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## 四中全會與司法改革

The Fourth Plenary Session of the 18th CPC Central Committee and the Judicial Reform in China

【法治觀察】 Rule of Law Observation

## 中國《立法法》的修改

On Revision of Legislation Law of People's Republic of China

【深度聚焦】 In - Depth Focus

## 兩岸四地律師制度

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## 接軌國際規則

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北京仲裁委員會(「北仲」)本次的規則修訂除了進一步明確若干程序上的相關規定,也充分展現北仲邁向更加國際化的決心。謹擇要評述如下:

(一) 新增《國際商事仲裁案件收費辦法》:關於仲裁員費用,向來,中國大陸境內仲裁員的報酬是仲裁機構按爭議標的額收取仲裁費用中的一部分。各仲裁機構就其自身費用與仲裁員報酬分配的比例不同,雖然北仲在舊規則的情況下,已以分配較多費用作為仲裁員報酬著稱,但仍與國際上常見按小時計酬的仲裁員費用有差距。所謂「仲裁的好壞取決於仲裁員」(Arbitration is only as good as the arbitrator.)。倘欲吸引國際一流的仲裁員,仲裁員的報酬制度需要與國際接軌,因此,這次的修訂新增附錄2:《國際商事仲裁案件收費辦法》,在國際商事仲裁案件中,將北仲收取的案件管理費與仲裁員報酬分開,仲裁員報酬可以是按小時計費,也可以是按爭議標的額計算的一定比例,給予當事人與仲裁員選擇的權利,兼顧目前中國大陸境內多數仲裁實務的情形,也引進了國際上按小時計酬的作法,有助於使當事人有機會可以聘請國際知名的仲裁員,提升仲裁品質。

(二) 就國際商事仲裁案件,新增關於臨時措施、緊急仲裁員的規定(新規則第62、63條)。本項新增與近年來國際上主要仲裁機構修訂仲裁規則的趨勢相一致。但當事人是否自主履行緊急仲裁員或仲裁庭所作成關於臨時措施的決定或中間裁決?在中國大陸現行的法制下,是否及如何能強制執行該關於臨時措施的決定或中間裁決,則有待觀察。

(三) 就國際商事仲裁案件,新規則第69條第3款新增:「根據當事人的約定,或者在仲裁程序中當事人一致同意,仲裁庭可以依據公平合理的原則作出裁決,但不得違背法律的強制性規定和社會公共利益。」本款新增系參考貿法會2010年版仲裁規則第35條第2款,賦予當事人以合意賦予仲裁庭依「公平合理的原則」作出裁決的許可權。在實務上的運用情況如何,則有待觀察。

(四) 開庭筆錄:於仲裁開庭時進行逐字記錄,並提供給仲裁各方當事人,在國際上是相當常見的作法,但中國大陸仲裁機構的仲裁規則卻遲遲沒有相關規定。過去雖然有關於「仲裁庭可以對庭審進行錄音或者錄影」的規定,但該錄音或錄影並不提供予當事人。本次修訂於新規則第40條第

5款新增:「經各方當事人申請,或者一方當事人申請且本會同意,本會可以聘請速錄人員對開庭情況進行記錄,由此發生的費用由當事人預交。」,有助於提高仲裁程序對當事人的透明度。無獨有偶,中國國際經濟貿易仲裁委員會於2015年1月1日起施行的新版仲裁規則第40條第3款亦新增:「應一方當事人申請,仲裁委員會仲裁院視案件具體情況可以決定聘請速錄人員速錄庭審筆錄,當事人應當預交由此產生的費用」。兩相比較,依北仲新規則,在各方當事人共同申請的情況下,無待仲裁委員會同意,即可聘請速錄人員對開庭情況進行記錄;而貿仲新規則則無此明文規定,則貿仲仲裁院在各方當事人共同申請的情況下,是否會依各方當事人的共同請求決定聘請速錄人員速錄庭審筆錄?有待觀察。不論如何,兩會新規則就此的修訂,均回應了各界關於提高仲裁程序對當事人之透明度的呼聲。

(五) 追加當事人、多方當事人間相互請求與合併仲裁:商事交易日趨複雜,爭議所涉當事人常不只雙方,也可能涉及相關聯的數個合同與仲裁協議。新規則新增第13條第1款,允許當事人在仲裁庭組成前,經北仲同意,依據相同仲裁協議在案件中追加當事人。新規則第14條第1款增訂:在仲裁案件涉及二個或以上的申請人或被申請人時,任何當事人均可以依據相同的仲裁協議,針對其他當事人提出仲裁請求。此外,新增關於合併仲裁的規定,合併仲裁是近年國際上仲裁機構修訂仲裁規則的要點之一,呼應此趨勢,新規則第29條第1款前段增訂:「經各方當事人同意,或者一方當事人申請且本會認為必要,本會可以決定將根據本規則進行的兩個或兩個以上的仲裁案件合併為一個仲裁案件進行審理」。實務運作上的技巧之一在於如何判斷在哪種情況下,仲裁機構會決定合併?就此,新規則第29條第2款明定北仲將「考慮相關仲裁案件所依據的仲裁協定的具體情況、案件之間的關聯性、案件程序進行的階段以及已經組成仲裁庭的案件仲裁員的指定或者選定等情況」,這些考慮因素與香港國際仲裁中心2013年版仲裁規則(HKIAC Administered Arbitration Rules)第28條所規定的考慮因素相類似,在具體案例中如何適用,則有待觀察。

(六) 明確規定當事人可以變更仲裁請求或反請求,但若變更過於遲延從而可能影響仲裁程序正常進行的,北仲或

者仲裁庭有權拒絕接受其變更(新規則第12條第2款)。此外,北仲或者仲裁庭決定是否受理逾期提出的反請求時,應當考慮反請求與本請求合併審理的必要性、逾期提出的時間、是否會造成程序的不必要拖延以及其他有關因素(新規則第11條第2款)。

(七)明確規定當事人有違反仲裁規則的情形導致案件審理程序拖延的,仲裁庭可以在決定仲裁費用承擔時納入考慮。若因程序拖延導致其他費用發生或者增加的,該當事人還應承擔其他相應的費用(新規則第51條第3款)。

(八)明文授予仲裁庭的裁量權,包括明定:本規則未

明確規定的事項,仲裁庭有權按照其認為適當的方式推進仲裁程序,以促使當事人之間的爭議得到高效和公平的解決(新規則第2條第3款)、仲裁庭在認定證據時,除依照相關法律、行政法規,參照司法解釋外,還可以結合行業慣例、交易習慣等,綜合案件整體情況進行認定(新規則第37條第2款)。

綜合言之,本次仲裁規則的修訂,使仲裁程序規則更加明確,增加仲裁程序對於當事人的透明度,為仲裁庭的許可權提供了明確的基礎,並且與國際實踐接軌,有利於吸引當事人選擇採用北仲的仲裁規則,為北仲未來數年更上層樓的發展,鋪墊了優良的基礎。

## 體現國際化趨勢

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北仲新規則對現行規則的修改體現了北仲仲裁實踐與國際仲裁的接軌,旨在提高仲裁程序效率、節約仲裁成本、為涉外仲裁當事人提供更靈活、及時的仲裁前救濟措施等等。新規則對現行規則的修改多達五十幾處,部分修改是對原文進行精簡和明確,便於當事人理解。下文僅對幾處具有突出意義的修改進行解析。

### 1. 追加當事人

北仲新規則新增第十三條有關「追加當事人」的規定。根據該規定,在仲裁庭組成前,當事人可以依據相同的仲裁協議申請追加當事人;仲裁庭組成後,追加當事人則需要經過申請人、被申請人以及被追加當事人的同意。是否追加當事人,由委員會決定。可以注意到,追加當事人的前提條件是被追加的當事人也是原仲裁協議的一方,受該仲裁協議約束;而之所以追加當事人程序在仲裁庭組庭以前更為寬鬆,原因在於為保障被追加一方當事人參與仲裁員指定程序的權利,確保最終裁決能夠獲得有效執行。

此外,值得注意的是,由於仲裁案件中並不存在民事訴訟程序中的第三人制度,原因主要在於仲裁程序需基於當事人的合意和自治原則,未同意參與仲裁的第三人不能強行被納入仲裁程序。從這個角度來看,任何被加入仲裁程序中的當事人,要麼是存在訴求,要麼是被訴求,相對保障了一項糾紛的法律關係的完整性。

### 2. 合併審理和合併仲裁

除上述新增條款外,在修改原第二十七條(現第二十八條)關於合併審理條款的基礎上,新增了第二十九條關於合併仲裁的條款。合併審理是北仲規則較有特色的程序性

規定,適用於已啟動的兩個或以上的仲裁案件中,在當事人均同意且仲裁庭組成人員相同的情況下,合併兩個或以上案件的部分仲裁程序的情形。新規則進一步明確,仲裁庭有權決定合併審理的具體程序,賦予了合併審理程序更多的靈活性和便捷性。

合併仲裁條款則體現了北仲在關聯交易、系列交易糾紛方面的仲裁實務的發展。與中國貿仲新規則類似條款相比,北仲新規則第二十九條沒有明確列出合併仲裁需滿足的前提條件,而將更大的自由裁量權賦予了委員會。事實上,美國仲裁協會國際爭議解決中心(ICDR)仲裁規則(2014)第8條、斯德哥爾摩商會仲裁院(SCC)仲裁規則(2010)第11條、LCIA仲裁規則(2014)第22.1(ix)條以及ICC仲裁規則(2012)第10條均有類似規定。

追加當事人和合併仲裁的制度設計均體現了北仲對於提高仲裁效率、降低仲裁成本的追求,也符合國際仲裁實務的現狀和發展趨勢。

### 3. 多方當事人之間的仲裁請求

在增加第十三條的基礎上,北仲新規則新增了第十四條關於多方當事人之間的仲裁請求條款,適用於申請人或被申請人不止一方的情形以及追加當事人的情形。根據該條款,在多方當事人或增加當事人的情況下,任何一方當事人均可以依據「相同的仲裁協議」對其他當事人提出仲裁請求;這意味著,一個案件中的一方當事人很可能同時具有申請人和被申請人的雙重身份。這一制度能夠將多個獨立的訴求納入到一個仲裁程序中,而無需另行立案仲裁,節約了仲裁資源且保障了每一方當事人的權利。

# New BAC Arbitration Rules-Leading the BAC into a More Internationalized New Era

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The Beijing Arbitration Commission (the "BAC")'s new Arbitration Rules ("New Rules") aim to provide clearer procedural guidance for its arbitration proceedings and also demonstrate the BAC's resolve to become an even more internationalized arbitration institution. To elaborate, the most important amendments in the New Rules are:

(1) The newly-introduced "Arbitration Fee Schedule for International Commercial Arbitration": In the past, remunerations to domestic arbitrators are included as a part of the arbitration institution's fees, which is calculated as a certain percentage of the amount in dispute. These arbitrators' remunerations vary from one institution to another depending on the arbitration institutions' rules on splitting the institutions' own fees and arbitrators' remunerations. Even though the BAC has a reputation for being "generous" to its arbitrators, there is still a discrepancy when the fees are compared to standard hourly charges in international arbitrations. As the saying goes, "Arbitration is only as good as the arbitrator". In order to attract first-tier arbitrators from around the world, a mechanism that is comparable with the international practice for deciding arbitrators' remunerations is wanting. Therefore, the New Rules introduce an "Arbitration Fee Schedule for International Commercial Arbitration" at Annex 2, which separates the arbitrators' remunerations from the institutional fees in international commercial arbitration proceedings. Under the new Fee Schedule, the parties and arbitrators may agree that the arbitrators' remunerations shall be calculated either being calculated on an hourly basis or as a percentage of the amount in dispute. By giving the parties and the arbitrators these options, the new Fee Schedule takes into account the prevailing domestic arbitration practice in the PRC and introduces the option of the hourly charge method commonly used in international arbitration proceedings so as to give parties an opportunity to retain internationally eminent arbitrators and therefore further enhance the quality of the arbitrations.

(2) For international commercial arbitration proceedings, the BAC has added provisions concerning interim measures and emergency arbitrators (Articles 62 & 63 of the New Rules). This amendment is consistent with the trends seen in major international arbitration institutions' amendments to their arbitration rules in recent years. However, in terms of enforcement of the decisions or interim awards concerning interim measures rendered by the emergency arbitrator or arbitral tribunal, it is unclear whether the parties will be left by themselves to comply with these decisions or interim awards. It remains to be seen whether the decisions or interim awards concerning interim measures will be enforced and how they would be enforced under the current Chinese legal regime.

(3) For international commercial arbitration proceedings, the BAC has added Article 69 (3) that: "By agreement of the parties, or upon the parties' consensus during the arbitral proceedings, the Arbitral Tribunal may render its award amiable compositeur or ex aequo et bono, but such award shall not violate the mandatory provisions of law and the public interest". This amendment follows Article 35.2 of the UNCITRAL Arbitration Rules (2010) and gives parties the option to, by agreement, authorize the arbitral tribunal to render its award amiable compositeur or ex aequo et bono. How this new amendment is implemented in practice remains to be seen.

(4) The transcript of arbitration hearing: It is a common practice internationally to permit a transcript of the arbitration hearing to be provided to the parties. Nonetheless, the arbitration rules of the PRC arbitration institutions had been silent on this matter. In the past, even though the Rules provide that "the arbitral tribunal may make an audio or video record of the hearing," that record is not provided to the parties. The amended Article 40(5) provides that "upon a joint request by both parties, or a request by one party that has been approved by the BAC, the BAC may appoint a stenographer(s) to record the hearing, and the

resulting additional costs shall be borne by the parties or the requesting party". Such an amendment is helpful to enhance the transparency of arbitral proceedings to the parties. Likewise, CIETAC's new Arbitration Rules, effective from 1 January 2015, also provides at Article 40.3 that "[a]t the request of a party, the Arbitration Court may, having regard to the specific circumstances of the arbitration, decide to engage a stenographer to make a stenographic record of an oral hearing, the cost of which shall be advanced by the parties". Comparing these two new provisions, the BAC rule provides that when there is a joint request by both parties, a stenographer may be appointed without the BAC's approval, whereas CIETAC's provision does not expressly stipulate so. It remains to be seen whether CIETAC's Arbitration Court will always decide to engage a stenographer to record an oral hearing when the parties so jointly request. In any event, the amendments by both the BAC and CIETAC in this regard are in response to calls by the parties to enhance the transparency of arbitral proceedings.

(5) Additional parties, claims between multi-parties and the consolidation of arbitration proceedings: As commercial transactions become more and more complex, disputes nowadays are not usually limited to two parties and may also involve several related contacts and arbitration agreements. Article 13 (1) of the New Rules provides that before the Arbitral Tribunal is constituted, the parties may apply to join an additional party under the same arbitration agreement to the arbitration, subject to the approval by the BAC. Article 14 (1) of the New Rules further provides that where there are two or more Claimants or Respondents in an arbitration proceeding, any party may raise claims against any other party that is under the same arbitration agreement. In addition, the possibility to consolidate arbitration proceedings reflects the trend seen in amendments to major arbitration institution rules in recent years. The first part of Article 29 (1) of the New Rules provides that "[w]here the parties consent, or where a party applies and the BAC considers it necessary, the BAC may decide to consolidate two or more arbitrations pending under the Rules into a single arbitration". In practice, what are the factors that the BAC will take into consideration when it decides whether or not to consolidate arbitration proceedings? In this regard, Article 29 (2) of the New Rules provides some guidance in that the BAC may take into account all circumstances, including the arbitration agreements on which the relevant arbitration proceedings are based, the nexus between the proceedings, the stage of proceedings of the relevant arbitration proceedings, and whether the arbitrators are already nominated or appointed. These

factors are similar to the factors set forth in Article 28 of the HKIAC Administered Arbitration Rules (2013). It would be interesting to observe how the BAC will apply and interpret these factors in practice.

(6) The New Rules expressly allows for the parties to amend their Claims or Counterclaims. However, if an amendment to the Claim or Counterclaim is made at a stage that may adversely affect the normal progress of the arbitral proceedings, the BAC or the Arbitral Tribunal may refuse such amendments (Article 12 (2) of the New Rules). In addition, when deciding whether or not to accept a Counterclaim raised after the expiration of the time limit to do so, the BAC or the Arbitral Tribunal (as the case may be) shall take into account whether it is necessary to hear the Counterclaim and the Claim in one single proceeding, the extent of the delay in bringing the Application for the Counterclaim, whether the Counterclaim will cause unnecessary delays to the arbitral proceedings and other related factors (Article 11 (2) of the New Rules).

(7) The New Rules expressly provides that if the parties breach the Rules and the breach results in a delay to the arbitration proceedings, the arbitral tribunal may take the breach into consideration when determining the issue of costs. Furthermore, where additional costs were incurred or increased due to such delay in the proceedings, the delaying party shall bear responsibility for those additional costs (Article 51 (3) of the New Rules).

(8) The New Rules expressly allow the Arbitral Tribunal to exercise discretion. For example, Article 2 (3) of the New Rules provides that in respect of any matters not expressly provided for in the Rules, the Arbitral Tribunal shall have the power to advance the arbitral proceedings in such manner as it considers appropriate in order to ensure an efficient and fair resolution of the disputes between the parties. Article 37 (2) of the New Rules further provides that when assessing evidence, the Arbitral Tribunal may, in addition to referring to the relevant laws, regulations, and judicial interpretations, conduct its own assessment by taking into consideration factors such as industry practices and trade usages, to consider the evidence in a holistic manner.

To sum up, the BAC's amendments to its Rules are helpful in that they further clarify its procedural rules, enhance the transparency of arbitral proceedings to the parties, provide a clear foundation for arbitral tribunals to exercise discretion and facilitate compatibility of BAC's practice with internationally accepted arbitration practice. These amendments make the adoption of the BAC arbitration rules more attractive and pave the way for growth and the development of the BAC in the coming years.