

## **Domestic Arbitration Update for Foreign Invested Enterprises; Anti-Protectionist Measures may delay Enforcement of Awards**

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A recent reform of the Prior Reporting System<sup>1</sup> will likely impact the procedural rights of Foreign Invested Enterprises (FIEs) following domestic arbitration. The 2017 Supreme People's Court Provisions on the Prior Reporting System dropped on 26 December, 2017. They became effective on 1 January, 2018. The Prior Reporting System originated in 1995. It has been expanded to apply to enforcement of a specific class of awards which have arisen from domestic arbitration proceedings.

The Prior Reporting System has served as an enforcement and annulment process for awards produced from either international arbitration or 'foreign-related' arbitration proceedings. Basically, enforcement courts must report 'up' to the High People's Court for that province before they may refuse enforcement. Likewise, High People's Courts which agreed to refuse enforcement had to report to the Supreme People's Court. Intermediate courts had served as the first instance forum for enforcement of both domestic and foreign arbitral awards. Deadlines for reporting or reply are sporadically observed. Resultant delays can drag enforcement out a year, or even longer.

The Prior Reporting System may be viewed as a fig-leaf. The system purports to shield awards from non-enforcement. But generally, enforcement works best when it is expeditious. The PRS also deprives the Intermediate and High People's Courts of both agency and urgency. One recent study found a majority of selected PRS cases reached the Supreme People's Court.<sup>2</sup> The glacial pace discourages confidence in enforcement.

The Prior Reporting System practice will continue as ever and unchanged as to 'foreign-related' arbitration proceedings and foreign awards. The recent reforms empower the provincial-level High People's Courts to review orders for annulment or re-arbitration of domestic arbitral awards, as opposed to leaving these to the intermediate level.<sup>3</sup> The Supreme People's Court, and not the high courts, will have the final say in two specific circumstances. The first circumstance applies to awards issued to a resident or company registered in one province against one of different province.

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<sup>1</sup> 仲裁司法审查案件报核制度.

<sup>2</sup> Monika Prusinowska, *China Arbitration Survey: Findings*, July, 2017, EU-China School of Law, China University of Political Science and Law (Beijing). Page 6.

<sup>3</sup> Note also that a Beijing regulation (Jing Gao Fa Fa [2013] No. 96) has mandated reporting of domestic arbitration to the Beijing Higher People's Court for the last five years.

After all, the PRS is billed as an anti-protectionism measure. Additionally, SPC may become involved whenever a lower court considers to refuse enforcement due to a perceived breach of public policy.

Before 2018, domestic arbitration at least offered Foreign Invested Enterprises relief from the inefficiencies of the Prior Reporting System. FIEs can now expect to encounter the same post-award delays in enforcement in domestic arbitration as they might otherwise in 'foreign-related' cases. However, FIEs may also benefit from the anti-protectionist safeguards, at least once enforcement on an award has received ultimate approval from on high.

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