



Looking Beyond Rules

— An Analysing Insight into the Competitive Attractions of BAC
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1. Introduction

From its humble start to a well-known name in the international arbitral community, the Beijing Arbitration Commission (BAC) is one of the great growth arbitration institutions of our times. People working on dispute resolution are paying more and more attention to this emerging organisation. While parts of BAC's history, features and achievements have already been reported on in a number of publications, far too little has been analysed on precisely why and how the BAC made a difference in over 200 arbitration institutions in the mainland – and in so doing, won the recognition for and respect to the idea and practice of arbitration in China. Such a study will precisely help answer why an increasing number of foreign parties have started to choose the BAC for resolving their disputes. The key to this article is to offer an analysing insight into some key principles and values which are the foundation of the BAC's expertise, as well as some practical tips under the BAC Arbitration Rules.

2. Independence does matter

From the UNCITRAL Model Law to national legislation, principles like impartiality and equal treatment have been recognised worldwide as the basic requirements of arbitration. These requirements are deeply rooted in and highly rely on the value of independence. Independence reflects

the core value of arbitration. In some arbitration institutions of developing countries, independence would only be hanging on the wall at the office. At the BAC, however, it comes to life. It has been fully endorsed by the leadership team and well integrated into the BAC's practice.

2.1. How is the BAC organized?

The BAC was founded in 1995, following the promulgation of China's Arbitration Law. Despite the funding from the Beijing municipal government at the beginning, the BAC developed a definite power for its own decision-making and a scientific structure for its management to address any possible concerns about the Chinese government's influence and local-protectionism. The decision-making body of the BAC is a committee including one chairman and fourteen committee members. These committee members are well-respected experts and scholars on law or economic and trade. For all affairs, including personnel, finance, as well as other significant matters, the BAC will clearly and simply determine by itself what to do and where to go, without any outside interference at all. Under the committee, the BAC secretariat takes care of the case management and other daily routines. In this way, the BAC has well kept its independence.

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2.2. Who is leading the BAC?

The BAC has achieved its award-winning values and culture in large part through the decisions that have been made by its leadership team. Indeed, for any organisation, it would be almost impossible to soar with the eagles if you are led by a flock of turkeys. Consisting of China's top experts on law and economics, the BAC committee has been proven as a group of true elites. From the 1st to the 5th session, Professor Jiang Ping has been elected as the Chairman of the committee (and is now the Honorary Chairman), and Madame Wang Hongsong has been appointed as the Secretary General. In China's legal arena, Professor Jiang is undoubtedly a "national treasure". His motto, "I bow my head to the truth only" symbolises the courage and conscience of Chinese intellectuals, and inspires generations of Chinese legal scholars and practitioners. Madame Wang, currently the BAC Vice Chairperson, raised the idea of "casting creditability", not only for the BAC, but also for, and respected by, all Chinese arbitration institutions. The current Chairman of the committee is Professor Liang Huixing, a renowned civil law expert from the Chinese Academy of Social Sciences. Meanwhile, other committee members are from prestigious colleges and institutes such as Peking University, Tsinghua University, Renmin University of China, and so on. The strong feature of the scholars reinforces the free thinking and the independent decision-making of the BAC.

2.3. How is the BAC financed?

With continuous collaboration and hard work, the BAC was rewarded with a sharp increase in its caseload and the disputed amounts. In 1995, only seven cases were filed with the BAC, with a total disputed amount of 44 million RMB. By the end of 2012, the BAC had registered 20,407 cases, with the total value in dispute of 94.74 billion RMB. During this process, the BAC acquired its financial independence with its case management income. Established in 1995, it became financially independent in 1999. Using its own funds, the BAC

purchased nearly 7,000 square metres of office space and 70 parking lots in Beijing's central business district. Every visitor to the BAC will be impressed by its high-tech and fully equipped hearing rooms and elaborately developed online case handling system. Except for covering all its expenses and arbitrators remunerations, the BAC pays taxes, an odd phenomenon during the transitional period of China's society. But by paying taxes, it achieved even greater independence in its organisational management. By the end of 2012, the BAC had paid 129 million RMB in taxes - 29 times more than its initial government funding at its establishment.

2.4. Arbitrators impartial and fair?

Professor Jiang used to comment that "the life of arbitration will hinge on quality services, and quality services will hinge on quality arbitrators". Despite the preeminence of the institution as a whole, the BAC fully understands the key role of arbitrators in individual cases, in particular their impartiality and fairness. It engages criteria to continuously improve, and the selection process is to ensure fair competition. Once arbitrators are listed on the panel, there will be a performance assessment, and those of high performance will get their contracts renewed. Thus far, the total number of appointed arbitrators is 810,410 of which have not been invited back.

Under the BAC Arbitration Rules, the arbitral award shall be signed by each member of the arbitral tribunal. The dissenting arbitrator may choose not to sign the award. And if so, this dissenting arbitrator shall issue a dissenting opinion, which shall be sent to the parties together with the award but does not form part of the award. If the dissenting arbitrator does not issue a statement of his/her personal opinion, the arbitrator shall be deemed to have refused to sign the award without any justifiable reason.

To guarantee and further the arbitrators' impartiality and fairness, the BAC made special internal rules.

The BAC chairman and staff members are not permitted to be arbitrators. Arbitrators are required to disclose any interest conflicts and the parties are provided with a computer system to search for background information of the arbitrators. In addition, the BAC arbitrators may not represent disputing parties in any case at the BAC. Such rules, although tough, distinguished the BAC from other arbitration institutions; for independence does matter.

3. Make it globalised

From the early history of arbitration to the New York Convention, arbitration is always believed to be an ideal mechanism for resolving transnational disputes. Living in a flattened world and a new era, with the boost of internet economy, free trade, and cross-border investment, the BAC was never satisfied to be just a leading domestic institution. Shortly after becoming self-funding, the BAC started to step forward to the outside world. It demonstrates being globalised in many ways, and the following facts will unveil the truth.

3.1. The facts show

Some foreign parties have mistaken the BAC as an institution for local disputes only, partly because of “Beijing” being in its name. Pursuant to the Arbitration Law of China, however, the BAC is free to accept and handle foreign-related or international cases, with its awards enforceable internationally. By the end of 2012, the BAC had already handled more than 500 international cases, serving parties from various jurisdictions including the United States, United Kingdom, Germany, Australia, Japan, South Korea, Singapore, Hong Kong and Taiwan, and so on. (Even in its domestic caseload, roughly 50% of cases involving one party or both parties from outside Beijing.) To make its Arbitration Rules more welcoming to foreign parties and foreign counsels, the BAC set special stipulations on international commercial cases in Chapter 8. When appointing arbitrators, parties in international cases may select arbitrators outside

the BAC panel (Art.60 (1), BAC Arbitration Rules). To address the foreign parties’ concerns about the impartiality and confidentiality of the arbitral tribunal in Arbitration-Mediation, or, the conciliation conducted by the tribunal during the arbitral proceeding, the Rules allow the parties to request a replacement of any arbitrator upon the termination of an unsuccessful conciliation (Art.58, BAC Arbitration Rules). When rendering the arbitral award, the tribunal is also required to take into account any relevant international trade usages (Art.60 (3), BAC Arbitration Rules).

3.2. The team prepared

When speaking of service, the human element always remains a cornerstone of the BAC’s success. To ensure a quality service for its foreign clients as well as its Chinese clients, the BAC has carefully built its “international team” of arbitrators and staffs. Among the 391 arbitrators in its panel, 98 are from foreign jurisdictions, comprising of 18 from North America, one from South America, 39 from Europe, three from Oceania, and 17 from Hong Kong and Taiwan. These arbitrators not only guarantee best quality service for parties from different countries, but also bring cutting edge ideas and solid foreign experience to the BAC. Accordingly, the BAC engaged China’s top-ranking case managers, mostly graduates from top law schools in China, and some even with overseas legal study and working experience. Language is usually an important factor to consider in cross-border arbitration cases. With such a prepared team, however, language is not really a problem at the BAC. Today, English is mostly chosen in international arbitration, and so it is at the BAC. In case of any other language, it will be easily handled by an interpreter utilising the BAC’s simultaneous interpretation equipment.

3.3. Colloquia and trainings excelled

Since human resources play a significant role at the BAC, the exchange of ideas and further studies are understandably indispensable and essential,

especially in its continual globalisation process. Arbitration theories and practices develop fast both in China and abroad. On the one hand, the BAC thirsts for up-to-date information from the international arbitral community, and therefore proactively holds high-profile colloquia and trainings, not only for its arbitrators and staff, but also for arbitration scholars and practitioners. A number of world top arbitration experts have given lectures at the BAC, including Gary Born from Wilmer Hale, Loukas Mistelis from Queen Mary University, Teresa Cheng from the HKIAC, Thomas Stipanowich from Pepperdine University, Philip Yang, and others. On the other hand, the BAC works hard to introduce the status quo and any progress in Chinese dispute resolution to the outside world. In 2013, the BAC started to produce an annual report of the commercial dispute resolutions in China, providing a review of and preview for the year, which is now being published by LexisNexis. Based on this report, the BAC held a legal forum, “Unlocking the Intricacies of Commercial Dispute Resolution in China” jointly with the Institute of Advanced Legal Studies in London, which has attracted key politicians and elites from the United Kingdom’s judicial circles, and worldwide attention.

4. Embracing the trends

Superior services always come from a genuine desire and effort to exceed what the clients expect and meet what the trends require. The BAC not only discovers the needs and the trends, more importantly, it acts on what it learns – and its internationalisation makes that easier than ever.

4.1. Why the revision?

Recently, the BAC published the revision draft of its Arbitration Rules for comments, purporting to replace the existing version, which became effective as of 1 April 2008. Changes have been brought to quite a few provisions in order to keep in consistency with clients’ expectations and international practices as far as possible. With

the revision of its Arbitration Rules, the BAC will further improve its competence in providing tailored dispute resolution services for both Chinese and foreign clients. The following paragraphs will tell what to expect from this revision.

4.2. Arbitration’s advantages strengthened

To highlight the ideas and features of modern commercial arbitration, the revision strengthened the arbitral tribunal’s discretion during the arbitral proceedings. In all matters not expressly provided for in the Rules, the BAC or the arbitral tribunal shall have the power to proceed with the arbitral proceedings in a way it considers appropriate, in order to facilitate the efficient and fair resolution of the dispute (Art.2 of the draft). When hearing a case, the arbitral tribunal shall have the power to, on a case-by-case basis, determine the agenda of a case hearing and take such various hearing measures, including, but not limited to, issuing question lists, holding pre-hearing conferences, or producing terms of references; the presiding arbitrator may accept an entrustment from the arbitral tribunal to take such hearing measures (Art.34 of the draft). In case of a truncated tribunal after the conclusion of the last oral hearing, with the consent of both parties and the Chairman of the BAC, the remaining two arbitrators may continue the arbitral proceedings and make decisions or the award (Art. 44 of the draft). Also, the arbitral tribunal will enjoy a free hand in the assessment of evidence. Rather than being rigidly bound by the evidence rules in litigation, the tribunal is required to take into consideration all factors and practices of the relevant specific industry, realising a professional and fair dispute resolution.

4.3. Transparency and predictability furthered

The creditability of arbitration lies not merely in a just result; a transparent and predictable procedure is of the same importance, or even more so. To absorb some of the feedback from the clients, the revision draft further streamlined the proceedings in this regard. In the event a party raises a jurisdictional

objection, the arbitral proceedings shall not be suspended (Art.6 (3) of the draft). When deciding whether or not to accept the counterclaim submitted after the expiry of the stipulated time limit, the BAC or the arbitral tribunal shall take into account factors like the necessity for consolidating the counterclaim and claim into a single case, the time period exceeded, whether such late submission will cause unnecessary delays and so forth (Art. 11 (2) of the draft). Where a party's application for an amendment to a claim or counterclaim is submitted so late that it may affect the normal progress of the arbitral proceedings, the BAC or the arbitral tribunal shall have the power to reject such an application (Art. 12 (2) of the draft). To better meet the clients' needs for a more detailed and accurate recording of oral hearings, the parties may request the BAC to appoint a stenographer or stenographers to record the hearing (Art. 39 (5) of the draft). During the arbitral proceeding, the Summary Procedure may be turned into an Ordinary Procedure upon a unanimous request by both parties or upon request by one party with the consent of the other party. In case of such a change, the parties shall determine through consultation their respective proportions of deposit of an advance in the additional arbitration costs; failing this, the BAC shall make a determination thereon (Art.56 (3) of the draft).

4.4. Internationally integrated

In recent years, the BAC paid close attention to the newly arising arbitration theories and practices, and found some of them both thoughtful and useful. As a part of its globalisation, the BAC absorbs the best of them in the revision draft, to better meet the expectations of international clients. While the "in writing" stipulation in the New York Convention and the UNCITRAL Model Law did cause some difficulties in handling cases involving non-signatory, the BAC has made a breakthrough by enlarging the scope of such a requirement. Where, in the exchange of the Application for Arbitration and the Statement of Defence, one party claims the

existence of the arbitration agreement whereas the other party does not deny such existence, it shall be deemed that there exist a written arbitration agreement (Art.4 (3) of the draft). Consolidation of arbitrations and multi-parties claims are other two focuses of attention. At the application of a party and where all the parties concerned consent, or the BAC considers necessary and where all the parties concerned consent, the BAC may decide to consolidate two or more arbitrations pending into a single arbitration; unless otherwise agreed by the parties, the said cases shall be consolidated to the case commenced first (Art.72 (1) of the draft). Where there are more than two parties in an arbitration case, any party may raise claims against any other party according to the same arbitration agreement; the arbitral tribunal shall decide whether or not to accept any such claim (Art.13 (1), (3) of the draft). In a multi-parties case, the arbitral tribunal may either render a unified award, or render multiple awards respectively according to the claims between different parties (Art.47 (4) of the draft). For international cases, if the parties have not agreed on the seat or language of arbitration, the BAC may make the determination by taking into account the circumstances of the case and choose any jurisdiction, including one outside of China, or any language it deems proper (Art.60 (1) and Art.70 (2) of the draft). Where Chinese law does not apply, the tribunal may have the power to grant interim measures, either in the form of a decision or an interim award (Art.61 of the draft).

5. Tips under the BAC rules

Notwithstanding the revision of its Arbitration Rules or any other change it has made or will make, the BAC never intends to simply copy. It embraces the trends, but is not a mere follower. From the very beginning, the BAC was ambitious to build up its own system based on its practices. A "BAC mode" is always the starting point and the final aim of all its endeavors. In view of this, some practical tips have been to be helpful for attorneys and legal counsels unfamiliar with BAC rules.

5.1. Proper case filing

A successful arbitration usually begins with a proper case filing. Yet claimants or their counsels, especially those residing outside Beijing, are not required to come to the BAC in person. The BAC provides a free case filing consultation service; a telephone call or fax or email will be enough to find the answers to their questions. The submission of documents could be done by post or courier. Materials expected to be submitted include not only a request for arbitration and the arbitration agreement, but also the statement of claims, evidence and the source of those evidence (attached with a list thereof), and the name and address of its witness if any, and proof of the claimant's identity (e.g. Business License, Certification of Legal Representative, Power of Attorney).

As for the language of the submissions, Chinese is not a must although it is the official language of the BAC. If the parties have agreed otherwise, their agreement shall prevail. If translation services are required by the parties or their counsels or witnesses during oral hearings, translators may be provided either by the BAC or by the parties themselves. The parties shall bear the cost of translation.

Different from litigation in China, there is no restriction on the number of representatives under the BAC Arbitration Rules, and a foreign attorney will be acceptable as well to represent the case. A Power of Attorney should be submitted to set out the matters specifically entrusted and the scope of the authorised representatives' authority.

The BAC shall register the case within five days of its receipt if it finds that the requisite requirements for acceptance are met. Within 10 days of the registration, the BAC shall send to the Respondent a Request for Submission of Defence, as well as a copy of the Application for Arbitration, attachments thereto, if any, a set of Arbitration Rules, and BAC's Panel of Arbitrators. Despite the time period for case registration, claimants

could apply for property preservation prior to an arbitration case that has been registered, pursuant to the Civil Procedure Law of China newly revised in 2012. Besides its own rules, the BAC could also administer arbitration cases under a different set of rules if so agreed by the parties, as long as it complies with the mandatory law of the seat of arbitration and is enforceable.

5.2. Strategic defence

To the respondent, on the contrary, a strategic defence should be carefully designed. Some people probably regard "doing nothing" as a useful weapon in international practice. Nevertheless, they are recommended to reconsider whether it is advisable to reject to sign for the arbitration documents. Under the BAC rules, if, despite reasonable inquiries, the addressee's place of business, place of habitual residence, or other mailing address cannot be found, service shall be deemed to have been effected if the documents, notice or material are delivered to the addressee's last known place of business, place of habitual residence, or other mailing address by mail, courier, or by any other means of delivery with proof of attempt to deliver. Accordingly, "doing nothing" will bring possible risks.

What is the respondent expected to do then? Under the Ordinary Procedure in an international case, the respondent should, within 45 days of the receipt of the Request for Submission of Defence, submit to the BAC a Statement of Defence, evidence and the source of the evidence (together with a list thereof), and the name and address of its witness if any; and proof of the respondent's identity. If the respondent finds the time limit for preparing the required documents not enough, timely communication with the BAC for an extension will be strongly recommended. Failing this, the progress of the arbitration shall proceed anyway.

If the respondent objects to the existence or the validity of an arbitration agreement or

the jurisdiction over the case, it may raise a jurisdictional objection. It should be kept in mind that such an objection should be raised in writing before the first oral hearing, or prior to the expiry of the time limit for the submission of the first round of defence in a documents-only arbitration. Otherwise, it shall be deemed to have accepted that the arbitration agreement is valid and that the BAC has jurisdiction over the case. The written objection may be submitted either to the BAC or to the relevant court for a decision thereon. If one party makes an objection to the BAC with the other party to the court, then it shall be decided upon by the court. The BAC may authorise the arbitral tribunal to rule on jurisdictional objections, and the tribunal may deliver its decision either in an interim award or a final award.

The respondent in an international case shall also submit its counterclaim within 45 days of the receipt of the Request for Submission of Defence according to the Ordinary Procedure. In case of an overdue submission, the arbitral tribunal, or if the tribunal has not been constituted, the BAC shall decide whether to accept the counterclaim.

5.3. Your suitable arbitrator(s)

The appointment of arbitrators is understandably a crucial step in arbitration. In domestic cases, arbitrators shall be chosen by the parties from the Panel of Arbitrators maintained by the BAC. There is no restriction on appointing foreign arbitrators in domestic cases, if the parties think a foreign arbitrator should be suitable for the dispute. This did happen in practice where the parties had special agreements (e.g. a foreign language was agreed as the language of arbitration), or where there are special factors in specific cases (e.g. a dispute between two Foreign Invested Enterprises, which is usually deemed to be a domestic case under the Chinese law).

In international cases, arbitrators could be chosen by the parties from or outside the Panel. In so doing,

the parties shall submit the resume and means of contact of the candidate to the BAC. The candidate selected outside the Panel may act as an arbitrator with the confirmation of the BAC, and with a term to expire at the closing of the case, unless the BAC decides to list the arbitrator on its Panel. Another question is, could an international arbitrator ask for extra compensation? According to the Rules, as a party agrees to increase the compensation for international arbitrators, the party shall deposit an advance on the resulting additional costs as required by the BAC; if a party has not deposited the advance on costs, it shall be deemed not to have selected the arbitrator, and then the Chairman of the BAC could appoint the arbitrator for the party.

To make the listing procedure more effective, the parties may each nominate one to three arbitrators as the candidates for the presiding arbitrator. According to the application or agreement of parties, the BAC may also provide a list of five to seven candidates for the presiding arbitrator from which the parties shall select one to three as candidates. It is worth mentioning that the BAC is the only institution providing such a service in China, with additional respect to party autonomy, and has proved a useful option for the appointment of the presiding arbitrator.

5.4. What are pre-hearing preparations like?

Appropriate pre-hearing preparations will lead to an effective arbitral hearing. The BAC Rules leave it to the arbitral tribunal for a case-tailored arrangement. If the arbitral tribunal considers it necessary, it may, prior to the oral hearing, authorise the presiding arbitrator to summon the parties to exchange their evidence and jointly draw up a list of the disputed issues and define the scope of the oral hearing. Prior to the oral hearing or at any stage during the oral hearing, the arbitral tribunal also may, if necessary, require the parties to produce evidence and to respond to the tribunal's questions. Parties may negotiate hearing date(s) with arbitral tribunal, and the case manager will also take care of the relevant

arrangements.

When preparing evidence, parties should not neglect that if a party can prove that the other party possesses evidence but refuses to disclose without any justifiable reason, and that such evidence would have had an adverse impact on the case of the party possessing the evidence, adverse inferences may be drawn from such refusal to disclose. In addition, a party may apply for an order for the preservation of evidence if the evidence may be destroyed or lost, or may subsequently be inaccessible.

5.5. What happens during a hearing?

Although China does not really have the tradition of cross-examining witnesses, it is not restricted in any way. Both parties are allowed to put questions to any witness.

The arbitral tribunal shall keep minutes of the hearing, except in relation to conciliation proceedings. The tribunal may also make an audio or video record of the hearing. The parties and other participants in the arbitration shall have a right to request a rectification of any error and omission in the minutes of their testimony. The request shall be recorded if the tribunal does not allow the rectification. The tribunal, the recorder, the parties, and other participants in the arbitration shall sign or affix their seals on the minutes.

The Arbitral tribunal may, on the application of any party and with the approval of all other parties concerned, order the consolidation of two or more related arbitrations or arbitrations involving a similar subject matter, if the compositions of the arbitral tribunals are the same.

5.6. What to expect on the arbitral award?

Needless to say, the arbitral award is of the greatest importance to the parties. Even before the case filing, the parties, or at least the claimant, will wonder when they will receive the award. As a leading institution famous for its efficiency, the

BAC sets a relatively short time limit for making the award. The arbitral tribunal shall render its award within six months of its constitution. If there are special circumstances justifying an extension, the Secretary-General may, at the request of the presiding arbitrator, approve a suitable extension of the time limit.

Where the arbitral tribunal finds it necessary, or where a party so requests and the tribunal approves, it may render a partial award on any part of the claims before rendering the final award, or, an interim award on the procedural or substantive issues in dispute. At the request of any party, a rectification or a supplementary award shall be made to correct any computational, clerical or typographical error, or to supplement the decision on any missed claim, respectively.

The losing party is expected to perform the award according to the time limit specified therein. In the absence of such a time limit, it should be performed immediately. Otherwise, the winning party will be rightful to request for enforcement to the relevant court.

For the enforcement of international arbitral awards, a special reporting system has been implemented in China. Lower courts are unable to refuse enforcement of an international award without referring the case to the higher courts and ultimately the Supreme People's Court (SPC) in Beijing. According to SPC's statistics, the ratio of such non-enforcement was lower than the global average level. As for domestic awards, pursuant to the Civil Procedure Law of China revised in 2012, the courts will, at the application of the losing party, have a judicial supervision on the arbitral procedure only, not a "trial on appeal" at all. This background partly explains why more and more foreign parties or their counsel feel comfortable and confident in the BAC's arbitration.

6. A final word

One will harvest what he plowed. Eighteen years of striving has made the BAC “the only local arbitration commission which meets or surpasses global standards” (*The Economist Intelligence Unit*), and a leading Chinese arbitration institution of “professionalism, competence and transparency” (*Global Arbitration Review*). Arbitration in such a huge country is never an easy job, but the BAC will never forget its aspirations, nor will it ever lose its passion.

In September 2013, the BAC celebrated its 18th birthday; it is just like a young man at this age, full of vigor, ambition, and confidence. It always looks forward. It always marches on. It always prepares to turn the ordinary into something extraordinary.



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