

CHAPTER 12

REFORM OF INDEPENDENCE OF ARBITRATION INSTITUTIONS IN ZHUHAI

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As clearly prescribed in the *Arbitration Law of the People's Republic of China* (*Arbitration Law*) promulgated in 1994, "Arbitration commissions are independent of administrative organs and there are no subordinate relations with any administrative organs...". During the negotiations for China's accession to WTO, China made clear to the international society, "arbitration fee is subject to the charge of inter-mediation services," and also restated arbitration institutions' independent function of market services. The *Arbitration Law* was promulgated more than 20 years ago; with the gradual establishment and improvement of the social market, the reform and development of the arbitration system in China is being geared to international standards. In recent years, some domestic arbitration institutions have got down to institutional reform, exploring the path to the evolution of their counterparts. Zhuhai city is adjacent to Guangzhou, Hong Kong and Macau, at the frontier of China's reform and opening up campaign. This geographic advantage brings in foreign exchange and economic development which put forth new requirements for arbitration, that is to say, the arbitration development is facing both opportunity and challenge. In accordance with the policy of the public institutions classification reform at central, provincial and municipal levels, we launched the arbitration reform in 2013, by means of reforming statutory institutions, especially the institutional system, to highlight the independence of arbitration institutions, the civil nature of commercial arbitration, and to guarantee the institutions' independent operation and impartiality and efficiency of arbitral awards.

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I ABOUT THE INDEPENDENCE OF ARBITRATION INSTITUTIONS

A The Basic Requirement Derived From the Essential Attribute of Commercial Arbitration

Since the day when arbitration came into being more than one hundred years ago, the civil nature has been the fundamental attribute without which arbitration would not be what it is. As a private dispute-resolution mechanism, arbitration is resorted to by people to judge disputes and settle differences, on the premise of no involvement of tax revenue of taxpayers and public power. Its nature is a transfer of public power of judgment of disputes to private power. To be qualified for arbitration, the private power should be premised on impartiality while the impartiality is based on independence. If there is no or just part independence, then the impartiality is ill-grounded or at least, shakable.

B An Inevitable Choice for the Internationalization of Commercial Arbitration

Attributes including its civil nature and independence, in foreign economic interactions, have made arbitration an effective approach beyond the barriers to international relations, so the commercial arbitration system was popularised and promoted quickly worldwide. Owing to the current circumstances – increasing number of parties acceding to the *New York Convention*, universal access to the *UNCITRAL Model Law on International Commercial Arbitration*, and the rapid pace of international economic integration – the dispute-resolution function of arbitration is being strengthened, elevating arbitration to being irreplaceable by other approaches. Commercial arbitration is playing an increasingly important role in facilitating the integration of local and national economy into global economic cycle as China is expanding its international exchanges and enjoying a flourishing market economy. According to statistics, 219 arbitration institutions has been established at multiple levels in China, handling over 100,000 cases with hundreds of billions of RMB involved. Hence, the independent commercial arbitration mechanism that complies with the development of a society governed by the rule of law has become a significant benchmark and integral part of China's international and law-governed business environment.

C A Necessary Approach to Obtain Credibility of Commercial Arbitration

Independence safeguards the impartiality of an arbitration institution, and serves as the systematic foundation to enhance the arbitration institution's credibility. Although the *Arbitration Law* forbids any arbitrary establishment of arbitration institutions, the arbitration market is still open, not shut or monopolistic. If an arbitration institution wants to have authority and credibility, it can only rely on its

impartial and effective commercial arbitration and high quality services. Practice proved that if an arbitration institution did not strive for independence, a long period of dependence on the treasury and the lack of market competition would lead to it losing motivation and dynamism. A more severe thing is that this kind of arbitration institution, without a clear line between authority and civil services, between administration and public services, between administration and corporation, and between administration and financial institution, has not only inherited all kinds of cankers from the former ones but also undermined the fundamental impartiality of commercial arbitration, causing loss of credibility. Therefore, the more civil and independent an arbitration institution is, the better performance it has in professional business, and more recognisable it is by society.

II OBJECTIVES AND APPROACHES OF THE REFORM

A Objectives: Improving Arbitral Mechanism, Reinforcing its Independence, Establishing Contemporary Management Structure, and Stimulating the Sustainable Development of Arbitration

The reform of arbitration institutions turning toward a civil and independent trend is the way to go. The reform of the independence of arbitration institutions we are pushing forward refers to, on the one hand, the separation from administrative function. For example, when an arbitration institution has a clear division between administration and public services, between supervision and business operation, it will, in nature be transformed from an administrative organ into a social welfare service organisation. It is organisationally independent of any administrative body; it is no longer subordinated to the latter, but supervised instead. And financially independent, it receives effective supervision and has broken away from the sole dependence on the treasury. As for business, this independent institution wins social credibility by impartial and effective arbitration, and obtains market share by quality services, instead of receiving cases as a dependent on administrative power and by means of administrative approaches. On the other hand, an arbitration institution will become "a legally independent organization committed to public welfare services with corporate governance structure." The core of corporate governance lies in establishing the board of directors composed of different representatives and the management responsible for operation. A corporation is operated and directed upon the distribution of rights and responsibilities as well as an interactive and mutually beneficial mechanism so as to restrict and stimulate the shareholders and to realise the favourable development.

B Classification Reform of Public Institutions, Opportunities and Approaches for the Reform of Statutory Institutions

In March 2011, the Central Committee of the Communist Party of China and the State Council issued the *Guidance on Carrying Forward Reform of Classified Public Institutions (the Guidance)* as the top-down design for classification reform of public institutions, promulgating relevant policies, identifying reform's guiding concept, basic principle, general objective and primary task, offering the reform timetable and road map. A series of documents were also issued. According to *the Guidance*, in the same year, the Guangdong Commission Office for Public Sector Reform issued the *Guidance on the Reform of Pilot Statutory Bodies at Some Provincial Public Institutions, Guangzhou, Shenzhen and Zhuhai Municipalities* to launch the pilot reform. A statutory organization is a public institution set up by specific law, regulations or rules, which takes up responsibility of public affairs management or public services. It is a separate legal entity independent of the list of administrative organs. Generally, a statutory body is featured by its establishing by law, statutory responsibilities, independent operation, common management, transparency, etc. It plays a significant role in public affairs management and public services.

We believe that the objectives of the reform of statutory institutions – "division between administration and public services, between supervision and business operation," "self-management and independent operation" – fit in with the direction of arbitration institutions reform. In 2013, the Zhuhai Arbitration Commission was selected as one of the six pilots for reform of statutory bodies in Zhuhai, providing us with a platform to explore the reform of the independence of arbitration institutions.

III MAIN MEASURES OF REFORM

Under the building requirements of the reform of statutory bodies, we started to advance the reform of arbitration authorities on the basis of the idea of building public service organizations which are established by law, self-managed, self-controlled, independently operated, and featured with modern governance structure.

A Establishing the Mode of Legal Person Management by Local Legislation or Government Regulations and Rules

According to the relevant institution-building idea, statutory bodies should be operated independently by law and achieve a breakthrough on the system in the way of the establishment of certain local regulation or government rules. Based on the basic principles of "a set of rules or regulations for one institution", each statutory body should establish a set of government rules or local regulations to

specify its responsibility, organization structure, management and operation, and supervisory mechanism. As a special economic zone, Zhuhai has its own legislative powers pursuant to the special authorisation from the National People's Congress, as well as the authority to introduce laws and regulations. Following the reform requirements of statutory bodies and considering the actual conditions of the arbitration, the Commission drafted *Arbitration Institution Management Regulations of Zhuhai* after investigation. In this draft, taking into account the independence requirement of arbitration institutions, we further detailed its legal responsibilities that independent personnel have in management, fund-raising, and performance-based distribution, and emphasised that the arbitration committee would conduct related business and undertake legal responsibilities independently. The draft is now reported to Legal Affairs Bureau, and to be listed in Zhuhai's local legislation projects. Regulatory documents will be introduced in the form of government rules if local legislation is hard to do in a short time.

B Formulating the Charter of the Zhuhai Arbitration Commission and Other Regulatory Documents

The nature of the statutory body of the Zhuhai Arbitration Commission will be further specified through introducing the *Charter of the Zhuhai Arbitration Commission*, as well as the legal responsibilities in the allocation and management of personnel, fund-raising, performance-based distribution, self-service of the relevant business, etc. By formulating the regulatory documents, such as rules of procedure of the Council, code of practice of the Board of Supervisors, and consulting method of Advisory Committee, the business-discussing and decision-making rules of statutory bodies will be improved and the fast transformation and standard operation of the arbitration commission will be advanced. At present, the draft of relevant documents has been completed and is waiting for the consideration and approval of the Committee Meeting.

C Building and Improving Corporate Governance Mechanism

Planning is underway to establish the Council, the Board of Supervisors, the Executive Department, and the Advisory Committee to make decisions, supervise, perform, and discuss business. The Commission has begun to consider the candidates for Advisory Committee and the Advisory Committee for the municipal government's reference.

D Carrying out the System Reform of Personnel Management

A personnel management system which combines the management of a specified number of personnel and employee management will be explored. A pattern of "ready for both promotion and demotion, advancement and retirement"

will be formed by vitalising the mechanism of using labour-resources. Personnel listed with a specified number are assigned positions according to the total size of the specified number of personnel. Position management will be implemented and linked up with benefits. The compensation of different positions varies based on the level of responsibility and difficulty, the intensity of labour, the environment, knowledge and skills, and experience. All of the personnel listed with specified number have now been categorised and managed according to the public enforcement institutions' management order of statutory bodies. For the personnel listed in employee management system, labour contracts will be signed to define, regulate and adjust the right and obligation between the institution and employees, thus to improve work efficiency and decrease costs.

E Setting up the Financial Supply and Administration System in the Statutory Bodies' Mode

It is necessary to explore the funding mode of "a combination of financial subsidies and service charges", implement the budget allocation pattern of "staff payment plus business expenditure", link up salary and business expenditure with the arbitration charge, and further activate the incentive mechanism in arbitration. On this basis, the Commission will keep discussing with the financial department and strive for establishing the Council's decision mechanism under municipal government's leadership, where the Council takes charge of the budget management of the arbitration institutions, and the Board of Supervisors takes charge of supervising the budget and financial discipline, and the audits of third parties are implemented in trial without the practice of the centralised payment system. This will gradually eliminate the obsolete factors under the original financial management that impede the reform of statutory bodies and the arbitration institutions' gearing to the international standards.

IV DIFFICULTIES IN THE PROMOTION OF THE REFORM

At present, there are certain difficulties and barriers in the promotion of the reform. Firstly, the Commission's current finance and financial system are not in accordance with the reform of the independence of the arbitration institutions. Secondly, the current personnel management system influences the integration and administration of human resources. So far, we have endeavoured to coordinate related administration authorities in the municipal government and striven for more support and help.