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New 2019 BAC Rules for International Investment Arbitration: A Chinese Approach to the Concerns over Investment Arbitration Regime

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Overview

On 11 February 2019, Beijing Arbitration Commission/Beijing International Arbitration Center (‘*BAC/BIAC*’) launched its draft of ‘Beijing Arbitration Commission/Beijing International Arbitration Center International Investment Arbitration Rules’ (the ‘*BAC Rules*’) for public comments, comprised of its main text and six appendixes. The BAC Rules are the second investment arbitration rules promulgated by a Chinese international arbitration institution after the 2017 CIETAC Investment Arbitration Rules (the ‘*CIETAC Rules*’). The BAC Rules have made a series of innovations and proposed a ‘*Chinese approach*’ to the issues and drawbacks of the current investment arbitration regime. In this post, the author will first discuss the major innovations of the BAC Rules and then provide some recommendations.

Main innovations

1. Strengthening the correction system of arbitral awards

The BAC Rules introduce multi-layered mechanisms to ensure the enforceability and credibility of the arbitral award. Apart from provisions for the correction and interpretation of award and power to issue the supplementary award, the arbitral tribunal is required to send the draft of an award to the Parties before finalizing an award, and the Parties may provide their comments on it. The tribunal may take into consideration those comments where it considers this necessary (Article 42.5). This mechanism allows the Parties to highlight serious errors in the award and to do so early, which decreases the likelihood of other correction mechanisms being required.

In addition, the BAC is the first arbitral institution to introduce an appellate procedure in investment arbitration rules. In the Asia-Pacific region, neither the SIAC nor the CIETAC incorporates the appellate procedure in their investment arbitration rules. The ICSID Convention Arbitration Rules also do not permit ICSID to re-examine any substantive issues of an arbitral award. Hence, this new appellate mechanism may encourage parties to choose to bring their claim before the BAC or choose the BAC Rules. Under the BAC Rules, the Party may submit the Notice of Appeal within 60 days from the date on which the award is made (Article 46.3). Since the

appellate procedure is not a compulsory mechanism, the Rules require the Party wishing to appeal the award to submit the Parties' written agreement to this procedure before the deadline to file comments on the draft award (Article 46.2). This requirement sufficiently protects party autonomy and ensures the efficiency of the proceedings. Moreover, the grounds of appeal are limited to 1) errors in the application or interpretation of the applicable rules of law, 2) manifest and material errors in the appreciation of the facts, or 3) the lack of jurisdiction (Rule 3 of Appendix E), which balances the desire for finality in the award.

2. Balancing confidentiality with the transparency of investment arbitration

The BAC Rules provide that any recordings, transcripts or documents associated with the arbitral proceedings shall remain confidential unless the Parties have agreed that the hearing shall be conducted in public (Article 24). Considering the public interest involved in investment disputes, the BAC Rules set a baseline with regard to the compulsory publication of certain arbitration documents, including the Notice of Arbitration, the Notice of Appeal, other orders, decisions and awards (Article 50.2). Moreover, to maintain a flexible scope of transparency and permit parties' adoption of the latest thinking in international arbitration, the BAC Rules also allow the Parties to apply the 2014 UNCITRAL Transparency Rules to the arbitration (Article 50.1), in which the party autonomy concerning transparency gets full respect.

3. Improving the efficiency of arbitral proceedings

The BAC Rules adopt several innovations to improve the arbitral efficiency, for example, the 24-month time limit for the render of arbitral awards since the constitution of the arbitral tribunal (Article 19), the digitalization of the written submissions (Article 23), an indicative timetable for the stages of arbitration (Appendix B), and a set of rules of expedited procedure (Appendix C).

Under the expedited procedure rules, the time for the written submission and the length of the document are restricted. After consulting the Parties, the arbitral tribunal may not allow the requests for document production, and the decision may be made solely on the basis of the written documents with no hearing or examination of witnesses or experts.

4. Expanding the scope of applicability

The BAC Rules are applicable to both institutional arbitration and ad hoc arbitration under the UNCITRAL Arbitration Rules administered by the BAC (Article 2). Appendix F provides detailed procedural guidelines for arbitration under the UNCITRAL Arbitration Rules in terms of the functions and duties of the BAC. Both investment treaty-based and contract-based investment arbitration can be referred to the BAC.

Recommendations

In my view, the draft BAC Rules would benefit from a few changes to the following Articles:

1. Article 5 and Article 6: the commencement of arbitration and response to the Notice of Arbitration

Article 5 provides that *'the date the Claimant validly submits the Notice of Arbitration (the 'NOA')*

shall be deemed to be the date of the commencement of the arbitration.' A valid submission of the NOA shall include providing a complete NOA, sending a copy of NOA to the Respondent and successfully paying the registration fee in accordance with Article 5.5. Consequently, the date of commencement of arbitration shall be the latest of the dates on which the previous conditions are met. However, Article 6 provides that '*the Respondent shall file a Response to the BAC within 30 days of receipt of the NOA*'. Assuming that a complete NOA is sent to the BAC and the Respondent on 1 January, but the registration fee is paid 15 days later, it would be inconsistent that, in the interim, the Respondent has been preparing a Response to the NOA but the arbitration has not been commenced.

Since the BAC is required to issue a Notice of the Commencement of Arbitration to the Parties, I have the following recommendation for Article 6: '*The Respondent shall file a Response to the BAC within 30 days of the Receipt of the Notice of the Commencement of Arbitration…*', or for Article 5(6): '*The Arbitration shall be deemed to commence on the date on which the NOA is received by the BAC*'.

2. Article 11: Sole arbitrator

Article 11 lacks detailed rules as to how the sole arbitrator is appointed by the Chairman when the Parties fail in their attempts to jointly nominate one. Thus, I recommend adding '*unless the Parties otherwise agree, the Chairman shall appoint the sole arbitrator in accordance with Article 10 (2)*' to Article 11, so as to ensure the consistency in the rules.

3. Article 33: Objections to jurisdiction

It is a common practice that the arbitral tribunal shall have the power to rule on its own jurisdiction as required by the competence-competence doctrine. However, should arbitrators ruling on the merits of a dispute decide jurisdictional issues? The existing arbitration rules, either commercial or investment rules, acknowledge that the same arbitrators may rule on both issues, but the doubts can still be raised that arbitrators are inclined to make a positive jurisdictional judgement so as to maintain their positions to gain financial interests or reputational benefits, particularly in investment arbitration cases. It is undeniable that there have been some decisions where investment arbitral tribunals declined their jurisdiction, for example, the ICSID case Supervisión y Control S.A. v. Republic of Costa Rica. However, the conflict-of-interest standards should not be only based on the actual arbitrator bias, which is almost impossible to measure and even prove, but the risk of bias.[1)] The expectation of the transparency of arbitral proceedings and the significant public interests involved have raised the bar higher for arbitrator impartiality in investment arbitration. As Gerard Meijer mentioned in his suggestion to the amendments to the ICSID Arbitration Rules '*the system of international arbitration … should be made as transparent and ethical as possible, particularly in investment arbitration*'. Considering the increased criticism investment arbitration has encountered, a mechanism should be set up to prevent the conflicts of interest between the arbitrator and the party who raises the objection. Therefore, I recommend the following addition to Article 33 (3) based on the structure of the BAC Rules:

'*The Arbitral Tribunal shall have the power to rule on its own jurisdiction. Unless otherwise agreed by the Parties, the objection to jurisdiction shall be ruled by a new sole arbitrator or new arbitrators nominated by the Parties or appointed by the Chairman pursuant to the Appendix D [Expedited Procedure], if an objection to jurisdiction is raised after the arbitral tribunal is constituted. While such an objection is pending, the arbitral tribunal may continue the arbitral*

proceedings and make an award'.

4. Article 17: Assistant to Arbitral Tribunal

It is a common practice to use an assistant or a secretary by the arbitral tribunal within the community of arbitrators in both international commercial and investment arbitration. Although the BAC Rules have tried to differentiate the assistant from the arbitrator and the secretary, it is still unclear what duties that the assistant shall or may exercise. Therefore, it is recommended to illustrate these duties directly in the Rules, for example, '*administrative, logistical assistance or liaison duties.*'

5. Article 39: Third-Party funding ('TPF')

It is a good initiative of the BAC Rules to explicitly obligate the Party to disclose '*the relationship between the third-party funder and the arbitrator*' since the arbitrator's independence and impartiality are guaranteed. However, the first issue is that Article 39(2) seems to impose too broad a mandatory disclosure requirement on the Party. Apart from the basic information of TPF, the details of the interest of the funder in the outcome of the proceedings and whether or not the funder covers the adverse fee award, subject to the confidentiality of the TPF agreement, are also required to be disclosed. Considering the scope of mandatory disclosure should not exceed the extent required for the legitimacy of proceedings, the alternative measure is to grant the tribunal the power to order the disclosure where it considers necessary.

The second issue is about the lack of clarity as to whom the disclosure shall be made. Article 39(3) requires the disclosure to be made only to the BAC, which does not make sense since the arbitral tribunal and particularly, the opposing party ought to have the right to know the disclosed information. It remains uncertain in the draft BAC Rules whether and how the BAC distributes the disclosed information to the other parties. Therefore, I recommend that the BAC Rules state clearly that '*the notice [disclosing third-party funding] … shall be sent to the other party or parties, the arbitral tribunal, and the BAC by the Claimant or the Respondent*'.

References

?1 Morelite Construction Corp. v. New York City District Counsel Carpenters Benefits Fund, 748 F.2d 79 (2d Cir. 1984), para. 18.

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