Kluwer Arbitration Blog

Arbitration Reform in China: Keeping up with the Beijing Fourth Intermediate People's Court

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In March 2020, the official Beijing judiciary website published the ground-breaking *Big Data Research Report on Cases of the Beijing Fourth Intermediate People's Court Involving Judicial Review of Arbitration* (??????????????????????????) (the "**Report**"). Prepared by the China Arbitration Institute of China University of Political Science and Law (???????????), the Report covers 18 months of decisions involving "judicial review" of arbitration cases (????????) ("**Judicial Review**") by the Beijing Fourth Intermediate People's Court (??????????) ("**No. 4 IPC**"). When the Report was first announced in December 2019, the No. 4 IPC also launched the comprehensive *Standardization Guide for Adjudication of Cases Involving Judicial Review of Arbitration* (??????????????) (the "**Guide**").[1] Both documents generally support an "arbitration friendly" narrative but also highlight judicial efforts to address legal ambiguities and provide insights into the dynamic relationship between courts and arbitral institutions in China.

The Report and the Guide are both likely to grow in influence. As of the time of this writing the main text of the Report has been accepted for publication in *People's Court Investigation and Research* (????????), which is a new journal sponsored by the PRC Supreme People's Court ("**SPC**"). Following augmentation by No. 4 IPC judges, the Guide was submitted to the Law Publishing House (a leading Chinese legal publisher) for publication.

Background

To address various outstanding legal gaps in China's arbitration regime pending amendment of the PRC Arbitration Law, the SPC issued several binding "judicial interpretations" in 2017 (the "**2017 Interpretations**"), previously discussed by Dr. Kun Fan of UNSW Law in his article, "*Supreme Courts and Arbitration: China*".[2] Of particular importance, SPC Judicial Interpretation *Fashi (2017) No.22* confines the scope of Judicial Review to determination of the validity of arbitration agreements (broadly encompassing typical "gateway" issues), annulment of awards and recognition and enforcement of foreign, Hong Kong, Taiwan and Macao awards, while leaving open the possibility of its future expansion. To implement the SPC's December 2017 notice calling for greater judicial specialization in arbitration matters, effective January 1, 2018 the Beijing High

Court granted exclusive primary jurisdiction over Judicial Review in Beijing to the No. 4 IPC. With arbitrations administered by CIETAC, CMAC and BAC/BIAC under its purview, the No. 4 IPC has emerged as a highly influential court nationwide whose decisions are frequently discussed in the arbitration community. Approximately one year later, the General Offices of the Chinese Communist Party Central Committee and State Council promulgated the "*Several Opinions Concerning Perfection of the Arbitration System and Raising Credibility of Arbitration*" ("**Credibility Opinions**"), a sweeping policy directive underpinning the 2017 Interpretations and mandating systemic arbitration reforms.

"Big Data" Research Report

The Report contains detailed statistics on 968 dispositive decisions (?????) encompassing both domestic and foreign-related Judicial Review cases issued from February 2018 through August 2019,[3] including decisional and procedural outcomes and the frequency of legal grounds asserted by parties. The accompanying qualitative discussion, reform recommendations and analysis of five "*representative cases*" provide useful insights into ongoing reform efforts.

Roughly covering implementation of the 2017 Interpretations, the Report establishes a baseline against which to compare their implementation by other courts nationwide and the impacts of future rule-making. The Report affirms the No. 4 IPC's strongly pro-arbitration record, with the court supporting arbitral jurisdiction in over 99% of challenges and granting less than 1% of annulment petitions. This is generally corroborated by a more general 2020 Tian Tong Law Firm study of reported Judicial Review cases.

Judicial Review Guide

The Guide reflects the No. 4 IPC's ongoing efforts to "*unify adjudication standards*" (??????) in Judicial Review, a key policy objective of the 2017 Interpretations. By restating legal rules governing over 100 issues the Guide clarifies application of over 20 laws and normative documents bearing on Judicial Review, mostly enacted since the Arbitration Law took effect in 1995. The 16 "*representative cases*" appended to the Guide presumably exemplify adjudicatory best practices in difficult cases. By reducing the risk of inconsistent application of the law by inexperienced judges and legally defective submissions by counsel, the Guide furthers judicial predictability and efficiency. As the Guide is a form of 'local court guidance' (discussed by Susan Finder in her 2018 chapter, *China's Translucent Judicial Transparency*), its direct impact will likely be confined to No. 4 IPC judges,[4] but with wider distribution it may well prove broadly influential.

Comments

Taken together, the Report and the Guide reflect an increasingly active role of Chinese courts in implementing arbitration reform policies and warrant close reading.

"Prior Review" System and Historical Delays

A previous blogpost expressed concerns that the 2018 expansion of the "*prior reporting system*" from foreign-related Judicial Review cases to purely domestic ones would seriously impair efficiency by clogging SPC dockets. The Report observes, however, that in the 18 Judicial Review cases (of which 14 were foreign-related) requiring over 12 months to resolve, delays generally resulted from international service of process, procedural issues and visa applications. In very few cases was prior review the cause of long delays, suggesting that its overall impact on timing has been negligible for cases handled by the No. 4 IPC. [Report, p. 24]

Greater Judicial Scrutiny of Institutional "Decisions"?

In what one Chinese law firm characterizes as judicial law-making, in *Chuangkai (Hong Kong)* (Representative Case No. 15) the No. 4 IPC held that a CIETAC procedural *decision* (??) dismissing arbitration against an improperly joined party was in substance an *award* (??) subject to its Judicial Review jurisdiction at the annulment stage.[5)] The court based its ruling on the following factors: the decision was rendered after CIETAC accepted jurisdiction, it involved adjudication of facts concerning the substance of the dispute, and it entailed application of law to determine whether a party was proper. A nationwide review of analogous cases would be useful to validate whether this represents an emerging trend of closer scrutiny of documents issued by arbitral commissions with binding legal effect on the parties.

Reducing Legal Ambiguity

While the gateway issue of *validity* (??) of an arbitration agreement explicitly falls within the scope of Judicial Review under the relevant 2017 Interpretation, a 2019 blogpost notes some variability among courts over their competence to decide jurisdictional challenges asserting the arbitration agreement's *non-existence*. Section 18 of the Guide implicitly affirms but limits the court's competence to review claims of non-existence, in effect establishing a presumption of existence and validity that can only be overturned by undisputed facts or clear and convincing evidence. Only if the respondent acknowledges non-existence of the agreement (or inauthenticity of signatures or seals), or if evidence proves absence of an agreement to arbitrate, may the court find the allegedly non-existent agreement to be "*invalid*". [Guide, Section 18(1)] In any event, if the parties' consent remains at issue, courts should "*do their utmost*" not to invalidate the arbitration agreement and defer this substantive determination to the tribunal. [Guide, Section 18(2)]

Relationship between Courts and Institutions

The Report suggests that the No. 4 IPC has established "*relatively open*" channels of communication with CIETAC and BAC/BIAC. [Report, §V(4)2.)] This appears to implement the Credibility Opinions' mandate to establish a "*work coordination system*" between courts and arbitration commissions. [Credibility Opinions, ¶(22)] Moreover, in addition to providing general policy support, the Credibility Opinions specifically call for strengthening the role of Communist Party committees at all levels in raising the credibility of arbitration. [*Id*, at ¶(19)] Some foreign

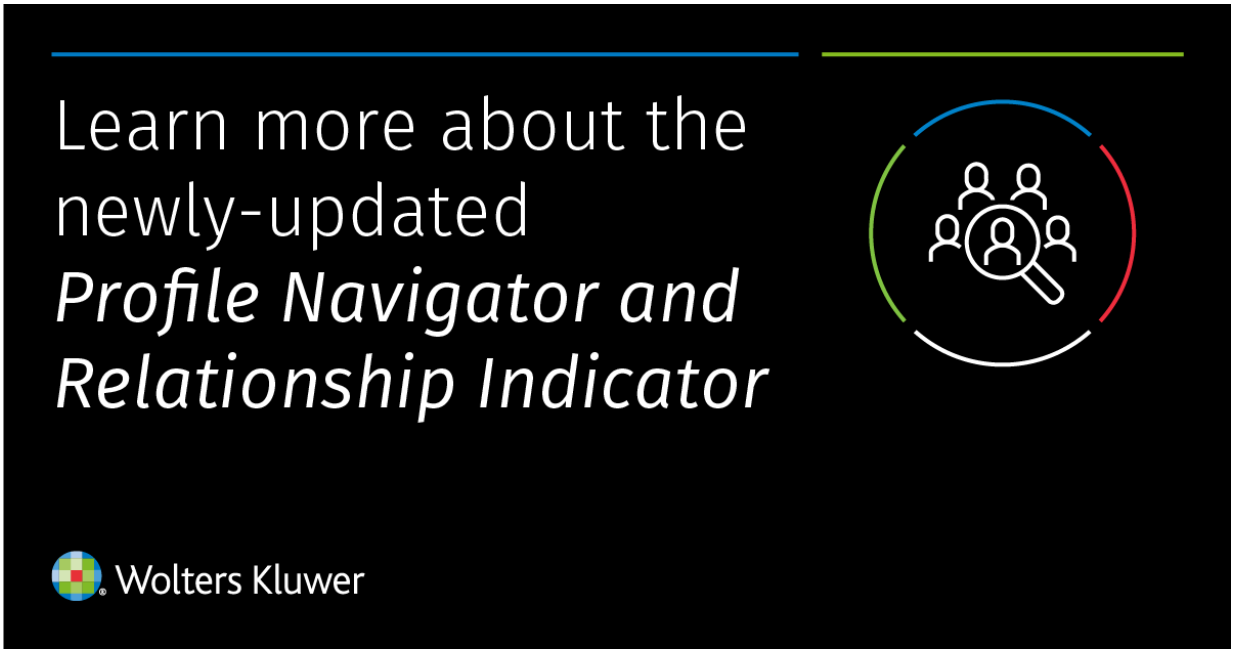
observers may view these features of China's unique system of administered arbitration as carrying a risk of informal and opaque intervention outside of formal legal proceedings, and therefore incompatible with China's aspirations to be a leading seat of international commercial arbitration ("**ICA**"). These initiatives should, however, be considered in light of China's judicial evolution and demonstrated commitment to supporting ICA.

The work coordination mechanism is expected to facilitate court remand to the tribunal under Article 61 of the Arbitration Law as a pro-arbitration alternative to annulment of awards involving curable procedural defects. Some local courts still lack an understanding of arbitral procedure and are reticent to investigate alleged breaches of procedural due process. Conflating procedural requirements of arbitration and litigation, they tend to undermine arbitration by indiscriminately granting annulment petitions based on procedural irregularities that could have been remedied by the tribunal on remand. A robust working relationship with arbitral commissions would serve to educate courts and improve their access to procedural history.

In order to implement its New York Convention obligations, China has not only established separate Judicial Review standards for ICA cases but also adopted the prior reporting system, under which the SPC ensures uniform application of legal standards and insulates review of ICA matters from local protectionism. Guaranteeing the independence and autonomy expected by foreign institutions considering to administer ICA proceedings under the Shanghai Free Trade Zone pilot program would be a natural extension of this long-standing policy commitment, and is consistent with the Credibility Opinions' prohibition on interference in the daily operations of arbitral commissions. [*Id*., at ¶(2)]

Conclusion

As noted in the 2018 International Arbitration Survey conducted by the School of International Arbitration, Queen Mary University of London and White & Case LLP, after "*general reputation and recognition*", the next three most important considerations in international seat selection can be summed up as the "'*formal legal structure' at the seat*". [At page 10] Given the preponderating role of central government policies in China's arbitration reforms, it remains to be seen whether recent pro-arbitration initiatives will crystallize into fixtures of the Chinese legal system. In the meantime, the Guide and the Report, by promoting transparency, adjudicatory consistency and general understanding of China's dynamic Judicial Review regime, are cause for optimism.



References

?1 The Guide is not currently available from an official court site. This embedded version was downloaded from https://xindalilaw.com/gjzc, courtesy of the Xindali Law Firm (accessed on 29/6/2020).

?2 *See also*, Jingzhou Tao and Mariana Zhong, "*China's 2017 Reform of its Arbitration-Related Court Review Mechanism with a Focus on Improving Chinese Courts' Prior-Reporting System*", Maxi Scherer (ed), Journal of International Arbitration, (Kluwer Law International 2018, Volume 35 Issue 3) pp. 371-378.

?3 Broken down as follows: 316 jurisdictional challenges, 647 annulment petitions and 5 challenges to recognition and enforcement of foreign awards: Report, §II(1).

?4 *See*, *Finder*, *supra*, pp. 169 – 170 (noting a prohibition on issuance of documents in the nature of judicial interpretations by local courts).

?5 The decision was made by the tribunal but issued as a CIETAC decision.

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