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Growth in China’s Outbound Investment Brings Chances and Challenges

Litigation and Dispute Resolution

Statistical year	2013	2012	2011	2010	2009
Outbound direct investment (million USD)	1,078.4371	878.0353	746.5404	688.1131	565.2899
Foreign investment in actual use (million USD)	1,187.21	1,132.94	1,176.98	1,088.21	918.04

On January 20, 2015, the National Bureau of Statistics of the People’s Republic of China released the GDP in 2014 of China. Compared with the GDP in 2013, the GDP in 2014 rose by 7.4 percent, amounting to 63,646.30 billion RMB, roughly 10,247 billion USD. Although some economists expressed their worry about the Chinese economy due to the declining economic growth rate, China has already become one of the most important economies of the world. Ever since 2009, the growth rate of China’s foreign investment in actual use has continuously decreased, with the compound

growth rate at around six percent. During the same period of time, the amount of China's outbound direct investment has doubled, with the compound growth rate at 17 percent.

The statistics revealed the fast increase of Chinese outbound investment in recent years. Naturally, such increase has started to show the influence of the Chinese economy and the Chinese business rules on Asia and even on the whole world. During the past 30 years, China has benefited from the import of foreign capital from developed countries, as well as its reform of thought and rules resulted from such foreign investment. In the next 30 years, the world will get more chances to interact with Chinese cultures and ideas from China's continuous reform and openness. Under this trend, it will be a smart choice for international corporations to select Chinese dispute resolution services, so as to better understand the commercial logic of their Chinese partners.

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Resource: National Bureau of Statistics of the People's Republic of China, at http://data.stats.gov.cn/index

Getting to know Chinese dispute resolution

As a growth industry, dispute resolution has also experienced a high-speed development during the past 10 years. From 1999 to 2013, Chinese arbitration institutions have accepted 806,154 arbitrations in total, with the amount in dispute of over 1,143.30 billion RMB, approximately 184 billion USD. After steady yearly accumulation, the Chinese arbitration industry has gradually met the needs of the Chinese economy, and has been competently provided qualified dispute resolution services to international users. With the increase of Chinese overseas investment and transactions, an in-depth understanding of Chinese arbitration and Chinese arbitration institutions will be helpful for the conclusion of midnight clauses that are more in line with the transaction. Since China only has institutional arbitration under the existing laws, it is the professional and opening level of the arbitration rules that will determine whether a specific arbitration institution can follow the rules of economic progress and meet the commercial needs in increasing cross-border transactions.

About the Beijing Arbitration Commission (Beijing International Arbitration Center)

As the leading arbitration institution in China, 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. And, after two years

careful preparation of drafting, discussion and comments seeking, the new version of the BAC arbitration rules (the “new rules”) will become effective April 1, 2015. This will become one of the major events which may deeply affect China’s commercial dispute resolution in 2015. It is an opportunity for international users to know how their Chinese counterparts solve disputes by looking into the new rules.

Main feature of the BAC’s new rules

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 timely exercising rights

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 time limit expiration 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 stenographers (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 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 converted expedited procedure into ordinary procedure. Such revisions make the rules clearer and easier to understand and use (article 6, article 41, article 44 and 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 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 but 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 transactional 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 consolidation of hearings more practical

“Consolidation of hearings” is designed for two or more pending arbitrations, in which the arbitral tribunal may, upon meeting certain specified conditions, order the consolidation of two or more related hearings. The new rules specified the circumstances for such consolidation 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 measures and assessment of evidence, highlighting features and advantages of commercial arbitration

Criticisms of 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 are 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 stipulate that 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 a manner it considers appropriate, in order to procure the efficient and fair resolution of the disputes between the parties (article 2.3).

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

Procedural measures 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 redesigned the “procedural measures” provision, with its wording more flexible and general, so as to reserve the discretion of the arbitral tribunal when determining whether to take such measures (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, 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).

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 charged the arbitrator's fee jointly with the administration fee, a Chinese feature but a divergence from international practice. The new rules allow 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 an "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).

Look into the future

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 only with such ideas will Chinese arbitration institutions follow the pace of Chinese enterprises going abroad, and win the trust and respect of international users as well, bridging the gap between

Chinese and foreign partners. In light of this, the BAC does hope to provide better dispute resolution services to its users, either domestic or abroad. More importantly, with the growth of China's outbound investment, the BAC is ambitious to spread and promote the Chinese dispute resolution culture and ideas worldwide, becoming the leader and setter of rules of the industry.

Further Reading

Arbitration Work Report (Vol. 13, 23, 56), Brief Report of the Government's Legal Work (Vol. 146, 171, 195, 210, 224, 236, 256, 275), Brief Report of the Legislative Affairs Office of the State Council (Vol.6, 14), the Legislative Affairs Office of the State Council of the People's Republic of China.

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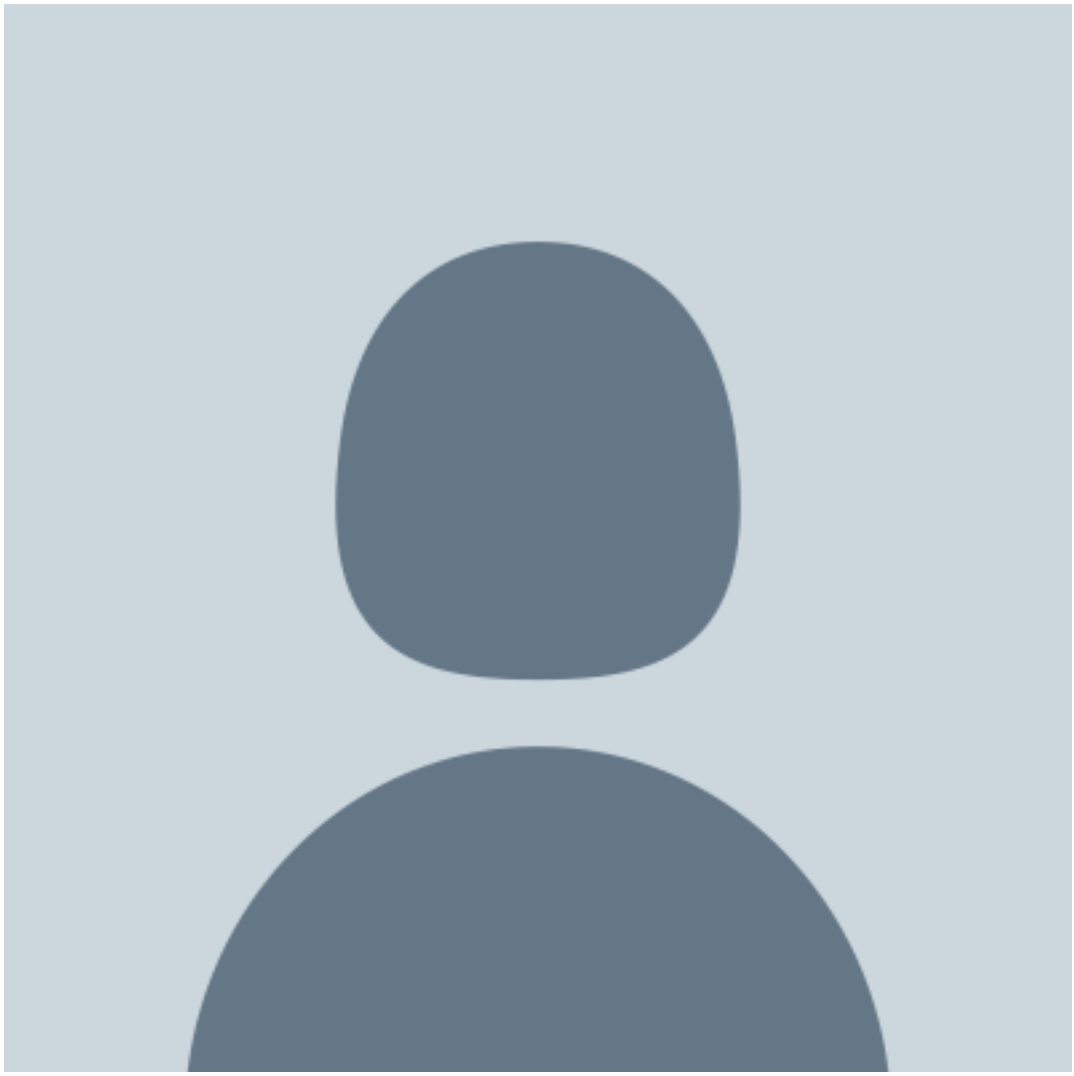

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