

# One Giant Leap for Chinese Arbitration: An Introduction to the New BAC/BIAC Fee Schedule

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On 19 July 2019, Beijing Arbitration Commission a.k.a. Beijing International Arbitration Center (the “**BAC/BIAC**”) released its amended Arbitration Rules (the “**Rules**”) and Fee Schedule (the “**Fee Schedule**”), both of which will take effect on 1 September 2019.

### **An Overview of BAC/BIAC’s New Fee Schedule**

The amendments introduced many reforms to reduce the time and cost of arbitration, addressing a range of issues raised by arbitration users, practitioners, arbitrators and other stakeholders, such as transparency of arbitration costs, single arbitration under multiple contracts, and emergency arbitrator.

The amendment to the Fee Schedule is however the highlight of the changes.

First, the new Fee Schedule separates arbitrator’s fees from administrative expenses for both domestic and international cases, with the arbitrator’s fees consistently higher than the administrative costs. The new Fee Schedule replaces the previous one, which divided the arbitration fees into arbitration acceptance fee and arbitration handling fee without clarifying their respective components, including how much will be used to remunerate arbitrators.

Second, the Fee Schedule provides a new approach to calculate the administrative expenses and the arbitrator’s fees: the amounts calculated for each successive tranche of the amount in dispute must be added together, except where the amount in dispute is over RMB 5 billion (about USD 726 million as of 1 August 2019), the administrative fee charged by the BAC/BIAC will be capped at RMB 8.761 million (about USD 1.27 million); and where the amount in dispute is over RMB 8.682 billion (about USD 1.26 billion), the arbitrators’ fees will be capped at RMB 18 million (about USD 2.6 million), so as to avoid higher costs for high-value cases.

Third, cases with an amount in dispute of no more than RMB 5 million (about USD 0.73 million) will be conducted in an expedited manner, replacing the RMB 1 million (about USD 0.15 million) threshold in the previous fee schedule. There is a modest increase of costs for cases with an amount in dispute above RMB 5 million (about USD 0.73 million), for which the default setting will be a three-arbitrator

panel. However, if parties may agree to submit their disputes to a sole arbitrator, the arbitrator's costs can be reduced by 40% under the Fee Schedule.

Last, the Fee Schedule introduces an optional approach to arbitrator's fees, that arbitrators may be compensated on an hourly basis upon parties' agreement, in both domestic and international cases. The fee schedule also sets the ceiling for hourly rates at RMB 5,000/hour (about USD 720/hour), which is believed to be sufficiently attractive for leading arbitrators.

## **Groundbreaking improvements**

The division of arbitrator's fees and the administrative costs, and the consequential set-up of a transparent standard for the arbitrator's charges are regarded by the Chinese arbitration community as the most groundbreaking improvements.

Its impact is threefold:

First, it delivers long overdue respect to the role of arbitrators in the process by providing fairer compensation for the services they render. It provides a strong incentive for high-quality arbitrator services, thus encouraging and enhancing professionalism among arbitrators' community.

Traditionally, with institutions at the center of procedural management, arbitrators in China are often not engaged with the case before the hearing. Usually arbitrations in China do not have case management conferences, procedural timetables, comprehensive Procedural Orders No.1. or reasoned procedural orders. Higher compensation leads to more responsibilities. Arbitrators are now expected to do more in procedural management before hearings, and to deliver decisions more efficiently.

Second, by paying arbitrators more competitively and providing transparency on arbitration costs to users, it consolidates the legitimacy of arbitration as a trustworthy private mechanism for resolving commercial disputes by independent, impartial and highly respected umpires, with no or only modest increase in costs.

Last, this reform further reflects, and reinforces, the non-profit nature of arbitration institutions in China, and sets a model for other arbitration institutions to follow.

## **Why the New BAC/BIAC Fee Schedule Is Revolutionary in Chinese Arbitration**

A practitioner commented that the new BAC/BIAC Fee Schedule is "one small step for BAC/BIAC, but one giant leap for Chinese arbitration". This is not an overstatement.

All 260+ arbitration institutions in China are founded and financed by the government. For most of them, the arbitration costs the institutions charge would be regarded as part of the state revenue, while their operating costs are sponsored by the government financial budget separately. As such, when the institutions and the state treasury are making considerable revenue for the administration of justice, the arbitrators are often not well paid. To make things worse, parties are prevented from access to the fee arrangement between institutions and arbitrators, and have no idea how much goes to arbitrators.

Therefore, arbitrators - many being established practitioners, leading academics or senior in-house

counsels – are often distracted from their arbitration work by their more profitable, productive, or demanding engagements, and are naturally less committed to their roles as private adjudicators of disputes. While many arbitrators are adhering to high standards in their practice and institutions are managing arbitrators as best as they can, users may find themselves stuck in poorly managed procedures, ill-prepared hearings, a long wait of 12 months or more for the award, or a final decision which is not well written and reasoned. This has become a fundamental challenge to the sustainable development of Chinese arbitration.

In short, users do not get what they pay for. Good arbitrators make good arbitrations, and economic logic tells us we cannot get better arbitrators with less fees. Without competitive remuneration to arbitrators, it would be very difficult for arbitration institutions to develop and retain a large pool of arbitrators committed to quality services. This move by BAC/BIAC is making a significant difference, and we are hopeful other institutions in China will follow.

### **What Further Steps BAC/BIAC May Take**

There remain outstanding issues on arbitrator's fees, such as the division of the arbitrator's fees among a three-arbitrator tribunal, the method for the determination of arbitrator's hourly rates (if applicable), and the remuneration of tribunal secretaries and assistants (if any).

The application of hourly charges would be at the center of further discussion. Although the Fee Schedule provides for the option of compensating arbitrators at hourly rates, it does not specify the method for determining the rates and how timesheet should be managed.

To avoid disputes on the application of hourly rates, we suggest BAC/BIAC issue a set of billing principles. BAC/BIAC may take the [Arbitrator Billing Guidelines of AAA/ICDR](#) and the [Terms of Appointment including Remuneration of CIArb](#) as references. Several principles therein are worth considering when drafting BAC/BIAC's own set of billing principles, such as the relevant Code of Ethics for Arbitrators, disclosure of pre-set rates, calculation methods for arbitrators' fees, cancellation fees, and reimbursement of expenses reasonably incurred. Such a set of billing principles would guide arbitrators in formulating their hourly rates as reasonably as possible and provide more transparency to users.

### **Conclusion**

With the amendment of the Chinese arbitration laws already on the calendar of the Standing Committee of the National People's Congress, we look forward to China further modernizing the arbitration legislation, rules and practice in the near future.