

THE ENFORCEMENT OF ARBITRAL AWARDS: AN ASEAN CASE STUDY

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To mark the 60th anniversary of the New York Convention, the South East Asian International Arbitration practice of Herbert Smith Freehills conducted a survey on the enforcement of arbitration awards in the ASEAN region to understand how the enforcement regime has operated in practice in the ASEAN region, and how effective it is thought to be. The key findings and conclusions from the survey were shared and discussed at an event held in Singapore on 12 June 2018 to celebrate the 60th anniversary of the Convention that was jointly hosted by the Singapore Management University, the Singapore International Dispute Resolution Academy and Herbert Smith Freehills.

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Participants from various sectors and jurisdictions contributed to the survey and shared their perspectives and experience regarding the enforcement regime of international arbitral awards in the 10 ASEAN member states. A fuller analysis of the survey results will be made available to the public in the near future. In the meantime, we share some of the key findings of the survey in this article.

EFFECTIVENESS OF SOUTH EAST ASIAN COURTS IN ENFORCING INTERNATIONAL ARBITRAL AWARDS

Unsurprisingly, among the ASEAN countries, 91.02% of the participants consider the Singapore courts to be highly or very effective in enforcing international arbitral awards, and almost all the participants responded that they would be very likely to recommend enforcement in Singapore. Singapore has developed into a leading arbitration hub over the years and its courts have been very supportive of arbitration, as evident from the multiple instances where they have upheld the finality of arbitral awards. This is followed by Malaysia where close to 69% of the participants consider the courts to be effective generally in enforcing international arbitral awards.

The courts' approach to enforcement of arbitral awards in the other South East Asian countries is still not as developed as in Singapore, but they have steadily improved over the years, especially in Thailand, and Philippines where courts have been increasingly effective in recognising arbitral awards. The survey results reveal that a majority of the participants consider the Indonesian and Vietnamese courts to be the least effective (relative to jurisdictions such as Singapore or Malaysia), while there is limited knowledge regarding enforcement of arbitral awards in Brunei, Cambodia, Laos and Myanmar. This may reflect the fact that there are not many cases of enforcement in these jurisdictions, especially in Myanmar which ratified the New York Convention only in the last few years.

EFFICIENCY IN ENFORCEMENT PROCEEDINGS

The survey also show improvements in the efficiency of enforcement proceedings in South East Asian courts in recent years. As reflected in the survey, enforcement proceedings (including all appeals) usually take between one to two years on average in the ASEAN region. Singapore enforcement proceedings, unsurprisingly, take the least amount of time, especially with the availability of an expedited procedure where enforcement usually takes less than six months. It is also heartening to know from the participants that enforcement in the courts of other major South East Asian jurisdictions such as Malaysia and The Philippines take less than 12 months: more than 69% of the participants responded that enforcement takes between six and 12 months in Malaysia, while more than 53% responded the same in relation to The Philippines.

As regards appeals against enforcement decisions of the courts of first instance, even jurisdictions which are seen to be pro-arbitration are not immune to high rates of appeals. More than 85% of the participants consider appeal to be highly or very likely against decisions which seek to enforce international arbitral awards. Similarly high rates are found in respect of Indonesia, Malaysia, and The Philippines.

LIMITED GROUNDS OF REFUSAL TO ENFORCE

In theory, the grounds on which national courts may refuse recognition and enforcement of arbitral awards are very limited and courts should generally enforce arbitral awards. Additionally, a court which is asked to enforce an arbitration award should not re-examine the merits of the underlying dispute. However, the language used in Article V leaves room for interpretation and gives the domestic courts discretion when interpreting these grounds (most famously the ground of public policy). This has resulted in varied interpretation by domestic courts, and the effectiveness of the enforcement regime under the convention has had mixed results across jurisdictions. This is true for the South East Asian jurisdictions as well, as reflected in the results of the survey.

However, it was only with respect to Singapore that a large majority of the participants (81.63%) felt that the courts did not re-examine the merits. While 51.43% of the participants felt that Malaysian courts also steered away from a re-examination of the merits, participants felt that, in practice, the courts of the other ASEAN countries did sometimes expand the grounds in the New York Convention in order to re-examine the merits.

CONCLUSIONS TO BE DRAWN FROM THE ASEAN ENFORCEMENT STUDY

Undoubtedly, there has been an increase in foreign investment and international transactions in the South East Asian region in the last decade. As such, the number and complexity of international commercial arbitrations in the South East Asian region have also increased. As reflected by the survey, courts in different ASEAN jurisdictions have interpreted and applied the New York Convention differently, resulting in varying degrees of effectiveness when it comes to enforcing international arbitral awards. Nonetheless participants of the survey remain optimistic about the prospect of improvements in the efficiency and the effectiveness of enforcement of international arbitral awards in the South East Asian jurisdictions. As judges and lawmakers become more familiar with international commercial arbitration through training, cross-border exchange of information, and capacity building conducted by various organisations including UNCITRAL, there will be better consistency and uniformity in the application of the New York Convention for enforcement of international arbitral awards across the region.

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KEY CONTACTS

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