

Exploring the Path of “One Belt and One Road” International Investment Dispute Arbitration and Settlement Mechanism

--Take Henan Free Trade Zone as an example

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Abstract

Henan Free Trade Zone, as one of the regional organizations serving the “One Belt and One Road”, analyzes the exploration and practice of the arbitration settlement mechanism of international investment disputes in Henan Free Trade Zone by illustrating the problems existing in the existing settlement mechanism, such as the lack of legislative provisions, the absence of arbitration system, and the shortage of arbitration reserve. In order to better establish and perfect the arbitration mechanism of international investment dispute in Henan Free Trade Zone, this paper puts forward some ways to construct the arbitration mechanism of international investment dispute in Henan Free Trade Zone, such as establishing and perfecting legislative provisions, perfecting arbitration system and enriching arbitration reserve.

Keywords

Henan Free Trade Zone; International investment disputes; Arbitration mechanism.

1. Introduction

Henan Free Trade Zone, short for China (Henan) Pilot Free Trade Zone, was established by The State Council on August 31, 2016. As one of the regional organizations serving the “One Belt and One Road”, Henan Free Trade Zone has explored the establishment and improvement of the arbitration settlement mechanism of international investment disputes. However, the existing settlement mechanism of Henan Free Trade Zone has some problems, such as the lack of legislative provisions, the absence of arbitration system, and the shortage of arbitration reserve. Then, it puts forward the path choice of establishing and perfecting the legislative provisions, perfecting the arbitration system, enriching the arbitration reserve and so on to construct the arbitration settlement mechanism of international investment disputes in Henan Free Trade Zone, so as to better establish and improve the arbitration settlement mechanism of foreign investment disputes in Henan Free Trade Zone.

2. Exploration and practice of the arbitration and settlement mechanism of international investment disputes in Henan Free Trade Zone

In recent years, the National People's Congress enacted the foreign investment law, through the optimization of business environment regulations of the State Council, the Supreme People's Court has issued “the Supreme People's Court of the people's court for the ‘One Belt and One Road’ construction to provide legal services and guarantee for the several opinions about provide legal guarantee for the free trade area construction opinion”, All these have provided strong support for the construction and exploration of Henan Free Trade zone.

2.1. In terms of institutional setting

Free trade zone of Zhengzhou, Kaifeng, Luoyang, Henan, Zhengzhou area at present sets free trade district people's court of Zhengzhou, Zhengzhou, Henan International Commercial Arbitration Court of Arbitration Committee, Luoyang area in the city of Luoyang high-tech zone court court has a free trade zone, Kaifeng area in Kaifeng court then has a free trade zone, the above three area of Zhengzhou area has special court, Free Trade Zone courts are set up in both Luoyang and Kaifeng districts, one in the middle court of the city and the other in the basic district court.

Zhengzhou Arbitration Commission has set up an international Commercial Arbitration Court specializing in the construction of free trade pilot zones. In December 2018, the Zhengzhou Arbitration Commission established the International Commercial Arbitration Court, which is specially responsible for accepting and hearing all kinds of civil and commercial disputes involving the pilot Free Trade Zone. In order to facilitate arbitration and better serve the construction of the Pilot Free Trade Zone, the office of the International Commercial Arbitration Court of Zhengzhou Arbitration Commission is located in the Pilot Free Trade Zone, and a consultation and filing window has been set up in the Comprehensive Service Center of Zhengzhou Area of the China (Henan) Pilot Free Trade Zone.

2.2. In terms of institutional construction

The Henan Free Trade Zone has issued a series of rules and plans. In November 2018, the Arbitration Rules for the China (Henan) Pilot Free Trade Zone were released. Zhengzhou then formulated the "about building China experimental zone of Zhengzhou (Henan) free trade area legal service system implementation plan" and "further enhance Chinese experimental zone of Zhengzhou (Henan) free trade area legal service system construction level work plan, and release on the involved free trade zone of Zhengzhou area under the jurisdiction of civil and commercial cases concentrated implementation plan (try out)", The identification of cases related to the free trade zone has been clarified.

Henan Free Trade Zone should promote the innovation of arbitration mechanism[1], and use arbitration innovation to promote the establishment of judicial, arbitration, mediation and other diversified dispute resolution mechanisms. To prevent and resolve commercial disputes in the pilot Free trade zone by means of arbitration has many advantages, such as expert handling, final adjudication, convenience and efficiency, international standards and respect for commercial practices. The arbitration commission of Zhengzhou International Commercial Arbitration Court in the system summary of our city, on the basis of existing arbitration practice, selecting a number of senior arbitrators and arbitration procedure of the professional management team, implements the "one-stop" service, "one-off" inform such advanced system, and through the optimization of the original arbitration procedure and ascension, achieve high quality arbitration service.

3. Problems in the arbitration and settlement mechanism of international investment disputes in Henan Free Trade Zone

It has been more than 5 years since Henan Free Trade Zone was established in 2016. Due to the short time of establishment and the lack of experience in foreign investment dispute settlement in Henan Free Trade Zone, the arbitration system of Henan Free Trade Zone is not perfect, and there are many problems in the following aspects:

3.1. Lack of legislative provisions

As a pilot zone for China's inland areas to explore opening-up and effectively serve the construction of the "One Belt and One Road", Henan Free Trade Zone has made useful exploration in recent years, but still lacks clear provisions in legislation.

First, the legislation lacks clear provisions on the dispute settlement mechanism for foreign investment. The current effective Foreign Investment Law was enacted and passed in 2019, but the existing provisions are too brief. It only provides a simple sloganizing on the complaint mechanism of foreign investment in Article 26, and its positioning is very vague. There is also no clear regulation on who complains, to whom and how. There are also no clear provisions on the means of dispute settlement, such as consultation, mediation, arbitration and litigation.

Second, the jurisdiction of FTZS cases has no legal basis. Fta including zhengzhou, kaifeng, luoyang, henan three area, zhengzhou area district court has a free trade area, henan zhengzhou, luoyang district court court in luoyang high-tech zone has free trade zone, kaifeng area in kaifeng court then has a free trade zone, free trade area, henan three area in the administrative management separately belong to three different areas, The three courts or tribunals do not have any subordinate relationship, so it is impossible to achieve centralized and unified jurisdiction over investment disputes in Henan Free Trade Zone.

3.2. Absence of arbitration system

First, the arbitration administration is not independent. In terms of management mode, the arbitration organization is a typical administrative management mode, which is the relationship between command and obedience. The administrative management of arbitration is not independent. In terms of composition, the head of an arbitration institution is often appointed by the administrative organ, which has a strong administrative color. The overlap of personnel aggravates the administrative tendency of arbitration[2]. The composition of personnel is not independent. In terms of funding sources, the arbitration institutions mainly rely on financial allocation and are not independent in funding.

Second, the absence of temporary arbitration. Our country has joined the New York convention, admit execution of foreign arbitration award, but according to the foreign investment arbitration law and other relevant laws and regulations, our country domestic temporary arbitration ruling validity can be denied, but, in turn, may result in foreign is not recognized, in the practice of this kind of practice also does not conform to the trend of the development of arbitration system as it is today [3]. In addition, the establishment of such temporary arbitration is only based on the policy documents of the Supreme People's Court, and the legitimacy of its establishment is questionable [4].

Third, the arbitration supervision standards are different. China's supervisory scale for domestic and foreign arbitral award is also not uniform. For foreign arbitral award, it only supervises on procedure and has no right to cancel; As for domestic arbitral awards, they are supervised not only procedurally but also physically, not to mention that they can be revoked. This kind of non-uniform and differential treatment of supervision standards also needs to be changed.

3.3. Insufficient arbitration reserve

First, the practice of arbitration is insufficient. Since the establishment of Henan Free Trade Zone less than six years ago, the experience accumulated in the practice process is limited. It may not adapt to the arbitration rules of other mature free trade zones, and there is no way to solve the practical problems encountered in the practice of Henan Free Trade zone.

Second, there is a shortage of arbitrators. The establishment of Henan Free Trade Zone has not been long, and the reserve of foreign-related legal talents specialized in handling foreign investment disputes in the free Trade zone is obviously insufficient. The construction of talent

team needs a relatively long-term process, so that it can have a place in the arbitration and settlement mechanism of investment disputes.

4. Path selection of international investment dispute arbitration and settlement mechanism in Henan Free Trade Zone

4.1. Establish and improve legislative provisions

First, we will clarify the contents of the dispute settlement mechanism for foreign investment. In view of the current brief provisions of the Foreign Investment Law, it is necessary to amend the provisions to clearly specify the means of dispute settlement, the sequence of application of various means, how the application process of various means is connected, and how effective the application of various means is. All the above need to be further clarified. In addition, in the process of revising the Foreign Investment Law, it is also necessary to clearly define what matters can and cannot be submitted to international arbitration, and how to apply the law.

Second, to make clear provisions on the jurisdiction of cases in free trade zones. The free trade zone is similar to a small world trade zone. The court level of jurisdiction over cases in Henan Free Trade zone should be clearly stipulated. "Cases related to Free Trade zone" should be clearly defined that the court of free Trade zone should carry out relative "centralized jurisdiction" [5]. This kind of centralized jurisdiction can be compared with the exclusive jurisdiction in the Civil Procedure Law, which needs to amend the relevant provisions of the Civil Procedure Law to make it clear.

4.2. Improve the arbitration system

Henan Free Trade Zone should on the basis of reference, combined with the actual situation, the arbitration system should be refined and localized, strengthen the arbitration dispute resolution mechanism is imperative[6].

First, make arbitration independent. Firstly, the relationship between command and obedience should be changed in administrative management to achieve independence in administrative management. Secondly, we should change the existing administrative appointment system and adopt the appointment system in terms of personnel composition. Finally, special budget is made for the funds, necessary funds are guaranteed, and the arbitration fee method and standard are clarified. We can also learn from the management model of arbitration institutions in Hong Kong and Singapore, that is, explore the establishment of a corporate governance structure with the council as the core through special local legislation[7], implement effective checks and balances of decision-making, execution and supervision.

Second, the legal status of provisional arbitration shall be granted. It is suggested to delete the requirement of arbitration commission as the entry into force of arbitration agreement stipulated in Article 16 of Arbitration Law, leaving room for the existence of temporary arbitration[8], to make the policy documents of Supreme People's Court more legitimate and effective in terms of upper law, emphasizing the "three specifications" of place, rules and adjudicators[9]. Provisional arbitration studios and provisional arbitration institutes can also be established[10]. Expert bank of provisional arbitrators can be established to improve the selection and appointment of provisional arbitrators and realize the orderly connection of arbitration.

Third, ensure the consistency of standards. The recognition and enforcement of arbitral awards should be treated as equals, formal review should be conducted procedurally, and substantive intervention should be avoided as far as possible, so as to eliminate differences between internal and external arbitral awards. In addition, make full use of the Internet, big data and other modern technological means, promote online arbitration mode, including online arbitration, online mediation and online appeal [11].

4.3. Enrich the arbitration reserve

First, we should accumulate arbitration practices. Give full play to the existing similar arbitration agency action within the free trade area, henan, in henan province within the free trade zone to set up the corresponding branch or branches, dedicated to free trade arbitration matters, can also set up the major arbitration institutions free trade area, henan representative office, can be further specialized for a specific field, set up the arbitration institution or specialized agencies, such as investment[12], intellectual property rights, etc.

Second, cultivate arbitrators. Adhere to the principle of introduction from within, in addition to attract domestic and foreign arbitration even professionals work to henan free trade zone, also in henan province is a part of colleges and universities, research institutes to carry on the beneficial exploration, such as in henan finance and economics politics and law university school of law, foreign languages institute, institute of international economy and trade joint training foreign financial legal talent, In Henan Institute of Urban Construction Law School, School of Foreign Languages, School of management jointly cultivate foreign project management talents.

5. Conclusion

In the face of various problems in dispute settlement of foreign investment, it is also an approach to establish a domestic arbitration dispute settlement mechanism in combination with the actual situation of Henan Free Trade Zone [13]. All of this is due to our exploration and practice. I believe that with the "One Belt and One Road" Initiative getting more and more widely recognized by the international community, The investment dispute settlement mechanism of Henan Free Trade Zone will also become more and more complete.

References

- [1] Fan Yu. Construction of Free Trade Zone and innovation of Dispute settlement mechanism [J]. Research on Rule of Law, 2017 (01) :7.
- [2] Wu Ruqiao, Li Zhen. From State to Society: Reflection and Improvement of China's Commercial Arbitration System [J]. Social Science Front, 2020(07):192.
- [3] Shi Zhiyu. Study on Temporary Arbitration System: A Case Study of Free Trade Zone Practice [D]. Master's Thesis, Xiangtan University, 2013:6.
- [4] WEI Xiaomin. On the Construction of Temporary Arbitration in China -- Taking "Free Trade Zone" as an example [J]. Journal of Hubei University of Economics, 2020(07):69.
- [5] Chen Li. Construction and Innovation of Investment Dispute Settlement Mechanism in Shanghai Free Trade Zone [J]. Oriental Law, 2014(03):101.
- [6] Ding Xinnian. On the Improvement of Commercial Dispute Settlement Mechanism in Shanghai Free Trade Zone [J]. Journal of Central China Normal University, 2016(12):10-14.
- [7] Yuan Dajuan. Exploration and Innovation of Arbitration Dispute Settlement Mechanism in Shanghai Free Trade Zone [J]. Law, 2014 (9) : 34.
- [8] Zhang Haotian. Construction of Temporary Arbitration System in China under the New Background [D]. Master Thesis of East China University of Political Science and Law, 2018:39.
- [9] TANG X. Difficulties and relief of temporary arbitration system applied in China's Free Trade zone[J]. Journal of International Economic Law, 2020(04):54.
- [10] Gao Fei, Xu Guojian. Practical Guide of Provisional Arbitration in China [M]. Beijing: Law Press, 2017:4.
- [11] Ni Nan. Research on the Construction of "One Belt and One Road" Trade Dispute online arbitration settlement mechanism [J]. Journal of Beijing Union University (Humanities and Social Sciences), 2017(04):103-109.
- [12] Huang Jie. Establishment of Dispute Settlement Body in Shanghai Free Trade Zone and Innovation of relevant domestic Law system [J]. Journal of Sun Yat-sen University (Social Science Edition), 2014 (05) :183.

- [13] Liang Y. Reform of international investment arbitration mechanism and China's countermeasures [J]. Journal of Xiamen University, 2018 (03):169.