



# Study on the Mechanism of Cooperation in Foreign Commercial Arbitration

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**Abstract.** China's commercial exchanges with various countries have become increasingly close, the number of foreign-related commercial disputes has increased, and the formation of a rule of law environment conducive to international commercial exchanges has become an important task for China's comprehensive opening up to the outside world. There are various ways to solve international commercial disputes in countries along the route, and international commercial arbitration, as a common way to solve transnational commercial disputes, has different advantages from litigation, mediation and other dispute resolution methods, and is an important part of the foreign-related dispute resolution mechanism. At present, China's foreign-related commercial arbitration is facing problems and needs to be reformed to build an arbitration system that is in line with international standards, so as to achieve the purpose of providing legal protection for foreign trade.

**Keywords:** international commercial disputes, international commercial arbitration, arbitration cooperation mechanism, arbitratin

## 1 Introduction

With the increasing interaction between China and the international community, the number of cross-border commercial disputes has been on the rise, and the effective resolution of these commercial disputes is of great significance to the creation of a favourable business environment, in which context the construction of a modern arbitration system widely recognised by the international community is of particular importance. At present, China's foreign-related commercial arbitration mainly relies on the Civil Procedure Law and the Arbitration Law, supplemented by legal amendments and judicial interpretations to solve the deficiencies in legal practice. However, in order to further promote the development of foreign-related commercial arbitration, we still need to adopt more scientific legislative and judicial strategies, and continuously improve the arbitration mechanism, so as to enhance its international competitiveness and influence, and contribute to the construction of a fair and reasonable new international economic order[1].

## 2 Challenges to the Mechanism of Cooperation in Foreign Commercial Arbitration

### 2.1 Western Dominance in International Commercial Arbitration

At present, The main sources of law applicable in international commercial arbitration are the choice of domestic law, the "international" choice of law and trade practices[2], Scholars represented by Schmitov proposed the theory of Mercator law in the 1950s, which centered on efforts to establish a system of international trade centered on commercial practices recognized by all countries[3],the international commercial arbitration system is mainly derived from the long-term international trade experience and legal tradition of Western countries, and the laws and norms of arbitration are to a large extent a development of the Western commercial adjudication system. The construction and legal application of this system has been largely influenced by Western legal culture, most of international commercial arbitration centers are led by the western countries and most of the arbitration centres are located in the western countries[4]. In the actual practice, many international commercial contracts tend to preset specific arbitration institutions as the place of arbitration.

### 2.2 Continuously Improving the International Influence of China's Foreign-related Arbitration Institutions

In accordance with the Arbitration Law of the People's Republic of China and its relevant judicial interpretations, China has established or reorganised a series of permanent arbitration institutions in municipalities directly under the central government, provincial capitals, capitals of autonomous regions and other cities with districts. In foreign-related commercial cases, when parties agree to choose these institutions, they have corresponding jurisdiction. At the same time, globally renowned arbitration centres, such as the Arbitration Institute of the International Chamber of Commerce (ICC) and the Singapore International Arbitration Centre (SIAC), have also established their branches or representative offices in China[5]. However, in practice, affected by the traditional habits of parties to foreign-related commercial disputes, it is more common to choose foreign arbitration institutions, while China's foreign-related commercial arbitration institutions are still mainly dealing with foreign-related commercial cases in their own countries.

### 2.3 Constraints of China's Arbitration System on Foreign Commercial Arbitration

**Absence of an ad hoc arbitration system.** Ad hoc arbitration is widely accepted internationally, allowing both parties to choose arbitrators freely without having to rely on an arbitration institution. However, China's Arbitration Law provides that a valid arbitration agreement must expressly designate the arbitral institution, otherwise the agreement is null and void, precluding ad hoc arbitration. Although China recognized

the enforcement of foreign ad hoc arbitral awards, the restrictions on ad hoc arbitration under domestic law might affect the unity and authority of the arbitration system[6].

**Litigation Features of the Institutional Design of China's Arbitration Law.** Apart from the fact that cases are heard in camera, the arbitration system does not fully reflect its unique characteristics and lacks the necessary flexibility. In addition, most of the persons involved in arbitration are part-time judicial practitioners, which also leads to a longer time-consuming arbitration process. For example, according to China's Arbitration Law, an arbitral award not only requires the signature of the arbitrator to confirm it, but must also be stamped with the official seal of the arbitration institution, a practice that is inconsistent with the prevailing international practice. In international commercial arbitration, the registration system is usually used to confirm the authenticity and validity of the arbitral award, while the role of the arbitration institution is more as a facilitator of the arbitration process, and does not bear the responsibility of proving the certainty and legitimacy of the award. These provisions of China's Arbitration Law are derived from the traditional litigation legal system, but arbitration institutions are fundamentally different from judicial organs under the State's public power in terms of their nature, positioning and functions, and therefore cannot simply replicate the practices of the litigation system.

**The Dual Judicial Review Mechanism Affects the Authority of China's Foreign-related Arbitration System.** According to the provisions of China's existing laws, arbitration is categorized into non-foreign-related arbitration, foreign-related arbitration and arbitration conducted by foreign arbitral institutions in their own countries. In the case of foreign-related arbitration, China's courts usually review the procedural compliance of arbitral awards and have the judicial supervisory power to set aside and refuse recognition and enforcement of foreign-related arbitral awards. For awards made by foreign arbitral institutions in their own countries, the courts of China are limited to reviewing the recognition and enforcement of the award in accordance with the provisions of the New York Convention, and do not have the power to set aside the award. This discrepancy between internal and external judicial review, as well as the long-standing two-track system, constitutes a practical problem faced by China in the field of foreign-related commercial arbitration.

**Lack of Value of the Place of Arbitration.** China uses the seat of the arbitration institution as the criterion for arbitration classification, which is significantly different from the prevailing international practice of using the place of arbitration as a means of determining the nature of arbitration. The place of arbitration, as the place where arbitration proceedings are conducted, is usually chosen based on the common will of the parties and is a subjective connecting factor in arbitration. In international commercial arbitration practice, the determination of the place of arbitration is the key to determining the arbitration procedure and the applicable law, and the criteria for recognizing foreign arbitral awards in the New York Convention are based on the place where the arbitration was made, not the seat of the arbitral institution. With regard to the application of the law of arbitration, it was stipulated that the law of the seat of the arbitral institution prevailed, which, although it could be regarded as an innovation in the arbitration system, was not in line with long-standing custom in international commercial

practice. The arbitration institution should be regarded as an auxiliary role in the arbitration process and should not be overly entrusted with duties and status beyond its auxiliary functions, otherwise the internationalization of China's arbitration institutions may be affected.

### **3 Exploring the Advantages of Arbitration in Foreign Commercial Dispute Resolution Mechanisms**

#### **3.1 Limitations of Dispute Resolution in International Commercial Law**

When parties face commercial disputes involving the interests of different countries, they often tend to avoid choosing the jurisdiction of a particular country, especially the courts of the country of the other party to the dispute, as the venue for dispute resolution. According to the data of a 2015 research in the field of international arbitration, only about one-third of the respondents indicated that they might consider other dispute resolution methods other than arbitration[7]. At present, there are only a limited number of cases actively choosing to conduct international commercial litigation in China's courts because the establishment of China's international commercial tribunals is relatively short and the construction of the system of international commercial tribunals has been led by the West mainly in the past, so the awareness and trust of domestic and foreign parties towards China's international commercial tribunals are still being gradually built up.

#### **3.2 Arbitration is More Binding on the Parties**

While it is true that other ADR methods offer more flexibility than arbitration, they often lack binding effect on the parties involved. Due to the discretionary nature of ADR, either party has the right to request termination of the proceedings at any time, which increases the risk that a party may use this mechanism to delay the matter or avoid liability. In addition, non-parties are often required to seek legal redress from the judiciary when a party refuses or interrupts the enforcement of an agreement.

#### **3.3 Advantages of Commonly Used Arbitration in International Commercial Disputes**

**Independence of the status of the arbitral institution.** Arbitral institutions are generally civil organisations and exercise arbitration powers independently. In commercial disputes involving multiple countries, the parties have the right to choose by agreement a third-country arbitral institution not directly related to the dispute to adjudicate their dispute. This helps to circumvent unfair factors affecting the fair resolution of disputes, thereby alleviating the parties' doubts as to whether the arbitration process can remain objective, neutral and impartial.

**Expertise in arbitration.** In the field of international commercial arbitration, parties often tend to favour arbitral institutions with a high degree of specialisation. With regard to the selection of arbitrators, the parties likewise expect to be able to select, in accordance with the specific characteristics of the case, experts with a high degree of professionalism not only in the field of law but also in the relevant professional field, so as to ensure that disputes can be resolved in a fair and efficient manner.

**Confidentiality of arbitration.** Compared with litigation proceedings, arbitration proceedings are usually characterized by greater confidentiality. In litigation, unless there are special circumstances involving state secrets, commercial secrets, etc., public hearings are the basic principle. If the parties choose arbitration as a means of dispute resolution, there is no need for hearings to be held in public. This practice not only maintains the commercial secrets of the parties and other interested parties, but also helps to resolve disputes in a more efficient and smooth manner, while avoiding additional conflicts and damages that may arise from the publicization of disputes.

**Simplicity and efficiency of arbitration proceedings.** The arbitration system is relatively simple. Typically, arbitration follows the principle of first instance, with a clear and efficient process and a relatively short hearing cycle. For the parties, this means that the process of dispute resolution is accelerated, which helps the parties to reach a speedy resolution of the dispute.

**Safeguards in international law.** Due to the unique advantages of arbitration, arbitral awards are generally accepted and enforced by the international community. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed in 1958 and entered into force in 1959), as an important international treaty, has a wide range of member States covering most countries in the world, including the vast majority of countries along the Belt and Road. In marked contrast to the difficulties faced by single-country court judgments in terms of recognition and enforcement in other countries, international arbitral awards, thanks to the support of such international treaties, are guaranteed in the legal systems of various countries, and are thus widely recognized and enforced at the international level.

## 4 Exploring the Path of Cooperation Mechanism for Foreign-related Commercial Arbitration

### 4.1 Rationalisation of International Commercial Arbitration Centres

China should actively build arbitration institutions in line with international standards and strategically locate international commercial arbitration centres throughout the country. In addition, it is also crucial to strengthen arbitration cooperation with the international community, and China's arbitration institutions can expand their international business by setting up branches overseas, so as to play a corresponding role in the field of international commercial dispute resolution.

#### 4.2 Improvement of Commercial Arbitration by Advanced Extraterritorial Experiences

In the process of borrowing from the litigation system, China's commercial arbitration system should make the necessary amendments to those provisions that are too litigious. In addition, the provisions on appraisal, cross-examination, preservation and other aspects of arbitration procedures are too similar to those of litigation procedures, which to a certain extent undermines the advantages of simplification and high efficiency that characterise arbitration. Therefore, it is necessary to revise the relevant provisions of the current arbitration law on the legal functions of arbitration institutions, reduce the provisions that characterise litigation in arbitration proceedings, establish the role of arbitration institutions as an adjunct to the arbitration process, reduce their direct intervention in arbitration proceedings.

### 5 Conclusions

International commercial arbitration has become a key means of resolving international commercial disputes by virtue of its independence, high efficiency, autonomy and strong enforcement power. In this new environment, China's foreign-related arbitration is facing a series of new challenges, which require us to face up to the existing problems, learn from the advanced international practices, and carry out reforms in various aspects, such as the construction of arbitration institutions and the optimisation of the system, in order to promote the docking of China's foreign-related commercial arbitration with the international standards, and to ensure the sustained and stable development of the international business exchanges.

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