Final Settlement of Disputes on Existence and Arbitration Agreements under the Of Effect of UNCITRAL Model Law

Submitted By

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1- Introduction

Arbitration is a means of the settlement of disputes between the parties and the arbitrators chosen by the parties decide the substantive issues in dispute. However, in arbitral proceedings, apart from the substantive issues, the respondent party, alleging that there is no valid arbitration agreement between the parties, raises an objection to the jurisdiction of the arbitral tribunal. In a recent arbitration case filed with the Japan Commercial Arbitration Association (JCAA) in which a Japanese company commenced the arbitration against an Indian company for the payment of the sales amount based on the arbitration clause contained in the agency agreement, and in response the Indian company raised the objection that there was no jurisdiction of the JCAA arbitration because the arbitration clause in the agreement provides that "the Principal and the Agent hereby agree that any dispute arising out of or in connection.

with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Tokyo, Japan in accordance

with the Arbitration Rules of the Arbitration Institute, Ministry of Justice (Japan) for the time being in force, which Rules are deemed to be incorporated by reference into this Clause…."(underline added). It is true that there is no such arbitral institution named "Arbitration Institute, Ministry of Justice" and nor does the Japanese Ministry of Justice administer any arbitration. However, in this case the arbitral tribunal determined that there existed an arbitration agreement between the parties to refer the dispute to the JCAA arbitration particularly because there clearly was an arbitration agreement between the parties and also in Japan there is no other arbitral institution than the JCAA usually dealing with international commercial disputes. Regrettably, however, this case did not end by the decision by the arbitral tribunal and instead the Indian party brought an action in its place to seek a declaratory judgment to confirm no JCAA arbitration agreement between the parties as well as anti-arbitration injunction against the Japanese party, the arbitrator and the JCAA.

This is one of the examples of the pathological arbitration clause but in varying degrees of the defects in an arbitration agreement, such pathological clauses often take place in practice. In such case or even in the case where no such defect exists in the arbitration agreement, where alleging that the arbitration agreement will not extend to the dispute for which the claimant demands arbitration, the respondent party disputes the scope of the arbitration agreement. If the respondent party disputes the existence and effect of the arbitration agreement between the parties, such jurisdictional dispute must be settled before the substantive dispute is settled by the arbitral award because, needless to say, there is no arbitral award on the merits without the existence of a valid arbitration agreement. In other words it is essential and a prerequisite for the dispute regarding jurisdictional issues to be

finally settled in order for the dispute regarding substantive issues to be finally determined by the arbitral award.

As discussed below, under the new Japanese Arbitration Law which is based on the UNCITRAL Model Law on International Commercial Arbitration (hereinafter called "Model Law"), the jurisdictional dispute cannot be finally settled in arbitral proceedings and even under the Model Law, if the arbitral tribunal denies its jurisdiction, the jurisdictional dispute cannot be finally settled in arbitral proceedings. It therefore will address below this issue and consider how the Model Law as well as the Japanese Arbitration Law finally settle the dispute on the existence and effect of an arbitration agreement between the parties, which often takes place in practice of arbitral proceedings.

2- Disputes in Arbitral Proceedings

2.1Cases Where the Respondent Raises No Objection to Jurisdiction

In the arbitral proceedings, if the respondent party raises an objection to the jurisdiction of the arbitral tribunal because there is no valid arbitration agreement between the parties, under Article 16(2) of the Model Law, it must raise a plea that the arbitral tribunal does not have jurisdiction not later than the submission of the statement of defense as well as a plea that the arbitral tribunal is exceeding the scope of its authority as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. Therefore, if the party does not raise such objection in a timely manner, its later challenge to jurisdiction of the arbitral tribunal will be estopped.1 It may also be deemed that in such case, the respondent party implicitly accepts the arbitration agreement. However, if the arbitrability of the dispute is at issue, the arbitral tribunal must examine its jurisdiction regardless of

whether the respondent party raises the objection on jurisdiction based on that reason because in such case, no arbitration agreement can be formed only by the agreement of the parties.

The jurisdictional dispute will not take place in any event as long as the respondent party raises no timely objection. Furthermore, if the respondent party disregards the arbitration commenced by the claimant and neither submits any statement and evidence nor appears before the arbitral tribunal in arbitral proceedings, the arbitral tribunal will decide ex officio its own jurisdiction. In such case, if the respondent party disputes the existence of a valid arbitration agreement at a later stage, it will raise the objection in the court proceedings of either setting aside or

1JULIAN D M LEW, LOUKAS A MISTELIS AND STEFAN M KR.LL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION para. 14-7 (Kluwer Law International 2003); KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 353(Kluwer Law and Taxation Publishers 1993).

2See HOWARD M.HOLTZMANN AND JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 483 (Kluwer Law and Taxation Publishers 1989). enforcement of the arbitral award in which the jurisdictional dispute can be finally settled .

The above consideration can also be applied to the case where the Japanese Arbitration Law applies because it has the provisions in Article (2)23similar to Article 16(2) of the Model Law.

2.2Cases Where the Respondent Raises an Objection to Jurisdiction

If the respondent party raises an objection to the jurisdiction of the arbitral tribunal, the arbitral tribunal has the competence to decide its own jurisdiction. Such competence is not conferred by the arbitration agreement but instead is by law itself based on the well-known legal doctrine of "Kompetenz-Kompetenz." The Model Law expressly provides for this doctrine in Article 16(1). The similar provisions can be found in Article 23(1) of the Japanese Arbitration Law. Therefore, the arbitral tribunal has the authority to decide the jurisdictional objection. Under Article 16(3) of the Model Law, the arbitral tribunal may rule on a plea either as a preliminary question or in an award on the merits. The ruling by the arbitral tribunal is not final on this issue and 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 to decide the matter but such decision is subject to no appeal.

If the arbitral tribunal decides the jurisdiction in an award on the merits, the respondent party unsatisfied with such decision can request the court to set aside the arbitral award under Article 34 of the Model La.

The setting aside procedure itself is not governed by the Model Law and instead the domestic procedural law in the jurisdiction adopting the Model Law governs this procedure. In general, the jurisdictional dispute will be finally settled in the court proceedings.

In Japan, under the Japanese Arbitration Law, the court procedure for the setting aside of an arbitral award has been simplified and the court must give the party an opportunity to be heard before the judge, but it is not necessarily required to hold a formal oral hearing as required in ordinary civil actions

(Art.44(5)). The court decision is subject to appeal within two weeks (Art.44 (8)). It was intended to replace a more onerous procedure for obtaining a setting aside judgment under the previous arbitration law. Even in such a simplified procedure, given procedural due process requirements, the court decision should have res judicata effect although the contrary view also exists. Therefore, if the request of a party to set aside an arbitral award is finally dismissed by the court, the existence of the valid arbitral award will become final and binding on the parties and as a result of the final settlement of the substantive dispute, the jurisdictional dispute between the parties will also be finally settled in the setting aside procedure. On the other hand, under the Japanese law, if the arbitral award is finally set aside by the courts, the court decision on the existence and effect of the arbitration agreement cannot have res judicata effect, because res judicata does not extend to the reasons on which the court decision rests. However, given procedural due process requirements, the parties, in light of the bona fide principle, should be precluded from raising the objection on jurisdiction in later proceedings although the contrary view also exists. It therefore follows that the jurisdictional dispute will be finally settled in the setting aside procedure.

On the other hand, if the arbitral tribunal rules on the jurisdiction as a preliminary question, the respondent party unsatisfied with the ruling by the arbitral tribunal can appeal to the court for its review. However, the court decision on the appeal by the respondent party on the ruling by the arbitral tribunal affirming its jurisdiction is final and not subject to further appeal. In this respect, considering procedural due process, under the Japanese law, it is generally recognized that because of a lack of sufficient due process by giving the party no opportunity to further appeal as well as the simplified court proceedings requiring neither formal oral hearing nor

giving the party an opportunity to be orally heard before the judge, the court decision for the review of the ruling by the arbitral tribunal has no res judicata effect and that the party unsatisfied with the court decision cannot be precluded from raising the objection on the jurisdiction of the arbitral tribunal at a later stage. It therefore follows that under the Japanese law, there is a problem that the jurisdictional dispute cannot be finally settled in these proceedings.

If the jurisdictional dispute cannot be finally settled by the ruling by the arbitral tribunal, the parties will face a fatal procedural problem. For instance, if the court affirms the ruling by the tribunal affirming its jurisdiction and then relying on such court decision, the tribunal continues arbitral proceedings and makes a final arbitral award, but in the procedure of setting aside of the arbitral award, the court overrules the previous court decision affirming the jurisdiction of the arbitral tribunal and sets aside the arbitral award, the whole arbitral proceedings will be wasted and the parties will lose all the efforts, time and costs devoted to the arbitral proceedings.

In addition, under the Model Law, there is no procedure to appeal to the court if the arbitral tribunal decides that it has no jurisdiction and in such case the final settlement of the jurisdictional dispute cannot be obtained in the procedure set forth in Article 16. Therefore, in order to finally settle the jurisdictional dispute, the claimant party unsatisfied with the ruling by the arbitral tribunal is compelled to initiate a new action to the court to seek declaratory relief that there is a valid arbitration agreement between the parties. However, in order for the jurisdictional dispute to be finally settled at an early stage of arbitral proceedings in an effective and expeditious manner, such newly-initiated action should be avoided and instead the appeal procedure from the ruling by the arbitral tribunal should be provided in the same manner as

in the case where the arbitral tribunal affirms the jurisdiction.3 Even if the party files an action and the court decision affirming the jurisdiction of the arbitral tribunal becomes final in the court proceedings, as at that time, the arbitral proceedings have already been terminated; the claimant must commence new arbitral proceedings for the settlement of the dispute. Such repetition of the proceedings is redundant and never a favorable option. It therefore follows that the appeal procedure to the court should be provided.

In this respect, according to the legislative history of the Model Law, it was recognized that a ruling by the arbitral tribunal that it has no jurisdiction was final as regards its proceedings because it was inappropriate to compel arbitrators who made such a ruling to continue proceedings.4 However, this reason is not persuasive in that it means even in the case where the arbitral tribunal affirms the jurisdiction, it is 3See PIETER SANDERS, QUO VADIS ARBITRATION? 176-186 (Kluwer Law International ؛(1999 Pieter Sanders, UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future, 21(4) ARB. INT'L 443, 452-45. 4 HOLTZMANN AND NEUHAUS, supra note 2, at 487. inappropriate to compel arbitrators to discontinue proceedings contrary to their intentions.

3- Disputes in Court Proceedings

3.1Cases Where the Defendant Raises No Objection

The dispute on jurisdiction of the arbitral tribunal can take place in the court proceedings on the merits. Under the Model Law, a court before which an action is brought in a matter which is the subject of an arbitration agreement must, if the defendant requests not later than when submitting its first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void,

inoperative or incapable of being performed. Therefore, if the defendant fails to request the court to refer the parties to arbitration in a timely manner, it will be precluded from raising an objection to the jurisdiction of the arbitral tribunal at a later stage and the dispute on the merits will be finally settled by the court decision. As a result, there will be no grounds or necessity for the dispute to be settled by arbitration instead and the jurisdictional dispute will also be finally settled.

3.2 Cases Where the Defendant Raises an Objection

If the defendant requests the court to refer the parties to arbitration in a timely manner, the court will decide whether there exists a valid arbitration agreement between the parties. If the court affirms the existence, it will dismiss the action taken by the plaintiff. The effect of the court decision is governed by the domestic procedural law of the jurisdiction adopting the Model Law. Under the Japanese law, the court decision dismissing the action is generally considered to have res judicata effect and the jurisdictional dispute will be finally settled in the court proceedings. On the other hand, if the court decides that there exists no valid arbitration agreement between the parties in an interlocutory judgment on jurisdiction separately from a final judgment on the merits, such judgment has no res judicata effect and therefore it is only binding on the court but not the parties. However, once the court affirms its jurisdiction and then the dispute on the merits has been finally settled in the court proceedings, there is no more necessity to proceed with an arbitral proceeding in respect of the settlement of the substantive dispute .

It is therefore submitted that the arbitration agreement has ceased to exist as far as the substantive issue in dispute is concerned and that it will subsequently lead to the final settlement of the jurisdictional dispute between the parties.

4- Settlement of Jurisdictional Dispute

4.1 Questions to be Resolved

As mentioned, under the Model Law, the jurisdictional dispute takes place in both arbitral proceedings and court proceedings. In the court proceedings, even in case where the Japanese law applies, there is no issue to be dealt with in terms of the final settlement of this jurisdictional dispute. On the other hand, however, conferring an arbitral tribunal competence to rule on its competence, the Model Law seems to have caused the question how the jurisdictional dispute can be finally settled in conjunction with the court proceedings. Specifically, if the arbitral tribunal rules that it affirms its jurisdiction, it raises an issue whether the court review of such ruling can finally settle the jurisdictional dispute .

In this respect, under the Japanese law, the court decision has no res judicata effect and therefore the final settlement of the jurisdictional dispute cannot be obtained. In addition, if the arbitral tribunal denies its jurisdiction, it will also be at issue whether the jurisdictional dispute can be finally settled in arbitral proceedings instead of seeking from the court the declaratory relief that a valid arbitration agreement exists between the parties .

Considering these questions, it will first look at the legislative history of the Model Law and see whether the Model Law intends the final settlement of the jurisdictional dispute within the procedural scheme set forth in Article 16.

4.2 The Legislative History of the Model Law

On the issue of the ruling by the arbitral tribunal and judicial control on the jurisdiction of the arbitral tribunal, it was a focal point in the legislation process how to deal with the conflicting two concerns; the possible delay in arbitral

proceedings by appealing to the court on the tribunal's decision, and the possible wasting of money and time devoted to arbitral proceedings in case of overruling the tribunal decision by the court after the arbitral award is rendered, and consequently the draft provisions of Article 16 (3) were amended several times. As a result, the draft of Article 16(3) which the UNCITRAL Working Group submitted to the Commission in its eighteenth session held in Vienna during the period between June 3 and 21, 1985 provided that "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. In either case, a ruling by the arbitral tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award."5 The Working Group responded to this draft provision as follows:6

It is submitted that the weight of these two conflicting concerns, i.e ،. fear of dilatory tactics and obstruction versus waste of time and money, is difficult to assess at a general level imagining all possible cases. It seems that the assessment could better be made with respect to each particular case. Thus, it may be worth considering giving the arbitral tribunal discretion, based on its assessment of the actual potential of these concerns, to cast its ruling in the form either of an award, which would be subject to instant court control, or of a procedural decision which may be contested only in an action for setting aside the later award on the merits. In considering this suggestion, which would help to avoid the present inconsistency between article 16(3) and article, (3)13 thought may be given to adopting the special elements of article (3)13designed to minimize the risk of dilatory tactics, i.e., short time-limit for resort to court, finality of court decision, discretion of arbitral tribunal to continue proceedings . 5Report on the UNCITRAL of Its Eighteenth Session (Vienna, 3-21 June 1985), U.N.Doc . A/40/17, para.

149. 6Analytical commentary on draft text of a model law on international commercial arbitration, report of the Secretary General, U.N. Doc. A/CN.9/264, article 16, para.14.

In response to the above comments of the Working Group, several revised draft provisions were submitted to the Commission and among them it proposed the reintroduction of the previous draft Article 17.7

However, this proposal was rejected and the Commission finally agreed that the provisions would be provided in line with the court proceedings in respect of the challenge of an arbitrator set forth in Article 13(3).8

According to the legislative history, the Commission, considering the balance of the two conflicting concerns, that is, the waste of the time and cost to be possibly incurred by postponement of the settlement of the jurisdictional dispute until the setting aside of an arbitral award on the merits and on the other hand, the delaying and obstruction by providing the appeal procedure against the ruling by the arbitral tribunal, the Commission finally decided that it would be most appropriate to give the arbitral tribunal discretion whether it decides the jurisdictional issue at an early stage of arbitral proceedings or in the final arbitral award on the merits. While it was not clearly referred to in the legislative history, it is considered that the Commission intended the final settlement of the jurisdictional dispute in the procedural scheme set forth in Article 16 of the Model Law although the court decision on the review of the ruling by the arbitral tribunal is final and subject to no appeal in order to avoid the delay in arbitral proceedings. In particular, the previous Article 17 drafted by the Working Group was deleted in the draft provisions so as to avoid the conflict with the appeal procedure to the court against the ruling by the arbitral tribunal9 and it supported the intention of the Commission that the jurisdictional dispute can

be finally settled in the proceedings set forth in Article 16 as the substitute proceedings of the court proceedings for the declaratory relief to confirm the jurisdiction of the arbitral tribunal.

Therefore, while the appeal procedure itself is governed by the domestic procedural law not the Model Law, the Model Law jurisdiction should 7Article 17 provides that "[Notwithstanding the provisions of article 16,] [a party may] at any time [request the court specified in article 6 to decide whether or not there exists a valid arbitration agreement and], if arbitral proceedings have commenced, whether or not the arbitral tribunal has jurisdiction [with regard to the dispute referred to it] ".

8U.N.Doc. A/40/17, paras. 157-163. 9U.N.Doc. A/CN.9.WG.II/WP.50, para.18; A/CN.9/264, para. 54. provide the appeal procedure whereby the jurisdictional dispute will be finally settled so as to preclude the respondent party from raising the objection on jurisdiction at a later stage such as in the setting aside procedure. In this respect, under Article 1065(1) of the German Arbitration Act based on the Model Law, the ruling by the arbitral tribunal affirming its jurisdiction can be appealed to the Higher Regional Court being subject to the appeal to the Federal Court of Justice and the court decision is binding on the parties in order to finally settle the jurisdictional dispute at an early stage of arbitral proceedings.10 As mentioned above, contrary to this position, the Japanese procedural law does not provide any legal effect on the court decision on the review of the ruling by the arbitral tribunal and it is observed that the court decision is merely for reference of the arbitral tribunal.11 However as mentioned above, it is clearly inconsistent with the Model Law which intends to finally settle the jurisdictional dispute by the court decision on the review of the ruling by the arbitral tribunal.

However, according to the legislative history of the Japanese Arbitration Law, there was no intention of the legislature to modify the provisions of the Model Law and provide different provisions in respect of Article 16 of the Model Law.12 Therefore it must be considered how the final settlement of the jurisdictional dispute is obtained if the arbitral tribunal affirms its jurisdiction in arbitral proceedings.

In addition, as mentioned above, as the Model Law provides no court proceedings for the review of the ruling by the arbitral tribunal denying its jurisdiction, the final settlement of the jurisdictional dispute cannot be obtained in arbitral proceedings.

In order to resolve both of the above problems, it will be considered whether the arbitral tribunal can decide its jurisdiction in the form of an arbitral award instead of a mere preliminary ruling. If it is possible, the party unsatisfied with the arbitral award regardless of affirming or denying its jurisdiction may request the court to set it aside and as a result the jurisdictional dispute can be finally settled in arbitral 10 Bundesgerichtshof, III ZB 83/02, March 27, 2003, German Arbitration Journal, SchiedsVZ 2003, 133. See Stefan M Kr.ll, News Section: N-23 [2004] INT.A.L.R. 2004, ISSUE 2.

11MASAAKI KONDO ET AL., 104-105 ARBITRATION LAW OF JAPAN (Shojihomu 2004) . 12KONDO, supra note 11, at 97-111. proceedings. It will consider this possibility below.

4.3 The Possibility of Ruling on Jurisdiction by an Arbitral Award

First, before considering the possibility of ruling on jurisdiction in the form of an arbitral award, we must see how an arbitral award is defined under the Model Law. In the legislative history of the Model Law, the Working Group

considered it important and desirable to define an arbitral award in respect of the relationship between Article 16 and Article 34 providing for setting aside of an arbitral award but due to the time limitation for such consideration, it could not provide for the definition in the draft provisions and its consideration was moved to the Commission.13 However, even in the Commission session, no definition would be realized in the Model Law and as a result the Model Law has no provisions for the definition of an arbitral award.

In this respect, Professor Lawrence Boo pointed out that after deliberations, the Commission had determined to provide for immediate judicial review of the preliminary ruling on jurisdiction as opposed to contesting it subsequently as an award under Article 34 and as a result effectively had de-linked and differentiated such a decision from the nature of an award contemplated within Article 34.14 He further stated that "the decision not to define 'award' but instead to de-link or differentiate the preliminary ruling on jurisdiction from an award on the merits where the setting aside provisions would apply fortifies the argument that the Commission had no intention to include such a preliminary ruling, whether affirmative or negative, as an award subject to setting aside under Art. 34." 15 As he correctly pointed out, the Commission decided that the arbitral tribunal would decide its jurisdiction at its discretion by two optional ways, that is, by an arbitral award on the merits and by a preliminary ruling subject to immediate court review. However, it is not submitted that by even so providing, the Model Law entirely precludes the arbitral tribunal from ruling on jurisdiction in the form of an arbitral award because the arbitral award 13 A/CN.9/264, article 34, para.3 . 14Lawrence GS Boo, Ruling on Arbitral Jurisdiction – Is that an award?, 3(2) ASIAN INTERNATIONAL ARBITRATION JOURNAL 125, 133. 15Id. on the merits constitutes the two decisions on both substantive and

jurisdictional issues and the latter jurisdictional decision is a prerequisite for the former substantive decision and forms a part of the arbitral award. Therefore the arbitral award dealing with only jurisdictional issues can also be given a status of an arbitral award and apart from the preliminary ruling, the arbitral tribunal can decide the jurisdictional issues in the form of an arbitral award. In this respect, although Professor Pieter Sanders pointed out that as arbitrators issuing a negative ruling declare that they are not in a position to render an award, the setting aside of a negative ruling seems legally contestable,16 it is submitted that if the arbitral tribunal has the authority to affirm its jurisdiction in the form of an arbitral award, it has also the authority in case of denying its jurisdiction because irrespective of affirming or denying its jurisdiction, the nature of the decision is common in deciding its jurisdiction. In addition, in arbitration practice, the arbitral tribunal decides its jurisdictional issue as a preliminary question in the form of a partial, interim or preliminary award.17

In such case, the arbitral award on the jurisdiction can be set aside by the court if there is no valid arbitration agreement between the parties under Article 34(2)(a)(i) and (iii). On the other hand, if the arbitral tribunal incorrectly denies its jurisdiction, no such ground for setting aside an arbitral award is enumerated in Article 34(2). In this respect, Dr .Stefan Kr.ll pointed out it can be resolved by interpreting that the incorrect denial of the jurisdiction made by the arbitral tribunal is an infringement of the scope of the arbitration agreement and that it constitutes a ground for setting aside of an arbitral award under Article)(2)34a)(iii) providing for the case where the award is "not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration."18

This conclusion is also not inconsistent with the definition of an arbitral award provided in the legislation of the Model Law jurisdiction in Singapore, New Zealand, and British Columbia in Canada. For instance, 16SANDERS, supra note 3, at 185. 17ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION para. 8-06 (Sweet and Maxwell 4th ed. 2004). 18Stefan Kr.ll, Recourse against Negative Decisions on Jurisdiction, 20(1) ARB. INT'L 55, .69-68 Singapore International Commercial Arbitration Act provides in Section (1)2that an award means "a decision of the arbitral award on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section 19".12 Such legislation defines an arbitral award as the decision of the arbitral award on the substance of the dispute but as mentioned above, the arbitral award on the merits includes the decision to affirm its jurisdiction and therefore under the above legislation of the Model Law jurisdiction, the arbitral tribunal can decide its jurisdiction in the form of an arbitral award subject to the setting aside procedure as set forth in Article 34 .

However, in this respect, the court decisions in the Model Law jurisdiction have been divided in two views. One is to allow the arbitral tribunal to decide its jurisdiction in the form of an arbitral award and the other is denying it. For instance, in Germany, as mentioned above, under Section 1040(2) of the German Arbitration Act, the arbitral tribunal determines its jurisdiction in general as a preliminary question and the court decision for review of the tribunal's ruling will finally determine the jurisdictional issue and the parties are bound by the decision and on the other hand, in the case where the arbitral tribunal denies its jurisdiction, under case law, an arbitral tribunal is allowed to decide it in the form of an arbitral award.20 In addition, in Bermuda adopting the Model Law, it seems that the court took the view that an arbitral tribunal

could decide its jurisdiction in the form of an arbitral award.21 On the other hand, in Singapore and Croatia, the courts took the position to deny the ruling by the arbitral tribunal to decide its jurisdiction in the form of an arbitral award in the case where the tribunal denies its jurisdiction.22

4.4Final Settlement of the Dispute on Jurisdiction by Arbitration

19Similar definition is found in New Zealand's Arbitration Act 1996, section 2(1) and British Columbia's Commercial Arbitration Act 1996, Chapter 233, section 2. 20 Bundesgerichtshof, III ZB 44/01, June 6, 2002, German Arbitration Journal, SchiedsVZ 2003, 39 . 21Alan Uzelac, Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas under the UNCITRAL Model Law, 8(5) INT. A.L.R. 153, 155 (2005). 1 [2007] 22SLR 597; CLOUT CASE No 656, A/CN.9/SER.C/ABSTRACTS/60, English translation is available at [http://www.usud.hr] .s discussed above, the dispute on jurisdiction of the arbitral tribunal can be finally settled in arbitral proceedings if an arbitral tribunal decides its jurisdiction in the form of an arbitral award. However, under the doctrine of "Kompetenz-Kompetenz," the arbitral tribunal is given the authority to decide its jurisdiction but the final decision always lies in the courts. Therefore, the party unsatisfied with the decision of the arbitral tribunal in arbitral proceedings can always request the court to review such decision and it will possibly cause delaying arbitral proceedings. In order to avoid such delay, irrespective of actual events, it would be a possible option that the parties agree to refer the jurisdictional dispute to an arbitral tribunal. If such agreement is allowed, then the jurisdictional dispute can also be finally settled by the arbitral tribunal instead of the courts .

In this respect, it is observed that in most countries, the courts retain the last word on excluding their jurisdiction and therefore the arbitral tribunal is not allowed to decide with biding force on its jurisdiction.23 In addition, the German law, by adopting the Model law, abolished this concept and as a result the decision of the arbitral tribunal on jurisdiction can be reviewed by the courts.24 However, under the Model Law, as an arbitration agreement is defined as an agreement by the parties to submit to arbitration all or certain disputes between the parties in respect of a defined legal relationship (Art.7(1)), there is no restriction to exclude the jurisdictional dispute. In addition, the disputes may be submitted to arbitration unless it is not allowed by the domestic law (Art .(5)1 . Therefore, under the Model Law, the parties may agree to refer the jurisdictional dispute to the arbitral tribunal unless prohibited by law .

In respect of the settlement of the disputes between the parties, there is no difference in substance between the jurisdictional and substantive disputes both of which the parties may dispose of, and it is submitted that the state court should neither intervene in the settlement of such disputes through arbitration based on the agreement of the parties, nor retain the exclusive jurisdiction to decide the jurisdictional dispute by 23 LEW, MISTELIS AND KR.LL, supra note 1, para. 14-32 . 24LEW, MISTELIS AND KR.LL, supra note 1, para. 14-29. forfeiting the parties' right to settle such disputes through arbitration .

Therefore, if a state takes so liberal a policy to allow the parties autonomy to settle the jurisdictional dispute by arbitration and defer to the arbitral tribunal on the final decision of the court jurisdiction on the settlement of the dispute, the jurisdictional dispute can be finally settled by arbitration based on the agreement of the parties. In such

case, the arbitral award to decide whether a valid arbitration agreement exists between the parties is final and binding on the parties but subject to the setting aside procedure set forth in Article 34.

5- Conclusion

This article dealt with the issue how to settle the jurisdictional dispute within the arbitral proceedings under the Model Law. Specifically, if an arbitral tribunal affirms its jurisdiction pursuant to Article 16(3), the court decision on review of this preliminary ruling by the arbitral tribunal is final and not subject to appeal (Art. 16(4)). Therefore in particular under the Japanese Law, it will raise a question that the jurisdictional dispute can be finally settled in such court proceedings. On the other hand, if the arbitral tribunal denies its jurisdiction, there is no procedure to appeal to the court provided and therefore, in such case, there is also an issue how the jurisdictional dispute can be finally settled in arbitral proceedings. In this respect, as discussed above, it is concluded that the Model Law does not preclude the arbitral tribunal from deciding its jurisdiction in the form of an arbitral award and therefore the arbitral award on jurisdiction can resolve such problems. In addition, in order to avoid the delay in arbitral proceedings by the court proceedings for the settlement of the jurisdictional dispute, it may be at issue whether the parties can agree to refer such dispute to arbitration instead and in this respect, it is concluded that the Model Law itself does not have such a restriction and it should be permitted for such disputes to be referred to arbitration based on the agreement of the parties, and that if the state takes so liberal a policy to defer to the arbitral tribunal on the decision of the court jurisdiction on substantive disputes between the parties, such disputes may finally be settled expeditiously through arbitration.