Reforms on the “Prior Reporting System” — A Praiseworthy Effort by the PRC Supreme People’s Court, or Not?

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The Prior Reporting System, established in August 1995 (see SPC Notice on Prior Reporting System (1995)), has been the most notable intervention of the Supreme People’s Court (“SPC”) in the area of arbitration since the PRC Arbitration Law (1994) was enacted.

During the China Arbitration Summit held in Beijing on 20 September 2017, Justice Xuefeng REN, a Presiding Judge of the 4th Civil Chamber of the SPC, informally announced a planned reform of the Prior Reporting System.

On 20 November 2017, the SPC officially passed the Provisions on Questions Concerning Approval and Reporting in the Judicial Review of Arbitration-Related Cases (关于仲裁司法审查案件报核问题的有关规定) (“SPC Provisions on Prior Reporting System (2017)”). These provisions were not made public until 29 December, coming into effect on 1 January 2018.

This Article summarizes the key features of the reform.

The Prior Reporting System – The Current Framework

Originally, the Prior Reporting System was designed to apply only in the context of enforcement of foreign or foreign-related arbitral awards or arbitration agreements. It establishes a duty for the Intermediate People’s Court to report and request approval from the High People’s Court if the former intends to refuse enforcement. If the High People’s Court concurs with the position of the Intermediate People’s Court, the former must further report to the SPC.

Although the law prescribes overall time limits for such cases (6 months, plus (for foreign awards) 2 months for recognition), the Prior Reporting System does not provide any deadlines for courts to report or to reply to a report.

In April 1998, through its SPC Notice on Prior Reporting System (1998), the SPC extended this system to the annulment of foreign-related arbitral awards, with essentially identical arrangements as those applying to enforcement cases, except that the new provisions introduced deadlines for the reporting and reply duties in annulment proceedings. Specifically, the Intermediate People’s Court has 30 days from its acceptance of a case to report to the High People’s Court, and the latter, if it concurs, has 15

days from then to report to the SPC.

These deadlines, however, only apply to annulment cases; moreover, in practice, lower courts often disregard them because there are no direct sanctions for non-compliance. In addition, neither the 1995 nor the 1998 provisions include a deadline for the SPC to reply, which has been known to take as long as a year. Finally, the current Prior Reporting System is an internal court process in which parties are neither invited nor allowed to participate.

On account of these inefficiencies, the arbitration community has been pushing for the Prior Reporting System to be reformed.

Changes Planned under the SPC Provisions on Prior Reporting System (2017)

As briefly introduced by Justice REN and later disclosed to the public, the major change envisioned in the SPC Provisions on Prior Reporting System (2017) is the extension of the Prior Reporting System to all arbitration-related cases, whether foreign, foreign-related, or domestic. In other words, no court in China will be able to issue a decision refusing enforcement of an award or an arbitration agreement, or annulling an award, without having obtained the higher court's prior approval. It is one of the approaches adopted by the SPC to ensure more consistency in the judicial review of arbitration-related cases.

Whilst this idea may at first seem a good one, one must think about what it means for the already time-consuming prior reporting process. According to the authors' statistical analysis of 220 published court decisions from 2000 to 2015 (case summaries available on the database of Chinese Court Decision Summaries on Arbitration), the time between the initiation of relevant proceedings and the final reply from the SPC under the Prior Report System is not encouraging:

(i) For enforcement of awards, the average time is 870 days and the median is 601 days, the shortest time being 40 days and the longest 3,237 days.
(ii) For enforcement of arbitration agreements, the average time is 107 days and the median is 79 days, the shortest time being 8 days and the longest 445 days.
(iii) For annulment of awards, the average time is 597 days and the median is 506 days, the shortest time being 165 days and the longest 1,791 days.

These figures apply to the current system, which deals only with foreign and foreign-related cases (including Greater China cases). It is not difficult to imagine what impact the extension of the Prior Reporting System will have in terms of delays and inefficiency.

In 2016, while 3,141 foreign-related arbitration cases were accepted by Chinese arbitration institutions, 205,404 domestic arbitration cases were accepted.[fn]See http://www.legaldaily.com.cn/Arbitration/content/2017-05/05/content_7137563.htm?node=79488, last visited on 28 Dec 2017.[/fn] This 65-times difference in the number of accepted cases may give an approximation of the order of magnitude increase in the number of cases subject to the Prior Reporting System with the inclusion of domestic cases. How can the courts cope with such an increase? What will it mean in terms of delays?

It seems that the SPC is aware of this issue and is seeking ways to tackle it. After discussing various approaches the SPC has decided that, in domestic cases, the High People's Courts at each provincial level will have the final say, except in the following two situations (when reporting to the SPC is mandatory):
(i) If the parties are from different provinces.
(ii) If the lower courts intend to refuse enforcement or annual a domestic award due to an alleged

breach of public interests.

In addition, the High People's Court will have the discretion to report to the SPC any other cases for which they consider reporting appropriate.

Remarks

The reform of the Prior Reporting System is part of an overall effort by the SPC to improve the consistency of the Chinese courts' judicial review of arbitration-related cases. Other efforts include:

(i) The *SPC Notice on Issues Relating to the Centralized Handling of Judicial Review of Arbitration Cases (*□*仲裁司法审件归口办理有关问题的通知*》) (issued on 22 May 2017).
(ii) The *SPC Provisions on Judicial Review of Arbitration-Related Cases (*□*最高人民法院关于审理仲裁司法审查案件若干问题的规定*》) (passed "in principle" on 4 December 2017), which aims to provide guidelines on how to handle issues that emerged after the promulgation of the PRC Arbitration Law (1994) and the SPC Interpretations on the PRC Arbitration Law (2006).

Although the intention of the SPC to increase consistency is praiseworthy, the SPC risks impairing efficiency and fairness. It is not uncommon for parties against whom enforcement is sought to use their local influence and power to pressure lower courts into sending a case through the Prior Reporting System to delay proceedings. Lower courts also take advantage of the Prior Reporting System to shift responsibility for cases onto higher courts. Given the dearth of deadlines and the lack of sanctions for failure to comply therewith, the current Prior Reporting System is already suffering from costly inefficiencies—the announced reform may only exacerbate the inefficiencies. Will it not be counter-productive to extend this limping system to all arbitration-related cases?

Another major criticism raised against the current Prior Reporting System is the lack of transparency. The arbitration community has been pushing for parties to have the opportunity to participate in the process to ensure that lower courts report the case properly and comprehensively to the higher courts. This concern is not just theoretical. In practice, a lower court may not fully understand certain issues or may not submit the entire set of arguments or files to the higher court. This leads the latter to make a decision based on incomplete and maybe even biased grounds; and the parties have no formal opportunity to correct the mistake in the process and no legal remedies against the result.

Unfortunately, it would seem that the current reforms do not tackle this deficiency of the Prior Reporting System. This is disappointing and somewhat surprising, considering that the SPC has also been discussing ways to make judicial review more transparent and extend party rights to include at least some of those available in commercial litigation, particularly party access to proceedings.

Therefore, although a reform of the Prior Reporting System has been long awaited, and it is certainly positive that the SPC is finally attending to this hobbling system, it seems that the SPC's current efforts are not directed at tackling the users' concerns. Instead, the reform seems aimed more at implementing broader governmental policies without considering what it will mean for the effectiveness of arbitration as a dispute resolution mechanism.

It remains to be seen whether the SPC aims to address some of the users' concerns about the efficiency and fairness of the process in the near future.