

Lessons from Arbitration Transparency Rules

By Peiming Yang and Xiang Gao

The number of outbound investments by Chinese enterprises has soared in recent years. Up to the end of 2013, aggregated foreign investments have reached US\$609 million (Rmb3.78 billion). Investors are paying more attention to risk control in their portfolios, especially due to the disputes that arise between the investors and government of the investment host nation. International investment disputes are generally resolved through arbitration and the confidentiality of arbitration enables the dispute to be resolved away from the glare of publicity. Without access to precedents, foreign investors are therefore unable to identify or take precautions against these legal risks. In consideration of the public interests involved in such arbitrations, the United Nations Commission on International Trade Law (UNCITRAL) has adopted the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (Rules on Transparency) and the *UNCITRAL Arbitration Rules* (revised in 2010, with the new Article 1.4 adopted in 2013) on July 11 last year to increase the transparency of international investment arbitrations. In this article, the international investment arbitration refers to the arbitration regarding the investment dispute between the foreign investor and the government of host nation.

Challenging Confidentiality

The traditional principle of arbitration confidentiality is hugely challenged by the Rules on Transparency. Innovations include the establishment of a repository for the publication of information and documents in treaty-based investor-State arbitrations (Transparency Registry), publication of information at the commencement of arbitral proceedings, publication of documents, allowing submissions by a non-disputing party and establishing the principle of public hearings. In particular, at the commencement of the arbitral proceedings, the repository must promptly publish the information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made. In addition, a wide range of procedural

如果您需要本出版物的中文本，请与下列人员联系：

郭建良: (86 21) 3135 8756
Publication@llinkslaw.com

If you would like other Llinks publications, please contact:

Roy Guo: (86 21) 3135 8756
Publication@llinkslaw.com

Llinks Law Offices
www.llinkslaw.com

Lessons from Arbitration Transparency Rules

and substantial documents shall be made available for the public, including the notice of arbitration, orders, decisions and awards of the arbitral tribunal, statement of claim, statement of defence, written statements or submissions, expert reports, witness statements and the table listing all exhibits.

After consultation with the disputing parties, the arbitral tribunal may decide, on its own initiative or upon request from any person, whether and how to make exhibits available. It may also allow a non-disputing party to the treaty, or a third party who is neither a disputing party nor a non-disputing party to the treaty, to file a written submission regarding a matter under the dispute. Furthermore, the arbitral tribunal will allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing party to the treaty. More importantly, the Rules on Transparency establish the principle of public hearings.

Nevertheless, the rules are subject to the exceptions provided in the Rules on Transparency. Information that will not be made available to public consists of confidential or protected information and information of which disclosure would jeopardise the integrity of the arbitral process.

It is also worth noting that the Rules on Transparency still show great respect for the consensual nature of arbitration. For instance, the parties to a treaty may agree to exclude the application of the Rules on Transparency to the investor-State arbitration initiated under the *UNCITRAL Arbitration Rules* pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014.

In short, the Rules on Transparency will impose extra pressure on the investment host nations, preventing them from abusing the confidentiality of arbitration and concealing their infringement of the investors' interests. It may also facilitate foreign investors' predictions and evaluations of the legal risks of a potential investment.

Inspirations to Chinese Investors

Investors, before making overseas investments, are strongly recommended to research and analyse any relevant international investment arbitral precedents publicly available under the Rules on Transparency or other similar rules. Attention must also be paid to the treaties regarding investment protection between the investment host nation and the nation of the investor, as well as the agreement regarding dispute resolution of investor-state investment disputes. Furthermore, before a multinational investor decides on a specific investing entity from its subsidiaries or affiliates, the treaties between each nation of its subsidiaries or affiliates, the specific host nation and the application of the Rules on Transparency need to be carefully examined. In the event of disputes, investors are encouraged to proactively utilise the applicable rules of the transparency of international investment arbitration to protect their interests.

Lessons from Arbitration Transparency Rules

Contact Details

If you would like to know more information about the subjects covered in this publication, please feel free to contact the following people or your usual Llinks contact.

Shanghai	
David Yu Tel: (86 21) 3135 8686 David.Yu@llinkslaw.com	Charles Qin Tel: (86 21) 3135 8668 Charles.Qin@llinkslaw.com
Ming Zhang Tel: (86 21) 3135 8777 Ming.Zhang@llinkslaw.com	Peiming Yang Tel: (86 21) 3135 8787 Peiming.Yang@llinkslaw.com
Beijing	
Charles Qin Tel: (86 10) 8519 2266 Charles.Qin@llinkslaw.com	

This article was first published in *China Law & Practice*, July/August 2014, Volume 28, Number 4.