

Newly published judicial interpretations on arbitration in China

January 2018

On 29 December 2017, the Supreme People's Court of China (SPC) published two judicial interpretations (Interpretations) which came into force on 1 January 2018. Both Interpretations sought to clarify and provide consistency to the judicial review process between domestic, foreign-related and foreign arbitrations in China. These Interpretations have the effect of guiding and regulating the lower Chinese courts' judicial review process and are considered to be part of the SPC's efforts to be seen as pro-arbitration.

The most important aspect of these Interpretations is the removal of the distinction between the different types of arbitrations in the judicial review process. Previously, only foreign-related or foreign awards were subject to this review system ie where the Intermediate People's Court refuses to enforce or annul an award then it must obtain approval from the High People's Court (who have jurisdiction to hear cases submitted by the Intermediate People's Court). If the High People's Court concurs with the determination of the Intermediate People's Court, the award must be further reported to the SPC. With the Interpretations coming into force, regardless of the arbitration type, be it domestic, foreign-related or foreign arbitration, no annulment or refusal to enforce an arbitral award can take effect in China without the decision having been judicially reviewed by a higher court.

Perhaps recognising the potential backlog of cases and the burden that this newly established process will create, the Interpretations provide that in relation to domestic arbitrations, a review up to the level of the High People's Courts (as opposed to the SPC) is sufficient except in two circumstances:

1. if the parties in dispute are from different provinces of China;
2. if grounds for the annulment or refusal of enforcement is due to the award being contrary to public policy. Where arbitrations fall into one of the two exceptions above, then the SPC continues to be competent to finally determine the matter.

Despite the best intentions of the SPC to bring consistency to the judicial review of arbitral awards in China, the delay with the previous review system has already been subject to well-publicised criticism. It remains to be seen how much impact the Interpretations and the additional caseload will have on the efficiency of the judicial review process.

The other significant clarification provided by the Interpretations is the level of 'party' involvement in the judicial review process. Previously, the review process was criticised as lacking transparency and at risk that the lower courts will shift the burden of review responsibility to the higher courts. The Interpretations now expressly provide that if the higher courts, in the process of review, are unclear as to certain facts related to the case then they have the ability to clarify such matters with the parties or refer the case back to the lower courts to clarify the facts before it is once again reviewed by the higher courts.

The Interpretations also set out what supporting documentation should accompany an application for judicial review. What is interesting is that the Interpretations appear to indicate that the arbitral award to accompany any application for annulment, recognition and enforcement of the same need not be 'legalised' (i.e. need not comply with a specific document authentication process). What is required is merely the submission of the original award, or a certified copy, along with the application. The award is to be accompanied by a Chinese translation where it is written in a foreign language. The Interpretations, therefore, seem to replace the current practice where arbitral awards, in addition to requiring to be notarised and certified by the foreign ministry of the originating country, also needed to be 'legalised' by the relevant Chinese embassy as the receiving country before any official use in China.

Finally, the Interpretations give guidance as to the applicable law of the arbitral agreement. This was an area fraught with difficulties under the previous system, due to different courts adopting different positions when it came to interpreting the applicable law. The Interpretations now clarify that the law governing the underlying contract will not necessarily be the applicable law. Parties must expressly state the applicable law that governs a foreign-related arbitration agreement. Where the parties are silent on the applicable law, then the law of the seat of arbitration must be adopted. If there are different interpretations as to the law at the place where the arbitration institution is located and the law at the seat of arbitration then the courts shall apply the law that is most likely to result in a valid arbitration agreement.

Any decisions of the courts in the judicial review process shall take force immediately and those decisions are not subject to review, appeal or application for a retrial unless provided otherwise by the law and judicial interpretations.

It remains to be seen whether the Interpretations will achieve the goal of promoting the healthy growth of arbitration and of alternative dispute resolution in China. However, the Interpretations have been received with cautious optimism generally and are welcomed as a positive step forward.

Article by [Anita Lee](#), registered foreign lawyer from Hong Kong office.

Contacts



Timothy Hill

Partner



James Kwan

Partner



Kent Phillips

Partner



Chalid
Heyder

Office
Managing
Partner

> [Read the full article online](#)