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Legal Issues Related to Access to Overseas Arbitration Institutions

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Abstract: In the context of economic globalization and internationalization, the construction of an arbitration center has also been put on the agenda. All countries in the Asia-Pacific region, including China, have opened the arbitration market accordingly. In recent years, China has also encouraged the entry of overseas arbitration institutions, but there are still some urgent problems to be solved. For example, relevant arbitration by two types of overseas arbitration institutions will lead to disputes and discussions. That is to say, arbitration by, for example, two types of overseas arbitration institutions will cause disputes and discussions. That is, arbitration by overseas arbitration institutions in China is found to have no legal effect, although China has set up relevant pilot areas for testing. However, this paper aims to explore the legal framework of overseas arbitration institutions in China, which is the main obstacle to the smooth arbitration of overseas arbitration institutions in China. This paper aims to expound the development status, access standards and obstacles of overseas arbitration institutions in China, so as to put forward their own views and suggestions. This paper aims to expound the development status, access standards and obstacles of overseas arbitration institutions in China, so as to put forward their own views and suggestions.

1. Introduction

With the increasing globalization of the economy, trade between countries is becoming more frequent, and with it comes commercial issues. Due to differences in national laws, arbitration has become the main method of settling international commercial matters, respecting the views of both parties and being impartial and confidential. In international commercial arbitration, a place of arbitration is often chosen. i.e. arbitration laws and regulations are used to arbitrate the case. This has become a challenge. With the increasing openness of regions to foreign arbitral institutions, the problem of placing arbitrators and foreign arbitral institutions has gradually disappeared, but a new problem has emerged, namely that arbitration agreements made in China by foreign arbitral institutions do not have the corresponding legal effect and are not recognized and enforced in practice. In recent years, China has not only established pilot zones, but also taken the initiative to introduce offshore arbitration institutions, but without clear legal provisions, the difficulties and obstacles for offshore arbitration institutions to arbitrate in China have still not been eliminated. These obstacles have been discussed in academic circles, but still without definite results, and views such as non-domestic award theory and foreign arbitration award theory have emerged [1,2].

In conclusion, the essence of the current problem of access to and resolution of foreign arbitral institutions in China is the lack of clarity, maturity and imperfection of the relevant laws, which has led to a difficult situation in arbitration. The purpose of this article is to provide a personal view and suggestions on the current state of development, admission criteria and obstacles faced by foreign arbitral institutions. [3]

2. Overview

2.1 The development of offshore arbitration institutions in various countries

The United States, for example, is a capitalist country that not only occupies the top spot in terms of economic power, but is also the first choice for companies to enter the world, and is, of course, home to many economic disputes. The United States has been a relatively smooth entry point for many foreign arbitral institutions. European capitalist countries, which had begun to recuperate after the Second World War, had more comprehensive arbitration legislation and judicial practice, despite the economic downturn, and there were no passive obstacles to the introduction of foreign arbitral institutions as they gradually regained their economic strength. Asian countries are generally weaker economically, with only Japan having some economic strength and relatively well developed arbitration legislation, and as an island country with frequent trade with many countries, the arbitration market is also of a certain size, so the development of offshore arbitration institutions is also smooth [4,5].

2.2 History of the development of offshore arbitration institutions in China and current situation

The history of the development of offshore arbitration institutions in China can be broadly divided into three stages: the stage of complete rejection of the introduction, the stage of study and promotion of the introduction and the stage of implementation of the introduction. First, the phase of total rejection of the introduction, as the name implies, was a phase in which China's attitude towards the introduction of offshore arbitration structures was completely negative, with most people at home and abroad not believing that the ICC Court of Arbitration could introduce an offshore arbitration institution into the country until 2016, when the ICC Court of Arbitration established an arbitration office in China, but there were still opponents at home and abroad. As trade between countries has become more frequent, various legal disputes have arisen between companies, some of which have been sensational, such as the Fuyuan Enterprise case, after which scholars pointed out that the legal provisions interpreting arbitration in China were not binding and clear, and scholars discussed the relevant issues and gradually accepted the idea of introducing an offshore arbitration institution. In recent years, as economic globalization has matured, the introduction of foreign arbitral institutions in China has been accelerated. For example, through the establishment of the Shanghai Pilot Free Trade Zone, there are still many problems and obstacles to the successful implementation of foreign arbitral institutions, such as the identity and nature of foreign arbitral institutions, access criteria and regulatory restrictions, etc. These are current and urgent issues [6]. Only when these issues are reflected and resolved in China's laws and regulations will a large number of foreign arbitral institutions be established in China [7].

3. China's admission criteria and modalities for offshore arbitration institutions

3.1 China's admission criteria for offshore arbitration institutions

3.1.1 Restrictions on Foreign Investment Entry

For China, an offshore arbitration institution is formally different from a representative office of a foreign company, but is essentially a foreign-owned enterprise, which means that offshore arbitration institutions are subject to the entry restrictions of the Foreign Investment Law, which does provide for a foreign investment management system of national pre-entry treatment plus a negative list, which means that the entry restrictions for offshore arbitration institutions comply with the provisions of the negative list for market access and apply for an access permit [8].

3.1.2 Interim arbitration issues

Since the establishment of the Pilot Free Trade Zone (FTZ) in Shanghai, China has promulgated a number of relevant laws and regulations, which provide for autonomous arbitration between conflicting parties in the FTZ under specific conditions, which will be recognized as valid when submitted to the court, or referred to a higher court for verification and determination if there is a dispute in the lower court. This provision encourages the autonomy of arbitration by the parties to the conflict in a specific way, which undoubtedly promotes the development of ad hoc arbitration in China, but also serves as a test for foreign arbitral institutions in China, whether the awards of foreign arbitral institutions are relevant to our legal affairs, which needs to be studied in practice [9].

3.2 China's approach to the admission of offshore arbitral institutions

3.2.1 Access for operational agencies

Owing to the lack of regulations, whether an offshore arbitration institution enters the domestic market as a branch or as an independent arbitration institution depends on the management structure, operating mechanism and actual business of the offshore arbitration institution, which can choose the nature, form and scope of business of the post-entry enterprise within reasonable limits. However, experience in other countries shows that foreign arbitral institutions are reluctant to exist as independent arbitral institutions because of the many cumbersome steps involved in conducting their business and the greater degree of regulation to which they are subject. Most institutions have opted for an office or representative office, with Russia and Dubai being prime examples. In conclusion, an offshore arbitration institution may only be admitted to our country in the form of an office or representative office for case management purposes, but not as a commercial institution protected by our laws, and the awards rendered are not our awards, but remain those of the country to which they belong [10].

3.2.2 Access to business scope

In this way, they can be regarded as handling arbitration cases in China, even if they are not independent institutions, and they do not need to be regulated by our laws, but only need to be recognized by our courts. This is the method of access for most offshore arbitration institutions in China and they have already handled a large number of cases. However, there is a dispute as to whether the arbitration is in accordance with the law and which country the award belongs to. There is no clear provision for this in our current arbitration legislation, and the way we distinguish

between the country of an arbitration is the country of the arbitral institution, which is contrary to the New York Convention's criterion of the place of award, so this issue also creates conflict [11].

4. Legal practice and obstacles faced by foreign arbitral institutions in China

4.1 China's recognition of arbitral awards by foreign arbitral institutions

The recognition of awards made by foreign arbitral institutions in China depends on the nature of the award, that is, whether it is a foreign award or an extraterritorial award, and the corresponding legislation in China has clear provisions to determine whether it can be recognized. At present, the nature of awards made by foreign arbitral institutions in China is determined in accordance with the New York Convention, with foreign awards undergoing the corresponding review process and foreign awards being recognized and enforced by the relevant laws of China [12].

4.2 China's market access for offshore arbitration institutions

The issue of market access for foreign arbitral institutions in China is highly controversial in academic circles, with some scholars claiming that their commercial arbitration activities in China are commercial legal services and international service trade activities, and that there are no clear provisions allowing foreign arbitral institutions to conduct legal affairs in China, and therefore they should be prohibited from entering the arbitration market in China. As international trade becomes more frequent, the degree of openness increases, and foreign arbitral institutions have their advantages. There are laws in place to determine the capacity and ability of foreign arbitral institutions to conduct business in China. In conclusion, China should introduce clear market access principles for foreign arbitral institutions to ensure that they are judged to operate smoothly in China [13].

4.3 Restrictions on the operation of offshore arbitration institutions in China

Restrictions on the operation of foreign arbitral institutions in China are mainly administrative and market policy restrictions. Since the establishment of the Pilot Free Trade Zone, foreign arbitral institutions have moved in, but they need to be registered and managed by China's market supervision department, and because they exist as foreign non-governmental institutions, they are also subject to supervision and management by China's public security department. In short, in order to operate in China, it is not only necessary to be registered by the immediate commercial authorities, but also to have all its information filed with the public security authorities before it can operate normally. The Lingang Arbitration Institute is registered with the Lingang Judicial Bureau and operates in accordance with the relevant regulations of the Lingang area. This is one of the differences from the previous regulatory approach. In this regard, some international scholars have expressed doubts about the neutrality of foreign arbitral institutions under this type of regulation, which has discouraged the entry of foreign arbitral institutions and raised international doubts about the validity of arbitral awards. The key to solving this problem lies in the timely promulgation of new and specific administrative policies [14].

4.4 Domicile of offshore arbitral awards in China

In some cases, although the arbitral institution has successfully rendered an award, there is still some dispute as to its attribution and the laws of different countries conflict with each other. For an arbitral award to be valid, it must be recognized by the law of a particular country, i.e. it is part of

the law of the country of attribution, and the law of the country of attribution is the legal basis for its arbitration, and only an award with a clear country can be verified later in each country. At the international level, there are generally three types of criteria for determining the country of an arbitral award, namely the arbitral award criterion, the law applicable to the arbitral proceedings and the mixed criterion. The place of arbitration criterion, as the name implies, is a criterion for determining the country of an arbitral award according to the place where the award is located. The mixed standard is a combination of the first two, i.e. the application of one of the first two is considered a national award [15].

The country of foreign arbitral awards is determined in China according to the institution that made the award, i.e. an award made by a foreign arbitral institution is a foreign award and an award made by a foreign arbitral institution is a domestic award. With the increasing international cooperation, the arbitration criterion is gradually becoming more and more common, but it is still not explicitly provided for in China's arbitration legislation, and it is only in recent years, with the increasing number of international commercial cases, that China has explicitly adopted the arbitration criterion for determining the country of arbitral awards [16].

5. Proposals to address the problems faced by offshore arbitration institutions in China

In recent years, China has maintained maximum openness to foreign arbitral institutions. Although China has repeatedly identified many problems with the entry of foreign arbitral institutions into China, and has set up pilot zones for experimentation, and also rectified some contradictions and problems, there are still some obstacles that have restricted the development of foreign arbitral institutions in China, for which the following recommendations are made.

5.1 Clarifying the conditions for market access and recognition of awards

This has led to a lack of enthusiasm and interest on the part of many foreign arbitral institutions to enter the country, as well as scepticism on the part of some, and although some policies have been enacted in recent years, they are not perfect. Secondly, there is a lack of clarity on the recognition of awards made by foreign arbitral institutions, which results in awards made in China having no legal effect and also hinders development, so improving and clarifying the system of recognition of awards made by foreign arbitral institutions is also the key to solving the obstacles. [17]

5.2 Improve the Arbitration Act and other relevant legislation

China's legislation on offshore arbitration institutions includes the Arbitration Law and the Civil Procedure Law, of which the Arbitration Law is the main legal basis, and its amendment requires a resolution by the Standing Committee of the National People's Congress. Today, both China's economy and international status have taken a huge leap forward, and the academic community has reached agreement on some controversial theories and issues of the Arbitration Law, so it is inevitable that it will be improved. This is, of course, only a revision of the Arbitration Act, but attention must also be paid to civil, commercial, international trade and other related legislative provisions for revision and improvement. [18]

5.3 Improving the judicial environment for arbitration through judicial interpretation and case law

In China's specific judicial practice, judicial interpretations can explain and fill in ambiguities

and omissions, especially in areas where legal amendments cannot keep up with their development, and offshore arbitration is one such area of concern. China has issued a number of judicial interpretations after the enactment of the Arbitration Law for the reference of lower courts and to fill possible gaps, and has also published some guidelines and specific cases as references for hearings [19].

5.4 Improving the judicial review system for arbitral awards

The first step is to establish a complete classification standard for arbitral awards in the legal system. Only by determining the classification of the nature of awards made by foreign arbitral institutions can we clarify what kind of judicial review is to be used. The second is to abolish the non-enforcement of arbitral awards. The second is the abolition of the system of non-enforcement of arbitral awards. Although this system provides a double guarantee and supervision of the rights of the claimant and the State arbitrator, it has the corresponding disadvantage that the losing party takes advantage of this law to delay, making it contrary to the original intention of its establishment and doing more harm than good [20].

6. Conclusion

In summary, with the continuous strengthening of international trade, China has become more and more open to foreign arbitration institutions, allowing them to carry out business activities in the territory and pilot areas, but there are still many legislative and judicial obstacles in China, such as the imperfect legal system of arbitration and the principle of strict interpretation, which have played a negative role in hindering the development of foreign arbitration institutions in China. Although the relevant international legal provisions are relatively sound, China should remove the cross and take the essence, not copy it completely, but improve the formation of arbitration legislation with Chinese characteristics according to our specific national conditions. In this paper, we analyze the entry, activities and development of foreign arbitral institutions in China and make specific and reasonable recommendations to improve the relevant laws in China.

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