

Study on the Selection System of Arbitrators for Ad Hoc Arbitration in China

Zhengyan Zuo¹

¹ China Institute of Boundary and Ocean Studies, Wuhan University, Wuhan 430072, China
Correspondence: Zhengyan Zuo, China Institute of Boundary and Ocean Studies, Wuhan University, Wuhan 430072, China.

doi:10.56397/SLJ.2024.06.06

Abstract

The selection of arbitrators, as the beginning and core of ad hoc arbitration procedure, needs to be fully regulated by legislation, and the existing norms do not well meet the needs of the selection of arbitrators. Based on the theoretical foundation of autonomy, we explore the constituent elements of the system for the selection of arbitrators in ad hoc arbitration under the international perspective, sort out the existing system and deficiencies in our country, and make suggestions for the improvement of the system for the selection of arbitrators in ad hoc arbitration in our country: on the one hand, we should stipulate the loose conditions for the service of the arbitrators, improve the way of selecting arbitrators, and safeguard the party's autonomy; on the other hand, we should take the intervention of the institution as the supplement to the party's autonomy, and solve the deadlock of the selection. On the other hand, institutional intervention should be used as a supplement to party autonomy to resolve the deadlock in the selection. At the same time, the rules on the obligation to disqualify arbitrators should be improved to safeguard the independence of arbitrators and realize justice in arbitration.

Keywords: ad hoc arbitration, arbitrators, selection of arbitrators

1. Introduction

Arbitration has been playing a pivotal role in the field of commercial dispute resolution with its advantages of economy and speed. Arbitration is divided into institutional arbitration and ad hoc arbitration. Previously, China's Arbitration Law only provided for institutional arbitration, which could not fulfill the treaty obligations of the New York Convention¹ and could not satisfy the needs of commercial subjects in resolving disputes. In July 2021, the draft of the Arbitration Law of the People's Republic of

China (Revised) for solicitation of opinions proposed for the first time to establish ad hoc arbitration system in the form of law. In ad hoc arbitration, the arbitrator is the core of the operation of the ad hoc arbitration system, and how to select an arbitrator is of utmost importance. Faced with this brand-new system, how we based on China's practice to learn from extra-territorial experience, so that it is better for China's foreign economic development escort, this is an urgent solution to the reality of the need for request. Ad hoc arbitration is a new thing in our country, but in the international

arena, ad hoc arbitration has developed early and has a long history, and has formed a relatively mature system, such as the English Arbitration Act, the German Code of Civil Procedure, the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, the Arbitration Rules of the World Intellectual Property Organization, and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, and so on. Foreign academics on the relationship between the arbitrator and the parties, the independence of the arbitrator and the basis of arbitration – meaning of autonomy has also formed a relatively complete theoretical system. China's academic community is mainly focused on the current legislation on the arbitrators "two high, three eight" conditions, the relationship between arbitrators and parties, how to protect the independence of arbitrators and ad hoc arbitration procedures are less research.

2. The System for the Selection of Arbitrators in Ad Hoc Arbitration from an International Perspective

Ad hoc arbitration, also known as ad hoc arbitration or arbitration at will¹, is an arbitration system relative to institutional arbitration. The parties are not subject to the management of the arbitration institution, choose the arbitration procedure by their own negotiation, and form the arbitration tribunal by themselves. The arbitral tribunal is dissolved once it has rendered its award². Selection of arbitrators as the beginning of the formation of the arbitral tribunal, that is, the focus of this paper. The system of selecting arbitrators includes procedural and substantive elements. The procedural element solves the problem of how to choose, including the number of arbitrators to be chosen, the method of selection, recusal and replacement, etc.; the substantive element solves the problem of what kind of people can be chosen, including the nationality of the arbitrators, the professional requirements, and the code of ethics.

This paper will first explore the constituent elements of the system for the selection of arbitrators in ad hoc arbitration from an

international perspective, in order to derive general experience and scientific criteria for the system for the selection of arbitrators in ad hoc arbitration.

2.1 *Rationale: Autonomy*

2.1.1 The Meaning of Autonomy in the Selection of Arbitrators

Party autonomy is the foundation of ad hoc arbitration, and the starting and ending point of ad hoc arbitration. The fundamental theoretical support for the selection of arbitrators as the beginning and core of the ad hoc arbitration procedure is the autonomy of meaning. The basic connotation of autonomy of meaning is that the civil subject can decide to carry out a certain behavior by virtue of its own will and be bound by that behavior³. This is reflected in the selection of arbitrators, the arbitration parties can completely according to their own will, decide to select the arbitrator in what way, including the selection time, procedures, standards, as well as the replacement, avoidance of the arbitrator, that is, the freedom of selection of arbitrators.

2.1.2 The Value of Freedom of Choice of Arbitrators

The reason why the freedom of selection of arbitrators in ad hoc arbitration should be emphasized and guaranteed is that, on the one hand, the freedom of selection is the foundation and kernel of the ad hoc arbitration system. Arbitration is based on consent, whereby the parties agree not to be subject to the jurisdiction of the public authorities of the State. Ad hoc arbitration has taken this freedom of meaning to a new level: not only is the dispute between the parties not subject to the jurisdiction of the court, but it is also not subject to the arbitration institution. Ad hoc arbitration needs to be insulated from all external forces that impede the realization of its freedom of expression, including the judiciary, the arbitral institution, as well as malicious delays, coercion and threats by other parties. Arbitral awards are made by arbitrators, who are chosen by the parties. It is therefore not difficult to conclude that only by fully safeguarding the freedom of selection can we realize the fairness of arbitral awards and the true value of ad hoc arbitration. On the other

¹ Yang, Liangyi. (1997). *International commercial arbitration*. China University of Political Science and Law Press, 136.

² Wu, Ming-Tung. (2005). *Arbitration jurisprudence*. Shaanxi People's Publishing House, 16.

³ Dong Lianhe. (2006). On the Principle of Meaningful Autonomy in China's Arbitration System. *Journal of Tsinghua University (Philosophy and Social Science Edition)*, (03), 130.

hand, it is more appropriate to emphasize the protection of the freedom of will of a party that may be relatively weak. Like a barrel, the lowest place determines the volume, only to ensure that the strength, status and other less prominent parties can have the right to decide and choose the selection of arbitrators, the arbitrators may make a truly fair award,¹ the principle of fairness and justice can be implemented.

2.1.3 Balance Between Autonomy and Efficiency

As a commercial subject, the purpose of all meaning and behavior is efficiency. The reason why businessmen choose ad hoc arbitration, apart from the low cost, is that they can maximize their own decision, save time in dealing with institutions and courts, and improve the efficiency of dispute resolution. However, a high degree of autonomy may bring new problems: without external supervision and constraints, the opposing party may intentionally delay the arbitration process; without clear rules, the arbitrators selected may not be satisfactory; and with the delay in organizing the tribunal and the inability to convert to institutional arbitration or litigation, the rights will not be remedied. Throughout the history of the development of modern businessmen's law², we can see that businessmen's law arose in the businessmen's society, with a certain degree of autonomy, the state generally support and recognize businessmen's law. But at the same time, merchant law is neither domestic law nor foreign law, its more a kind of law order similar to customary law.³ Consequently, States often require that it be applied after the enactment of the law. The purpose of such an order of application is not so much the power of the state as the realization of the highest good for the society as a whole, which can also be regarded as a form of public order. Down to the ad hoc arbitration arbitrator selection, in general should fully respect the parties' right to autonomy, when it seriously affects the process of dispute resolution, the state, arbitration institutions and other third parties also have a legitimate reason

to intervene in the maintenance of arbitration procedures, but also equal to the maintenance of the efficiency of the pursuit of commercial activities.⁴

2.2 Legal Base: Legal Relationship Between the Parties and the Arbitrators Qualification

In order to study the system for the selection of arbitrators in ad hoc arbitration, it is important to find the legal basis of the system. The legal basis is the legal relationship between the parties and the arbitrators. Clear the relationship between the two, in order to clarify the entire selection process in the division of rights and obligations. In this paper, through the study of typical countries with well-developed arbitration systems, the following views are organized for the characterization of the legal relationship between the parties and the arbitrators.

2.2.1 Contractual Relationship

The contract theory refers to the conclusion of an arbitration contract between the arbitrator and the parties, with the arbitrator requesting reasonable financial remuneration and the parties requesting a fair and impartial decision. Specifically divided into commission contract, employment contract, contract of contract, etc.,⁵ such as 1996, the UK arbitration act, article 60, 62, 63, the parties can freely agree to compensate the arbitration amount, reflecting the protection of the party's autonomy, but also has a different from the litigation fee of the contractual nature.² Another example is Article 1034 of the German Code of Civil Procedure³, which provides that the number of arbitrators may be agreed upon by the parties, which means that there will be the possibility of multiple or single arbitrators, who may be appointed by a single party or jointly by both parties. It can be seen that contractual legislation, whether in ad hoc or institutional arbitration, gives the parties the right to choose their arbitrators, respecting their autonomy in commercial disputes.

2.2.2 Quasi-Contractual Relationship

In the common law, the meaning of quasi-contract is not a contract made by the

¹ He, Jianhua. (2004). *Theory of Economic Justice*. Shanghai People's Publishing House, 268.

² See Huang Jin, Hu Yongqing. (1997). Modern Merchant Law - History and Trends. *Comparative Law Studies*, (02), 38-52.

³ See Zheng Yuanmin, Chen Lingfeng. (2004). The Application of Modern Merchant Law. *Hebei Law*, (08) 17-21.

⁴ See Yue Shumei. (2006). On the social basis of international commercial arbitration. *Social Scientist*, (02), 101-103+107.

⁵ Du Huanfang, Li Xiansen. (2020). Dilemma of Arbitrator Selection and the Path to Solution: The Perspective of Legal Relationship between Arbitrators and Parties. *WU International Law Review*, 4(02), 39-59.

parties through the consent, but a kind of relief, in order to give the plaintiff a right of action, and in the law between the plaintiff and the defendant to make an implied contract.¹ It is in fact a remedy for unjust enrichment.

It is argued that there are no formal elements of offer, promise, etc. that a contract should have between the arbitrator and the parties, so they do not establish a contractual relationship. The parties to the arbitrator has the hope to get reasonable referee value requirements, and the arbitrator has the value of remuneration requirements, which is in line with the right to reimbursement of Anglo-American contract law of the constituent elements of the right to request. However, it puts the relationship between the parties and the arbitrator in a precarious state. Moreover, once an arbitrator is established, he or she cannot resign without cause, nor can the parties replace the arbitrator without cause.² Under this institutional structure, the selection of arbitrators does not reflect the autonomy of the parties, and it is difficult to reflect the active position of the parties in ad hoc arbitration.

2.2.3 Specialized Arbitration Services Legal Relationships Says

Mustill & Boyd consider that it is more convenient to explain the legal relationship between the parties and the arbitrator by the law of identity³: the arbitrator is appointed by a party to form a contractual relationship, and the other party forms a contractual relationship with the arbitrator through that party's apparent agent. The arbitrator and the parties are bound by the principle of good faith to comply with the obligations and terms of the contract. British scholars Critchlow also believes that the relationship between the arbitrator and the parties can be both "contractual relationship with the nature of the identity" and "identity relationship with the nature of the contract", that is to say, will be analyzed in conjunction with the law of identity and the law of contract. In other words, identity law and contract law

are analyzed together. Arbitration as a quasi-judicial activity initiated by the consent of the parties, the arbitrator for the parties to provide fair arbitration, the parties to pay, in itself, for a service contract relationship. And because arbitration with quasi-judicial characteristics, the arbitrator in the arbitration process needs to be fair and impartial, can not be arbitrary swayed by the parties, which makes the arbitrator as a quasi-judicial officer, with a strong identity. Furthermore, arbitration is different from the litigation of the significant characteristics of its program is simplified, free, fast arbitration, the purpose is clear, the parties in order to convenient and efficient settlement of disputes and choose arbitration. Therefore, the arbitrator and the parties also have the identity of arbitration for the purpose of dispute resolution. (DU Huanfang & LI Xiansen, 2020)

2.2.4. Evaluation of the Three Doctrines

To summarize the above views, foreign practice and academic mainly through the use of contract, identity and so on to explain the status of the arbitrator in ad hoc arbitration, the contract focuses on ad hoc arbitration of the will of the parties to the arbitrator's role in determining; identity focuses on the ad hoc arbitration of the judicial nature of the grasp; the special arbitration services legal relationship to the fairness of the arbitration and the autonomy of the meaning of the said balanced.

The contractual theory is mainly based on traditional civil law theories and emphasizes the subjective position of the parties in ad hoc arbitration. The contract theory can solve the problems between the parties and the arbitrators in terms of selection and payment of remuneration. The parties can rely on the nature of the case itself as well as the knowledge and needs of the arbitrator to negotiate the choice of arbitrator. Under the framework of contract, the parties choose the arbitrator according to their free will, which is closer to the characteristics of ad hoc arbitration, which is efficient, convenient and highly professional.

The restricted selection of arbitrators in a quasi-contractual relationship does not reflect the autonomy of the parties and makes it difficult to reflect the parties' active position in ad hoc arbitration.

The legal relationship of special arbitration services focuses on the dual nature of arbitration, with certain requirements for arbitrators, not all

¹ Yan Concubine Liao. (2014). The Evolutionary Path of the British Quasi-Contractual System — The Abuse of Common Law Return Law. *Comparative Law Studies*, (05), 112.

² Ma Zhanjun, Xu Hui. (2016). Modification and Improvement of the Replacement System of Commercial Arbitrators. *Hebei Law*, 34(05), 115-124.

³ Fan Mingchao. (2016). The Dilemma of Modeling the Legal Relationship between Arbitrators and Arbitration Parties and Its Solution. *North Law*, 8(06), 118-127.

of whom can serve as arbitrators, and the relationship between arbitrators and parties is not simply a contract of service, nor is it a relationship between a judge and a party. Arbitration is based on party autonomy, the selection of arbitrators need to be selected by the parties under the established conditions. This doctrine should be chosen as it recognizes the decisive role of the parties in ad hoc arbitration and is in line with the fact that certain criteria are required for arbitrators in our country today.

2.3 Core Objective: Safeguarding the Independence of Arbitrators

2.3.1 The Meaning of Independence of Arbitrators

The independence of the arbitrators, as the adjudicators who are in the middle of judging and resolving arbitration disputes, is directly related to the impartiality of the arbitration results. The independence of arbitrators runs through the entire arbitration and is the soul of the arbitration system. Therefore, safeguarding the independence of arbitrators is the core objective and inevitable requirement pursued by the entire design and operation of the system for the selection of arbitrators. As stipulated in the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, the Arbitration Rules of the World Intellectual Property Organization and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the independence of arbitrators includes two connotations: one is that arbitrators are independent of the parties and other members of the arbitral tribunal, and the other is that arbitrators should be impartial to the arbitration case and the parties.

2.3.2 Criteria for Determining Independence: The "Reasonable Doubt" Standard

Where the parties believe that there is a cause affecting the arbitrator's independence, they may request the arbitrator to recuse himself or herself. The parties are required to provide evidence to prove the cause, and the criterion for determining whether the cause genuinely affects the independence of the arbitrator is "justifiable doubts", i.e., facts and circumstances that, from the point of view of a reasonable third party with knowledge of the relevant facts, give rise to reasonable doubts about the independence and impartiality of the arbitrator, whether in the presence of, or as a result of, the appointment of

the arbitrator. (c) Circumstances.⁴

"Since neither the admission of evidence nor flaws in legal issues can lead to the setting aside of an arbitral award, a higher standard of objectivity and impartiality must be set as far as the arbitrators are concerned."¹ Unlike litigation, where there are guarantees such as second instance and retrial, the impartiality of arbitration all comes from the arbitrators, so it makes sense to have higher requirements for independence. Correspondingly, the difficulty of proof for the parties is also reduced, as long as the possibility of proving that the arbitrator is not independent can be proved, without the need to prove that the arbitrator is not in fact independent. Regarding the degree of the possibility of establishment, countries in judicial practice formed some judgment methods: the United States Merit Ins. Co. v. Leatherby Ins. Co.⁵ pointed out that: the challenge to the impartiality of the arbitrator should examine the relationship between the arbitrator and the parties, including social, personal, professional and economic relations, whether the arbitrator and the parties are so close and sufficient to cause reasonable doubt about the impartiality of the arbitrator. A challenge to an arbitrator's impartiality should look at whether the arbitrator's relationship with the parties, including social, personal, professional and financial relationships, is so close as to give rise to reasonable doubts about the arbitrator's impartiality.² The United Kingdom categorizes conflicts of interest into financial and non-financial interests, and when an arbitrator's financial interests are involved, the arbitrator is automatically disqualified from being an arbitrator.³

2.4 Main Modalities for the Selection of Arbitrators in Ad Hoc Arbitration

The theoretical foundation, legal basis and core objectives of the system for the selection of arbitrators in ad hoc arbitration need to be realized through specific procedural operation and institutional design. The following three main methods of selection have been

¹ Gary B. (2014). Born, International Commercial Arbitration. *Kluwer Law International*, 1779.

² Han, Saju. (2006). New development of standards for judging the impartiality of arbitrators under U.S. law. *Industry and Technology Forum*, (11), 82-83.

³ Ma Zhanjun. (2015). Research on the Independence of Commercial Arbitrators. Southwest University of Political Science and Law.

summarized through the study of major legislation both inside and outside the region.

2.4.1 Selection by the Parties

The selection of arbitrators by the parties includes both joint and separate selections. The former tends to apply when a single arbitral tribunal is constituted and the latter when a plurality of arbitral tribunals is constituted⁶. In the case of a plurality of tribunals with an odd number of members, a presiding arbitrator is often established. The presiding arbitrator may be chosen either jointly by the parties or by the arbitrators chosen by the parties. This can be explained by a special arbitration service relationship, whereby the two arbitrators act as representatives of the parties, allowing the parties to enter into a contractual relationship with the third arbitrator.

2.4.2 Selection by the Arbitral Institution

Selection of arbitrators by an arbitral institution means that an arbitrator is selected by an arbitral institution, either by agreement or by law, when the parties are unable to make a normal selection. Agreements include direct agreements made by the parties, either through or outside of the arbitration agreement, as well as indirect agreements where the parties have agreed to the application of an arbitration rule that directly provides for the treatment of such situations. There are provisions that require the parties to agree again before the arbitral institution can make the selection, as well as provisions that allow the arbitral institution to make the appointment directly at that point without the authorization of the parties. With the exception of the Hengqin Rules, which require the selection of arbitrators from the roster of arbitrators, there are basically no similar provisions in other countries. The prevailing international practice nowadays is that the arbitral institution first submits a list of arbitrators to the parties, who may delete or replace the order of the names on the list, and finally the arbitral institution appoints the arbitrators in accordance with the parties' revised list.⁷

2.4.3 Appointed by the Court

If the parties are unable to make their own selection and have not or cannot agree in advance on the selection by the arbitral institution, many countries provide for the appointment of arbitrators by the court upon application or agreement of the parties. For

example, Norway⁸, Portugal⁹, Poland¹⁰, the United Kingdom¹¹, Germany¹² and so on. In practice, the judge is not familiar with the situation of the arbitrator, in the confirmation of the arbitrator candidate is often more willing to listen to the views of the parties.¹ Most of the foreign legislation provides that the judge can directly select the arbitrators, which is different from the draft of China's Arbitration Law (Revised), which provides that the judge selects the arbitration institution, and the arbitration institution then selects the arbitrators.

3. Current Situation and Existing Problems of the System for Selecting Arbitrators in China's Ad Hoc Arbitration

From 2016 to the present, China has issued a series of legal norms on the selection of arbitrators in ad hoc arbitration. The specific legal norms are summarized in the table below:

¹ Ilias Bantekas. (2015). *An Introduction to International Arbitration*. Cambridge University Press, 117.

Table 1. Existing legal norms in China on the selection of arbitrators (left)

Name (of a thing)	Characteristic	Implementation time	Serve (in some capacity)
Arbitration Law of the People's Republic of China	legislation	September 1, 1995	currently in force
Opinions on Providing Judicial Guarantees for the Construction of Pilot Free Trade Zones	fatwa	December 30, 2016	currently in force
Arbitration Rules for Ad Hoc Arbitration in the Hengqin Free Trade Zone	Arbitration Rules	April 15, 2017	currently in force
China Internet Arbitration Alliance Ad Hoc Arbitration and Institutional Arbitration Matching Rules	Arbitration Rules	September 19, 2017	currently in force
Arbitration Law of the People's Republic of China (Revised) (draft for comments)	legislation	July 30, 2021	not yet in force

Existing legal norms in China on the selection of arbitrators (right)

Scope of application	Tenure requirements	Mode of election	Electoral impasse
Institutional arbitration cases	lit. three eights and two thumbs up	The parties agree	Appointment by the Director of the Arbitration Board
FTA ad hoc arbitration cases	specified person	The parties agree	unspecified
Ad hoc arbitration cases electing to apply the Hengqin Rules	Three Eights and Two Heights; Hengqin Arbitration Commission Arbitrators Roster	The parties agree	Direct appointment by the Hengqin Arbitration Commission
Ad hoc arbitration cases	lit. three eights and two thumbs up	The parties agree	The designation may be entrusted to the General Coordinator of the Union
Foreign ad hoc arbitration cases	Three eights, two highs and a negative list	The parties agree	Agreement on appointment of arbitral institution or, failing agreement, appointment by court

From the viewpoint of the above status quo of China's ad hoc arbitration arbitrator selection system, China's ad hoc arbitration arbitrator selection system currently exists the following several problems:

3.1 Unreasonable Conditions of Service of Arbitrators

For arbitrators in institutional arbitration cases, the Arbitration Law stipulates the "three-eight and two-high" conditions of service. The first legal norm on ad hoc arbitration, the Opinions on Providing Judicial Guarantees for the Construction of Pilot Free Trade Zones, only stipulates that ad hoc arbitration is to be conducted by "specified persons" as arbitrators, without clarifying the meaning of "specified",¹³ nor stipulating whether "specified persons" must meet the requirements of the Arbitration

Law¹. This has resulted in the absence of uniform rules and criteria for the application of the selection of arbitrators in ad hoc arbitrations. The subsequent ad hoc arbitration rules, the Hengqin Rules and the Union Rules, in fact follow the requirements of the Arbitration Law, and even add restrictions on the roster of arbitrators. The shortcomings of the existing legal norms are mainly reflected in the unclear or severely restrictive provisions on the qualifications of arbitrators.

The Arbitration Law of the People's Republic of China (Revised) (Draft for Comments), as a future law, demonstrates the legislative

¹ See Zhang J. (2017). Legal Construction of Interim Arbitration Rules in China's Free Trade Zone. *Journal of Shihezi University (Philosophy and Social Science Edition)*, 31(05), 66-72.

orientation of China. On the one hand, it imposes strict restrictions on the conditions of service of arbitrators in general, and in addition to the requirement that arbitrators must comply with the “three eights and two highs”, it also adds the provisions of the negative list. On the other hand, the arbitrators of foreign-related cases as an exception to the conditions of service without interference. However, firstly, the legal provisions strictly limiting the qualifications of arbitrators lack rationality in themselves. Secondly, the differentiation between the qualifications of arbitrators in domestic and foreign cases clearly lacks fairness. Thirdly, it might make it more difficult to apply the norms of ad hoc arbitration and to recognize the results of arbitral awards.

3.2 Incomplete Provisions for Resolving Selection Deadlocks

The norms governing the selection of arbitrators under the Arbitration Act are mainly articles 30 to 32, which in principle shall be chosen by agreement of the parties, with the exception of the appointment by the chairman of the arbitration commission. It cannot be applied to ad hoc arbitration. The Hengqin Rules provide that the parties shall, within 15 days after the commencement of the ad hoc arbitration proceedings, select an arbitrator in accordance with the Arbitration Law. It also creatively provides that if the parties are unsuccessful in selecting an arbitrator, the Zhuhai Arbitration Institution shall directly appoint¹⁴. This reflects China’s FTA’s reference to international practice, but has the following shortcomings: as local rules, they are of limited effectiveness; the appointment by the arbitral institution fails to break through the limitation of the roster of arbitrators, which is not in conformity with the prevailing international legislation¹; and there is no provision on the procedural direction in the event that the parties do not agree with the arbitrator appointed by the arbitral institution, which is obviously not perfect².

The Exposure Draft provides that, in the event of an impasse in the selection, the arbitral

institution may be entrusted with the selection of arbitrators by agreement of the parties, or, if no agreement can be reached, the arbitral institution may be appointed by the court.

Both the current norms and the Exposure Draft provide for appointment by an arbitral institution when the parties are unable to choose an arbitrator. However, there are no provisions on the source of the arbitral institution’s power to make the appointment, its criteria for selecting the arbitrators, or how to deal with the parties’ disapproval of the result of the appointment, i.e., the criteria for the arbitral institution’s intervention, the extent of its intervention and the consequences of its intervention.

3.3 Inadequate Mechanism for Safeguarding the Independence of Arbitrators

Arbitrators are the core of the arbitration system and their independence is a prerequisite for an impartial arbitral award. The independence of arbitrators is mainly guaranteed by the obligation of disclosure and the obligation of recusal. China’s legal norms previously did not provide for the duty of disclosure, the “Exposure Draft” for the first time to increase the duty of disclosure provisions, but there are imperfections in the provisions, and for the provisions of the recusal of the provisions of the unclear and incomplete. Therefore, China currently lacks these two safeguard mechanisms and needs to improve the application of the existing norms.

4. Improvement of the System for Selecting Arbitrators in China’s Ad Hoc Arbitration

Through the above analysis, it can be seen that our country has already formed a preliminary system for the selection of arbitrators in ad hoc arbitration, but there are still unreasonable, unclear and imperfect. Therefore, this paper intends to address the deficiencies discussed above, put forward the following suggestions, in order to improve China’s ad hoc arbitration arbitrator selection system to add bricks and mortar.

4.1 Relaxation of the Conditions of Service of Arbitrators

The Opinions only require the parties to select “specified persons” as arbitrators, but do not specify the meaning of “specified persons”. On the other hand, the Arbitration Law, the Hengqin Rules and the Exposure Draft all

¹ See Zhang Shengcui, Fu Zhijun. (2019). Research on the Innovation of Interim Arbitration System in China’s Free Trade Zone. *Journal of Shanghai University of Finance and Economics*, 21(02), 140-152.

² See Chen Lei. (2020). Interim Arbitration Program Deadlock and Its Institutional Intervention. *Journal of Xinjiang University (Philosophy — Humanities and Social Sciences Edition)*, 48(04), 42-50.

stipulate that arbitrators must meet the mandatory requirements of “three eights and two highs”. The Hengqin Rules even limit the scope of selection to the roster of its arbitration committee; the Exposure Draft also adds the opposite restriction, further narrowing the scope of appointment.

Therefore, we need to argue whether strict conditions of service such as the “three eights and two highs” are really necessary. Because the conditions of service of arbitrators are also part of the arbitration system, the core of the two are of course the same. The biggest advantage of arbitration is economic convenience, so the conditions of service of arbitrators should be viewed more from the economic point of view.

First of all, we should believe that theoretically market players are rational economic agents. When a party chooses an arbitrator, it must have economic considerations: costs, past and future cooperation, unavoidable other relationships, and so on. If the party intends to choose the arbitrator because of the law does not meet the mandatory conditions and disqualification, so that the party has to consume more time, through other ways to solve his dispute, which is contrary to the original purpose of the arbitration system. Arbitration is a system for the settlement of disputes between civil subjects. There is no need for the State to adopt “paternalism” to protect “rational parties”.

Secondly, in terms of the purpose of legislation, laws, especially commercial laws, are merely model contracts provided by the State, and their purpose is not to regulate but to serve. Legislation fixes a number of important and commonly used clauses to improve the efficiency of the conclusion and performance of contracts. It is therefore destined that the law should provide only the most central and general terms, leaving the rest to be filled in by the parties themselves. This is also confirmed in the legislation of other countries¹⁵. Moreover, the actual effect of the existing legislation in our country does not meet the legislator’s expectation, ¹since this is the case, the law might as well “turn a blind eye” in order to maximize the efficiency of dispute resolution.

Finally, restrictions on the qualifications of arbitrators should take more into account the

economic risks behind them, rather than directly imposing textual constraints on their moral character. Therefore, we suggest that the relaxation of posting restrictions should be accompanied by the necessary negative regulations. For example, persons with large personal debts and those who have not yet been reinstated from bankruptcy should be prohibited from serving as arbitrators.

The Exposure Draft even distinguishes the terms of office of arbitrators by the nature of the arbitration case, and there is basically no restriction on arbitrators engaged in foreign-related arbitration cases. In addition to leading to doubtful fairness, it may even lead to the parties, in order to circumvent the aforementioned norms, transforming their cases into foreign-related cases through agreement. It can be seen that our current legal norms and legislative orientation are inconsistent with arbitration theory and practice. We should have full confidence in the selection of the parties, so that everyone can serve as an arbitrator, except for those who have large personal debts, those who have not yet been reinstated from bankruptcy and so on.

4.2 Establishment of a System of Selection Based on Autonomy with the Exception of Institutional Assistance

Generally speaking, the autonomy of the parties should be fully respected and the parties should choose the arbitrators jointly. However, in order to avoid situations where the parties are unable to reach a consensus or are incapable of choosing a suitable arbitrator, it is recommended that the selection of an arbitral institution as the appointing authority or the administering authority for the ad hoc arbitration should be based on the prevailing international practice.²

4.2.1 Affirmation of Existing Provisions on the Source of Authority of Institutions to Appoint Arbitrators

Article 20, paragraph 3, of our Hengqin Rules provides for the appointment of arbitrators directly by the arbitral institution if the parties have reached an impasse in the selection. As mentioned earlier, the Hengqin Rules belong to the category of arbitration institutions explicitly given this power through legislation, meaning

¹ See Xiao Kai. (2006). Arbitrator’s Conduct and Responsibility in the Fuji Xerox Arbitration. *Jurisprudence*, (10), 28-38.

² Muhammad N. (2019). Resolution of Maritime Disputes: Ad-hoc vs Institutional Mechanisms. *International Conference on Advances in Business Management and Law (ICABML)*, 2(1), 189.

that the appointment of arbitrators by an arbitration institution no longer requires special authorization from the parties. However, arbitration is the consent of the parties, ad hoc arbitration is the need to fully protect the party's autonomy, the parties can not successfully select an arbitrator, must have occurred subjective and objective changes in the situation, at this time should respect the parties to change the meaning of the right, it is not appropriate to rigidly stipulate that the original agreement of the arbitral institution to appoint. At the same time, the essence of the power of the arbitral institution to appoint arbitrators still originates from the agreement of the parties, and only if it is agreed in advance that the Hengqin Rules shall apply, can the Hengqin institution make the appointment. In international ad hoc arbitration practice, the parties' authorization may be achieved either by their own agreement or by choosing the arbitration rules of the particular organization or the PCA's appointing authority. Either way, by its very nature, it is contractual in nature. Although the Hengqin Rules have broken the dilemma of organizing the tribunal, the arbitration institution is suspected of over-managing the arbitration and infringing on the freedom of meaning of the parties, and it should be considered that the Exposure Draft on the appointment of arbitrators by arbitration institutions to increase the number of "the parties may agree to entrust the arbitration institution to assist in the organization of the tribunal," is reasonable, and the power of the arbitration institution to appoint the arbitrators is justified.

4.2.2 The Finality of the Act of Designation of an Institution Should Be Clarified

The Exposure Draft is silent on whether the parties have the right to refuse an arbitrator appointed by an arbitral institution. As mentioned earlier, autonomy of meaning implies the values of freedom, rights and justice; no one exercising freedom can harm the freedom of others, and no one exercising rights can violate the rights of others. The freedom of will of the parties should be limited and the parties should not be allowed to abuse their rights so that justice can be realized. At the same time, the design of the system for the selection of arbitrators also needs to take into account the factor of efficiency. In order to prevent the parties from being caught in endless disputes, it is not recommended that the parties be given the

freedom to refuse the selection of the appointing authority for the act of appointment. The appointing authority should give full consideration to the views of the parties in making its decision, and once the decision is made, the parties should comply with it, which is the only way to save the parties from endless procedural delays. The same applies to the mechanism for resolving other types of deadlock, which should respect the free will of the parties on the one hand and prevent them from abusing their freedom of choice on the other.

4.3 Improving the Rules on the Obligation of Recusal of Arbitrators

The Exposure Draft makes corresponding provisions on the duty to disqualify arbitrators, but there are certain shortcomings and the protection of arbitrators' independence is slightly insufficient. China's current law on the obligation to disqualify the arbitrator does have some provisions, however, the provisions are too clear, so that it can not fully cover all the circumstances that should be disqualified, such as teacher-student relationship, colleague relationship, kinship relationship should be disqualified, but there is no provision. In this regard, it is suggested that China's arbitration law should follow the example of adopting the legislative technique of enumeration and generalization, so as to fully encompass the circumstances in which the arbitrator should be disqualified. Moreover, there are no specific provisions on the reasons and procedures for the parties to apply for the disqualification of arbitrators. In this regard, it is recommended that China's Arbitration Law establish the standard of "justifiable doubt" by drawing on the prevailing international practice, and add another paragraph as paragraph 2: "When a party has justifiable doubts about the independence of an arbitrator who has been selected or appointed, it may request the arbitral tribunal or arbitral institution to require the arbitrator to disqualify himself or herself." At the same time, in order to impose reasonable restrictions on the exercise of a request for disqualification by a party, the party shall be required to state the specific facts and grounds on which the request for disqualification is based and to adduce evidence. For judging whether the matter reaches the level of raising a justifiable suspicion, reference may be made to whether there exists any material or spiritual connection between the arbitrator and the

parties, including various factors such as interpersonal relationship and financial interests.

The arbitrator is the soul of the entire process that can run smoothly. The parties, regardless of which side they are on, would like to have a suitable and excellent arbitrator selected. In view of the special legal relationship between the parties and the arbitrator for arbitration services, the selected arbitrator, in addition to providing services, as a quasi-judicial officer for the settlement of disputes, is required to resolve the dispute in a fair and efficient manner.

Therefore, in constructing China's ad hoc arbitration arbitrator selection system, on the one hand, it should stipulate loose conditions of service for arbitrators, improve the way of arbitrator selection, and fully guarantee the party's autonomy in ad hoc arbitration; on the other hand, if the parties cannot agree on the selection of arbitrators, which will jeopardize the statute of limitations interest of ad hoc arbitration, the institution should be intervened as a supplement to party's autonomy to ensure that the arbitration procedures can be carried out smoothly. At the same time, improve the rule of the obligation of the arbitrator's recusal, and provide the last line of defense for the ad hoc arbitration with judicial remedies to safeguard the independence of the arbitrator, so as to realize the substantive fairness of the arbitration result.

Fund Project

This work was supported by Wuhan University Humanities and Social Sciences Research Project, Grant numbers: [413000070].

References

- Chen Lei. (2020). The deadlock of ad hoc arbitration procedure and its institutional intervention. *Journal of Xinjiang University (Philosophy — Humanities and Social Sciences Edition)*, 48(04), 42-50.
- Dong Lianhe. (2006). On the principle of autonomy in China's arbitration system. *Journal of Tsinghua University (Philosophy and Social Science Edition)*, (03), 130.
- DU Huanfang, LI Xiansen. (2020). Dilemma of Arbitrator Selection and the Path of Solution — The Perspective of Legal Relationship between Arbitrators and Parties. *WU International Law Review*, 4(02), 39-59.
- FAN Mingchao. (2014). The dilemma of modeling the legal relationship between arbitrators and arbitration parties and its solution. *North Law*, 8(06), 118-127.
- Gary B. (2014). *Born, International Commercial Arbitration*. Kluwer Law International, 1779.
- He Jianhua. (2004). *A Treatise on Economic Justice*. Shanghai People's Publishing House, 268.
- Huang Jin, Hu Yongqing. (1997). Modern Merchant Law — History and Trends. *Comparative Law Studies*, (02), 38-52.
- Ilias Bantekas. (2015). *An Introduction to International Arbitration*. Cambridge University Press, 117.
- Ma Zhanjun, Xu Hui. (2016). Modification and improvement of commercial arbitrator replacement system. *Hebei law*, 34(05), 115-124.
- Ma Zhanjun. (2015). Research on the Independence of Commercial Arbitrators. Southwest University of Political Science and Law.
- Muhammad N. (2019). Resolution of Maritime Disputes: Ad-hoc vs Institutional Mechanisms. *Management and Law (ICABML)*, 2(1), 189.
- Wu, Mingtong. (2005). Arbitration jurisprudence. Shaanxi People's Publishing House, 16.
- XIAO Kai. (2006). The conduct and responsibility of arbitrators from the Fuji Xerox arbitration case. *Jurisprudence*, (10), 28-38.
- Yang, Liangyi. (1997). *International commercial arbitration*. China University of Political Science and Law Press, 136.
- Yanwei Liao. (2014). The evolution path of the British quasi-contractual system — the abuses of the common law system of return law. *Comparative law research*, (05), 112.
- Yue Shumei. (2006). On the social basis of international commercial arbitration. *Social Scientist*, (02), 101-103+107.
- Zhang Cheng. (2022). Study on the Qualification of ICSID Arbitration Applicants of State-owned Enterprises under the Perspective of "Belt and Road". *Journal of Northwest University for Nationalities (Philosophy and Social Science Edition)*, (05), 76-89.

Zhang J. (2017). Legal construction of ad hoc arbitration rules in China's free trade zone. *Journal of Shihezi University (Philosophy and Social Science Edition)*, 31(05), 66-72.

ZHANG Shengcui, FU Zhijun. (2019). Research on the innovation of ad hoc arbitration system in China's free trade zone. *Journal of Shanghai University of Finance and Economics*, 21(02), 140-152.

Zheng Yuanmin, Chen Lingfeng. (2004). The application of modern merchant law. *Hebei Law*, (08), 17-21.

method of selecting an arbitrator agreed upon by the parties fails to produce an arbitrator, or if the appointing authority agreed upon by the parties fails to complete the appointment of an arbitrator, the Zhuhai Arbitration Commission (or the Zhuhai International Arbitration Institute (HKIAI), which has been authorized by the Zhuhai Arbitration Commission) will be the appointing authority.

¹⁵ For example, Article 7 of the Swedish Arbitration Act 1999, Rule 4 of the Scottish Arbitration Act 2010, Article 1450 of the French Code of Civil Procedure 2011, Article 9 of the Portuguese Voluntary Arbitration Act 2011, and Article 1023 of the Dutch Code of Civil Procedure 2015.

¹ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As a Contracting State, we are required to recognize and enforce foreign arbitral awards, most of which are ad hoc.

² Arbitration Act 1996, 60, 62, 63

³ Germany has placed the rules relating to arbitration in Title 10 of the German Code of Civil Procedure, Sections 1025 to 1066.

⁴ IBA General Standards for Guidelines (2)(b), <http://www.cnarb.com/Item/699.aspx>, last accessed February 1, 2022

⁵ Merit Ins, Co. v. Leatherby Ins, Co. 714 F.2d 673, 680 (7th Cir. 1983).

⁶ As provided for in article 10, paragraph 3, of the Portuguese Voluntary Arbitration Act 2011 and article 16, paragraph 5, of the English Arbitration Act 1996.

⁷ UNCITRAL Arbitration Rules, articles 8-9.

⁸ Section 13 of the Norwegian Arbitration Act 2004.

⁹ Article 9 of the Portuguese Voluntary Arbitration Act 2011.

¹⁰ Article 1172 of the Polish Code of Civil Procedure 2015.

¹¹ Section 16 of the English Arbitration Act 1996.

¹² Section 1035 (3) of the German Code of Civil Procedure 1998.

¹³ Opinions on Providing Judicial Guarantees for the Construction of Pilot Free Trade Zones: Where enterprises registered in a pilot free trade zone agree among themselves to arbitrate the relevant disputes at a specific place in the Mainland, under specific arbitration rules and by specific persons, the arbitration agreement may be recognized as valid.

¹⁴ Article 20, paragraph 3, of the Provisional Arbitration Rules for the Hengqin Pilot Free Trade Zone: In the event that the parties fail to make a direct selection of an arbitrator after the expiry of the time limit, or if the