the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law

Similarly, Article 36(1)(a)(iv) provides for irregularities in the appointment of the arbitral tribunal as a ground for refusal of recognition or enforcement of an arbitral award:

the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agree-

ment, was not in accordance with the law of the country where the arbitration took place; or

（5）Oberlandesgericht Dresden, Germany, 11 Sch 01/01, 28 Februar 2000; Bayerisches Oberstes Landesgericht, Germany, 4 Z SchH 09/01, 16 February 2002; Kammergericht Berlin, Germany, 23/29 Sch 16/01, 26 June 2001; Bayerisches Oberstes Landesgericht, Germany, 4 Z SchH 04/02, 13 May 2002; Bayerisches Oberstes Landesgericht, Germany, 4 Z SchH 12/99, 20 June 2000; Case Law on UNCITRAL Texts（hereinafter referred to "CLOUT"）case No. 439［Brandenburgisches Oberlandesgericht, Germany, 26 June 2000］; Bayerisches Oberstes Landesgericht, Germany, 4 Z SchH 02/98, 16 September 1998; Hanseatische Oberlandesgericht Hamburg, Germany, 14 Sch 02/98, 22 July 1998; CLOUT case No. 436［Bayerisches Oberstes Landesgericht, Germany, 24 February 1999］.

（6）Gordian Runoff Ltd v Underwriting Members of Lloyd's Syndicates, ［2002］NSWSC 1260.

（7）It is noted that from the contractual nature of the relationship between the parties and the arbitrator, the arbitrator is not allowed to resign without good cause. In this respect, *see* Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, Comparative International Commercial Arbitration（Kluwer Law International, 2003）, para. 12–15 *et seq*.

（8）Alberta Court of Queen's Bench Judicial District of Calgary, *Petro-Canada et al. v. Alberta Gas Ethylene Co. Ltd. et al*., July 12, 1991 and Alberta Court of Appeal, *Petro-Canada et al. v. Alberta Gas Ethylene Co. Ltd. et al*., January 28, 1992.

（9）CLOUT case No. 76［High Court of Hong Kong, 13 July 1994］.

（10）CLOUT case No. 40［High Court of Hong Kong, 30 July 1992］. *See also* CLOUT case No. 62［High Court of Hong Kong, 2 February 1994］; CLOUT case No. 101［High Court of Hong Kong, 27 January 1995］; CLOUT case No. 109［Court of Appeal, Hong Kong, 7 July 1995］.

（11）CLOUT case No. 438［Bayerisches Oberstes Landesgericht, Germany, 4 June 1999］; Bayerisches Oberstes Landesgericht, Germany, 4 Z SchH 01/01, 23 February 2001. In this respect, *see* Lew, Mistelis and Kröll, *su-*

pra note 7, para.14–78.

(12) *See* LEW, MISTELIS AND KRÖLL, *supra note* 7, para.14–78.

(13) Article 16 of the Model Law provides:

> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
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> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
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> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(14) In case in which the court proceedings internationally compete with the arbitral proceedings, it will need different considerations. In this re-

spect, *see* Tatsuya Nakamura, Parallel Proceedings Before An Arbitral Tribunal And A National Court From The Perspective Of The UNCITRAL Model Law, 19(7) Mealey's Intl Arb Report 23 (2004).

(15) CLOUT case No. 62. *See* CLOUT case No. 101; CLOUT case No. 59 [High Court of Hong Kong, 28 September 1993]; CLOUT case No. 60 [High Court of Hong Kong, 6 October 1993].

(16) CLOUT case No. 109.

(17) CLOUT case No. 40; CLOUT case No. 20 [High Court of Hong Kong, 29 October 1991].

(18) British Columbia Supreme Court, Canada, *Nippon Steel Corporation, et al. v. Quintette Coal Limited*, 24 March 1988, unpublished – Vancouver Registry No. A880290; [1988] B.C.J. No. 492.