



Improving the Enforcement of International Arbitration Awards in ASEAN Countries

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A. Introduction

At the outset I would like to express my gratitude to the national committee of ASEAN Law Association of Vietnam for the warm hospitality, excellent arrangements and successfully organizing this conference. I would like also to thank Honourable Chief Justice of the Republic of Indonesia Bapak Harifin Tumpa, Honourable Justice Dr. Susanti Adi Nugroho and Honourable Justice Prof. Dr. Mieke Komar Kantaatmadja for inviting me to take part in this important conference.

The choice of the issue on the enforcement of international arbitration awards in this 2009 ASEAN Law Association General Assembly, in my humble opinion is exceedingly relevant. Arbitration has gained, as shown below, regional acceptance within the ASEAN countries. The works on this issue has been on the rise, thanks to the growth of trade in the region.

The chief purpose of this article is to throw some light on the interesting case of the enforcement of international awards in Indonesia. The lesson learned from the Indonesian experience, I think would be a valuable lesson. The paper also offers a number of ways for the better enforcement of international awards within the ASEAN region.

B. Main Traits of Arbitration

It is interesting to note that there has been a growing reference of the commercial disputes to the arbitration by the business world. This reference is not without reasons. *Firstly*, arbitration has been regarded as the fast resolution of disputes between the business communities. The decision of the arbitration awards is final and binding. In essence, there is no appeal for arbitration already made and decided by the arbitral tribunal. The leading authors on international arbitration, Redfern and Hunter, provide:²

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² Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, London: Sweet and Maxwell, 4th.ed., 2004, p. 482.



“By choosing arbitration, the parties choose a system of dispute resolution that results in a decision that is, in principle, final and binding. It is not intended to be a mere proposal as to how the dispute might be resolved; nor is it intended to be the first step on a ladder of appeals through national courts.”

Secondly, the arbitration proceedings are not publicized. This trait is universal. Arbitration law in the world solemnly protects the secrecy of arbitration.

Thirdly, the arbitration law provides the parties with certain latitude to choose their own arbitrators, the applicable law, the place of arbitration, and also relevant, the procedure the arbitration tribunal must apply.

C. Enforcement of Awards

Despite those positive traits that arbitration has, the efficacy of arbitration awards lies on its enforcement. Arbitration will be an effective or efficient way of the resolution of the dispute if its awards, in the end of the day, are voluntarily adhered to by the parties.

Or, in the case of the reluctance of a party to follow the awards, arbitration will also be of use if the national courts lend their hands. The party may request the national courts to compel the other party, the reluctant party, to abide by the awards. As we can see it, the national courts, therefore, play a vital role in the enforcement of arbitral awards.

This paper argues that the level of growth of arbitration and the level of the expectation of the business to submit their cases to arbitration in a particular state, i.e., member countries of ASEAN, will heavily depend upon the enforcement of the international arbitration awards. What follows from this assumption is that the more the arbitration awards are enforced, the more the arbitration will flourish in that country. On the other side of the coin, the less the arbitration awards are enforced, the less the arbitration is used in that country.

D. New York Convention of 1958

As of today, the issue and the problems of the enforcement of international arbitration awards have been on the table in many jurisdictions. International efforts under the auspices of the United Nations, however, have been successfully conducted to remedy, to a greater degree, this problem. A UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been adopted in New York in 1958.



This Convention is the most important convention on arbitration.³ It has been long recognized as the most successful Convention on arbitration. Since its adoption in 1958, the Convention has attracted 144 countries.

It is quite interesting to see that 9 out of 10 member countries of ASEAN have ratified the Convention. It is probably right to assume that in the light of this number, the better perception and acknowledgement of arbitration in particular the significance of recognition and enforcement of foreign arbitral awards within the ASEAN member countries, are high. The member countries of ASEAN that ratified the Convention include:⁴

- (1) Thailand (date of ratification: 21 December 1959);
- (2) Cambodia (5 January 1960);
- (3) Philippines (6 July 1967);
- (4) Indonesia (7 October 1981);
- (5) Malaysia (5 November 1985);
- (6) Singapore (21 August 1986);
- (7) Viet Nam (12 September 1995);
- (8) Brunei Darussalam (25 July 1996); and
- (9) Lao People's Democratic Republic (17 June 1998).

The Convention with its 16 Articles has the following principles. Firstly, the Convention places the international arbitration awards at the same level as the decision of the national court.

Secondly, the Convention recognizes the arbitral awards as binding although the binding nature of the awards is not stated in the awards.

Thirdly, the Convention avoids the double enforcement process for the arbitral awards. In this sense, the enforcement of the awards is only given at the territory of the member country where the enforcement is sought.

Fourth, the Convention requires a simple documentation for the party seeking the enforcement of the arbitral awards. In this respect, the Convention requires only two

³ Pieter Sanders, the principal architect of this Convention, said the Convention has been a 'great success.' (Pieter Sanders, 'The Making of the Convention,' in: UN, *Enforcing Arbitration Awards under the New York Convention Experience and Prospects*, New York: UN., 1998, p. 5.

⁴ See New York Convention website: [Http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/nyconvention_status/html/](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/nyconvention_status/html/).

documents: (1) the original award or the certified copy of the award; and (2) the original arbitration agreement or the certified copy of the arbitration agreement (Article IV (1)).⁵

E. Enforcement of Arbitral Awards in ASEAN Countries

By and large, the law and practice of arbitration within the ASEAN countries has been evolving. Various publications have reported the law and practice in south-east Asian region, for example in Indonesia,⁶ Malaysia,⁷ the Philippines,⁸ Singapore,⁹ Thailand.¹⁰

As mentioned above, 9 member countries of ASEAN have ratified the New York Convention. This ratification showed at any rate the commitment of these countries to enforce the international arbitration award made in other contracting parties of the Convention.

It is however worth noting that although the majority of arbitration awards are performed willingly,¹¹ the problem of the enforcement of the award does still exist. This problem is partly due to the imprecise implementation process of the Convention in the home country and partly due to the interpretation of the Arbitration Law, as well as the recalcitrant behaviour of the losing party.

Take for instance the Indonesian experience on this issue. Indonesia ratified the Convention in 1981. The instrument giving effect of the Convention in Indonesia is the Presidential Decree Number 34 of 1981.

The Presidential Decree, nonetheless, is silent on which court or institution entitled to handle the issue of the execution of the international arbitration award in Indonesia. In addition, there was a controversy as to whether the Presidential Decree needs implementing legislation to enable the international treaty (Convention) be implemented in Indonesia.

To answer the two questions above, eventually the Supreme Court issued, on March 1 of 1990, the Supreme Court Regulation (*Peraturan Mahkamah Agung* or abbreviated to *PERMA*) No. 1 of 1990 concerning the Enforcement of Foreign Arbitral Awards.

⁵ Cf., Rene David, *Arbitration in International Trade*, Kluwer, 1985, p. 96).

⁶ For Indonesia, see for example: Huala Adolf, "The Indonesian Arbitration and Alternative Dispute Resolution Act 1999," 5:2 *International Arbitration Law Review* 50 (2002).

⁷ For Malaysia, see for example: Cecil Abraham and Godney Gomez, "Malaysia", in: J. William Rowley and McMillan B. Mendelsohn, *Arbitration World: Jurisdictional Comparisons*, 2006, p. 315 et.seq.

⁸ For the Philippines, see for example: Leslie Chow, "New Arbitration Law for the Philippines," (2004).

⁹ For Singapore, see for example: Christopher Lau, 'Singapore' in: J. William Rowley and McMillan B. Mendelsohn, *op.cit.*, p. 315 et.seq.; Rajah Tann, 'Singapore as a Forum for Arbitration' (2004).

¹⁰ For Thailand, see for example: Andreas Respondek, "Thailand's New Arbitration Regulations, (2003).

¹¹ See Alan Redfern and Martin Hunter, *op.cit.*, p. 511.



The PERMA ends the controversies by appointing the District Court of Central Jakarta as the sole district court entitled to handle the request for the execution of international arbitration awards in Indonesia. In addition, the PERMA lays down in a greater detail the procedure or requirements for the execution the award.

The other problem, the interpretation of the Law, is, as always, controversial. The Indonesian Law on arbitration is the Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. The Law contains the substantive provisions concerning arbitration and alternative dispute resolution.

The Law however does not embody or even reflect the spirit of the New York Convention, despite Indonesia ratified the Convention. In practice, as one may envisage, the implementation and the interpretation of the Law yield controversies or even dispute between the parties. In the face of it, the district court, again, play its role in enforcing and interpreting the Arbitration Law.

F. The Role of National Courts

The function of national (domestic) courts in the enforcement of international arbitration awards is decisive given the position it can play to compel the recalcitrant party.

Under the New York Convention, the word national court is termed as 'competent authority',¹² in addition to the term 'Court'.¹³ Indeed, these two articles clearly illustrate the vital role of the court in the enforcement of foreign arbitral awards.

Given this crucial function, it is therefore essential that the court should be aware of the substantive provisions of the New York Convention of 1958. Equally important, the court should recognize the binding nature of the awards, and, above all, the basic understanding of the international commitment of a member state on the international obligations as a contracting party to an international convention, in this respect, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

It is the genuine expectation of the business that every award is voluntarily honoured. It is also the undisputed hope of the commerce that every award may be enforced with the assistance of the domestic court should a losing party fails to comply with the award.

Fali Nariman, the President of International Council for Commercial Arbitration, emphasizes the significant role of the domestic court when the issue of the transnational

¹² Article V (a) and (2) of the New York Convention.

¹³ Article II (3) of the New York Convention.

dispute arises. He also points out that the drafters of the Convention were well aware of the important role of the domestic court in enforcing the international arbitration award. Nariman writes:¹⁴

“... so long as sovereign nation States exist, decisions in respect of any international or transnational dispute can only be enforced through sovereign national courts, not otherwise, a fact repeatedly (and so rightly) stressed in the carefully drafted provisions of the Convention.

In the same vein, Professor Jan Van Den Berg, has rightly expressed the role of national court, especially the judges, in enforcing the arbitral awards as required by the New York Convention. In observing the 40th year anniversary of the Convention, he stipulates:¹⁵

“The Convention is widely acclaimed as being an incredible success. I would like to use this occasion to express my gratitude for this to one group of persons in particular: the judges in most countries around the world who have supported the Convention so strongly. Without them, we would not be celebrating here the most successful international convention in international private law of this century.

G. Proposals for the Improvement of the Enforcement of International Arbitration Awards

The proposals or recommendations to improve the enforcement of international arbitration awards have already been put in the shopping list by experts. They include, among others:

- (1) The dissemination of information, technical assistance and training for judges about arbitration, most notably the New York Convention;¹⁶
- (2) The harmonization of national laws on arbitration;¹⁷
- (3) The harmonization of the New York Convention application and interpretation in the domestic court.¹⁸

¹⁴ Fali Nariman, ‘The Convention Contribution to the Globalization of International Commercial Arbitration,’ in: UN, *Enforcing Arbitration Awards under the New York Convention Experience and Prospects*, New York: UN., 1998, p. 17.

¹⁵ Albert Jan Van Den Berg, ‘Striving for Uniform Interpretation,’ in: UN, *op.cit.*, p. 41.

¹⁶ Jose Maria Abascal Zamora, ‘Enhancing dissemination of information, technical assistance and training,’ in: UN, *op.cit.*, p. 31.

¹⁷ Cf., Gerold Hermann, ‘Improving the Implementation: A Progress Report on the Joint UNCITRAL/IBA Project,’ in: UN, *op.cit.*, p. 37.

¹⁸ Pieter Sanders, ‘The Making of the Convention,’ in: UN, *op.cit.*, p. 3.



What can ALA play its part in improving the enforcement of international arbitration awards?

ALA, in my view, is a unique association. In terms of its membership, ALA consists of prominent judges, including chief justices, prosecutors, high-ranking governmental officials, prominent lawyers, professors and other interested persons who are leaders in legal society. Accordingly, ALA is actually the best forum for exchange of information, establishing networks, nurturing mutual understanding and cooperation, including in the field of or related with arbitration.

What I hopefully expect is that ALA may include the agenda of arbitration, if possible, in its annual conference.

Alternatively, ALA may also set up the so-called 'ALA Interest group,' in this case, the ALA's Interest Group on Arbitration. The member of this group is from all members of the ALA who are interested in arbitration. The members of this group may exchange information, share their publications or works on the law and practice of arbitration including the development in the enforcement of international arbitration awards in their respective countries.

ALA's Interest Group on Arbitration may also hold a special seminar or conference on arbitration and other possible and practicable, or even simple events that may be carried out outside the ALA's annual general assembly meeting.