

A Brief Introduction of Beijing Arbitration Commission Arbitration Rules 2015

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The Beijing Arbitration Commission (the “BAC”) has always laid stress on the improvement of its arbitration rules ever since its establishment, and has endeavored to provide a set of flexible, professional, efficient, and user-friendly arbitration rules, purporting to highlight the features and advantages of commercial arbitration. In 2012, the BAC initiated the 8th revision of its Arbitration Rules. After two years careful preparation of drafting, discussion, and comments seeking, the new version of the BAC Arbitration Rules (the “New Rules”) was finally adopted at the Fourth Meeting of the Sixth Session of the Beijing Arbitration Commission on July 9, 2014, and will become effective as of April 1, 2015.

Three points are worth mentioning in the process of revision. The first one is the openness and transparency of the revision process, with emphasis laid on the collection of opinions from those professionals. During this process of more than two years, the BAC has widely sought comments on the revision draft from arbitrators, scholars, lawyers, and in-house counsels, both domestic and abroad, by various means including conferences, discussions, interviews, surveys and the like, and has published the revision draft on its website for comments. As a result, the BAC has received some 40 pieces written feedbacks from both Chinese and foreign experts and institutions, a remarkable sign of the extensive attention and support from the global arbitral community. The second point lies in the idea of the revision. More attentions have been paid to user experience this time rather than the past emphasis on the institution’s administration of arbitral proceedings. Such a change of idea is only the tip of the iceberg. It truly showed the respect to party autonomy, one of the core values of commercial arbitration. The third point is the further adoption of international practice. Keeping its open-mindedness and inclusiveness, as well as sticking to its own practice and Chinese

arbitration' s experience, the BAC aims to make its arbitration rules in line with the trend of international commercial arbitration, and also be compatible with the characteristics of Chinese practice. These three points can tell how much arduous works the BAC has made for the internationalization of Chinese arbitration under the existing legal framework.

The key to this article is to offer a brief introduction of the New Rules from five perspectives as follows.

1. “BIAC” to be used as the concurrent name of the BAC

For the need of its development, the BAC has newly registered the “Beijing International Arbitration Center” as its concurrent name, which is clarified in the New Rules (Article 1.2). It is believed that the use of BIAC will unveil the new chapter of the BAC' s globalization.

2. More transparent, predictable, and user-friendly

2.1. Parties’ procedural rights and obligations further clarified with possible adverse consequence for not exercising rights timely

The New Rules specify that the parties may amend their claim or counterclaim, and where an amendment to the claim or counterclaim is made too late and may affect the normal course of arbitral proceedings, the BAC or the arbitral tribunal shall have the power to refuse acceptance of such amendment (Article 12). The factors to be considered when deciding whether or not to accept the counterclaim raised after the expiration of the time limit are also stipulated (Article 11.2). Under the New Rules, arbitration participants are obliged to collaborate in good faith, and where a party is under the specified circumstance which results in delay in arbitral proceedings, the arbitral tribunal will take into account such circumstance in its allocation of arbitration costs and other costs incurred or increased due to such delay in proceedings (Article 2.4, Article 51.3).

2.2. Stenographer possible in oral hearing for more transparent

proceedings

The oral hearing is undoubtedly of great importance to the parties. To fully meet the parties' need in disputes of high complexity or high professionalism, the New Rules added a special provision on the employment of stenographer(s) (Article 40.5), for the purpose of more accurate written record, and thus more transparent oral hearings, for the parties.

2.3. Procedural provisions refined on to avoid ambiguity

The New Rules redesigned the provisions on objection to jurisdiction, suspension and resumption of arbitral proceedings, withdrawing an application for arbitration and dismissing arbitration, and Expedited Procedure converted into Ordinary Procedure. Such revisions make the rules clearer and easier to understand and use (Article 6, Article 41, Article 44, Article 57).

3. More professional procedural conveniences for joinder of additional parties, claims between multiple parties, and consolidation of arbitrations

The growing complexity of business activities requires for a more professional procedure to settle disputes. The New Rules have well met such requirements with changes as follows:

3.1. Possibility to include additional parties during the arbitral proceedings based on the same arbitration agreement

In complicated transactions, a contract may be reached by and between multiple parties with connected and yet independent contractual rights and obligations. During the proceedings in the arbitration arising from such contract, the New Rules allow the parties to join additional parties to the contract to the arbitration, so as to make a more convenient and appropriate settlement of their disputes (Article 13).

3.2. Possibility to raise claims between multiple parties

In the event of a case with multiple parties, the complexity of the transaction may diversify the interest demands of the parties, not only between claimants and respondents, but also between the multiple claimants or multiple respondents. To better handle such cases, the New

Rules make a break-through to the traditional model of claims only between claimants or only between respondents, and any party may raise claims against any other party under the same arbitration agreement, an approach to resolve disputes between multiple parties, not only conveniently but also cost-effectively (Article 14).

3.3. Newly added “Consolidation of Arbitrations” provision

“The life of law doesn’ t lie in logic, but in experience.” This motto is manifested in the newly added provision on consolidation of arbitrations. Despite different theoretical arguments concerning such a provision, the New Rules paid more attention to its unique value for related or serial transactions’ dispute resolution. Where all the parties request, or where a party requests and the BAC considers it necessary, the BAC may decide to consolidate two or more arbitrations pending into a single arbitration, intending to provide the parties in complex cases with more procedural benefits (Article 29).

3.4. Provision on concurrent hearings more practical

“Concurrent Hearings” is designed for two or more arbitrations pending, in which the arbitral tribunal may, upon meeting certain specified conditions, order concurrent hearings. The New Rules specified the circumstances for such concurrent hearings as well as the discretion of the arbitral tribunal, improving the operability of the provision (Article 28).

4. A broad grant of authority to arbitral tribunal in application of Arbitration Rules, procedural orders, and assessment of evidence, highlighting features and advantages of commercial arbitration

Criticisms on the litigation-styled arbitration can be heard from time to time during the development of arbitration. To avoid the litigation style, and to highlight arbitration’ s cost-effectiveness and procedural flexibility, the arbitral tribunal must be granted with necessary authority. The New Rules therefore made the following changes:

4.1. Discretion of arbitral tribunal confirmed in application of

Arbitration Rules and in control of arbitral proceedings

As any other rules, arbitration rules can be detailed but by no means to be exhaustive. In case of ambiguity or in the absence of any specific stipulation, it will be advisable and reasonable to grant procedural discretions to the arbitral tribunal, which is an important way to reflect the flexibility and efficiency. The New Rules thus stipulated that in all matters not expressly provided for in the Rules, the BAC or the arbitral tribunal shall have the power to progress with the arbitral proceedings in such manner as it considers appropriate, in order to procure the efficient and fair resolution of the disputes between the parties (Article 2.3).

4.2. “Procedural Orders” refined to be more flexible and inclusive

Procedural orders will be helpful to increase the efficiency of case hearing and dispute resolution. They are also a distinctive feature of arbitration in comparison with litigation. In light of the diversified possible complexity in practice, the New Rules re-designed the “Procedural Orders” provision, with its wording more flexible and general, so as to reserve the discretion of the arbitral tribunal when determining whether to issue such orders (Article 35)

4.3. “Assessment of Evidence” specifically stipulated for the arbitral tribunal’ s authority when weighing evidence

Arbitration differs from litigation partly because of the assessment of evidence. The arbitral tribunal should be given a freer hand thereon, rather than be bound by the rules of evidence in litigation. For the purpose of a sound dispute resolution, the New Rules confirmed that the arbitral tribunal may conduct its assessment of evidence by taking into account such factors as industry practices and trade usages, and consider the case in its totality (Article 37)

It is to be clarified that the aforementioned authorities granted to the arbitral tribunal will not be unlimited, and should not be abused. The applications of these provisions shall be in line with and for purpose

of proper arrangements in procedure and reasonable judgments on substance of the dispute. Broader authorities will understandably bring higher requirements for the arbitral tribunal. New provisions in this respect can also tell the BAC's trust to and confidence in its arbitrators.

5. Further internationally integrated for better services to global parties

Commercial arbitration is a cross-border legal service. To provide qualified services to more and more global parties, the New Rules have widely adopted international practice in its international commercial arbitration procedure, which have been well integrated with Chinese local circumstances. This can be deemed as the best example of the New Rules' inclusiveness, openness, and internationalization.

5.1. More flexible determination of the Seat of arbitration

The Seat of arbitration is significant in arbitral proceedings, especially for those with international connections. The existing BAC Arbitration Rules (the "Existing Rules") deem "the location of the BAC" as the Seat in the absence of parties' agreement thereon. The New Rules however take a more flexible approach by clarifying that the BAC may also determine the Seat of arbitration according to the specific circumstances of the case (Article 26).

5.2. More language options for the parties or the BAC to choose in the absence of the parties' agreement

In respect of the language(s) to be used in the arbitral proceedings, the New Rules stick to the principle of party autonomy. In the absence of the parties' agreement, the New Rules do not simply go for Chinese, but give the BAC or the arbitral tribunal the final say on the selection of language(s) according to the specific circumstances of the case. Moreover, where the parties have agreed upon use of two or more languages, the arbitral proceedings can be conducted in multiple languages. Parties in international arbitrations will then enjoy more linguistic conveniences before the BAC (Article 72).

5.3. Separate collection of administration fee and arbitrator' s fee

Under the background of Chinese arbitration' s general practice, Chinese arbitration institutions have for a long time charged the arbitrator' s fee jointly with the administration fee, a Chinese feature but a divergence from international practice. The New Rules are to make a breakthrough on this point, allowing parties in international cases to pay the administration fee and the arbitrator' s fee separately. Parties may agree to pay arbitrator' s fees either in accordance with the amount in dispute or by hour. To provide more options to the parties, this provision makes the calculation and collection of arbitration fees more transparent, and thus is expected to better serve the parties in international cases (Article 61).

5.4. New provisions on Interim Measures and Emergency Arbitrator

Existing Chinese laws are silent as to whether an arbitral tribunal has the authority to order any interim measures. However, laws in some jurisdictions grant arbitral tribunals the power to make such orders, which are also enforceable before the local courts. On the purpose of a broader protection of the parties' legal rights, the New Rules confirm the arbitral tribunal' s power to order any interim measures it deems proper in accordance with the applicable law. To support this provision, the New Rules also provide for "Emergency Arbitrator" mechanism, in response to any possible request for interim measures before the constitution of the arbitral tribunal. Both provisions show exactly the BAC' s close attention to the newly arising practice and its open mind to embrace the trend (Article 62, Article 63).

5.5. More Practical "Applicable Law" provision with possibility of amiable composition

Party autonomy is always the first principle to determine the applicable law in international arbitration. And in the absence of an agreed choice of the applicable law, the New Rules do not follow the Existing Rules in the selection of the law "with which the dispute has

the most significant relationship”, but specify that the arbitral tribunal shall have the power to determine the applicable law according to the circumstances of the case, and hence become more flexible and practical. Meanwhile, the New Rules adopt the UNCITRAL Arbitration Rules and stipulate that the arbitral tribunal may render awards *amiable compositeur* or *ex aequo et bono* according to the agreement by the parties, or upon unanimous consent by the parties during the arbitral proceedings, a particular respect to some parties’ desires for substantive justice (Article 69).

In addition to the aforementioned provisions, further improvement and refinement have also been done to the structure, content, and wording of the New Rules. It is strongly advised to refer to the specific provisions of the New Rules for more details. The New Rules carry on with the BAC’ s respect to party autonomy and its pursuit of professionalism and cost-effectiveness. They are the best conclusion of the BAC practice in the past two decades, and more importantly, a sound symbol of the new era of the BAC practice. The BAC hereby extends its thanks to all friends, old and new, for their generous contribution and kind support to the draft and revision of the New Rules. Great things will always be done by mass effort. Hand in hand with its colleagues and friends, the BAC is confident of and looks forward to a beautiful tomorrow of Chinese arbitration.