

Expert Guide to Recognition & Enforcement - Judgments & Arbitral Awards in Asia Pacific

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Introduction


This CMS Guide on Recognition and Enforcement of Judgments and Awards provides an overview of the conditions for the enforcement both of court judgments and arbitral awards in the following Southeast Asian jurisdictions: Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam. It has been prepared with the assistance of specialist local counsel and identifies the relevant legislation and regulations, and outlines the key procedures and timeframes involved. This Guide will also assist parties when making decisions on jurisdiction, seat of arbitration and dispute resolution clauses when negotiating and drafting contracts.

ASEAN nations recovering from the effects of the COVID-19 pandemic are seeing signs of growth in the infrastructure, construction and energy sectors. This Guide would of relevance to the infrastructure and construction industries where disputes are an inescapable side effect, despite the industries’ best efforts in trying to come up with solutions to prevent or at least minimise the impact of project disputes: such as amending standard form contracts to include appropriate dispute resolution mechanisms that seek to encourage negotiations and amicable solutions and to avoid contentious methods of resolving disputes; using dispute boards in larger international projects as a way to nip disagreements in the bud and to prevent them from escalating; and using different and more collaborative forms of contracting.


Given this inevitability of disputes, it is therefore critically important that issues and risks related to the pursuit of money claims and the enforcement of a money judgment or award are properly understood and addressed. For international clients operating in a foreign country and involved in cross-border disputes with foreign parties, the hard work of enforcing the judgment or award in another country commences once the judicial decision has been successfully obtained.

This can be particularly acute when operating and trying to enforce foreign judgments or awards in Southeast Asia – although geographically relatively small, its considerable cultural diversity and each nation’s vastly different historical developments has resulted in a variety of laws and legal traditions. Navigating through the myriad of laws and regulations can be challenging.

If you would like further information on these issues, please contact us. CMS has an extensive international network of experienced specialists ready to discuss your questions on cross-border litigation and enforcement proceedings, and we would be delighted to hear from you.



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Singapore

1. Is there an exequatur procedure?

Yes. There are both common law and statutory means by which foreign judgments can be enforced in Singapore.

Under the common law, a foreign judgment may be recognised and enforced by commencing a fresh action for the judgment debt. The basis for this is that the foreign judgment creates an obligation on the part of the person against whom judgment has been rendered to make payment of the judgment debt. A claim for payment of the judgment debt is distinct from the original cause of action under which the judgment was obtained in the foreign jurisdiction. To be enforceable at common law, a foreign judgment must be:

- from a court of competent jurisdiction in the foreign country;
- final and conclusive on the merits under the law of that country; and
- for a fixed or ascertainable sum of money.

There are several statutes which simplify the recognition and enforcement of foreign judgments for stipulated countries. These statutes and the jurisdictions to which they apply are set out below. In respect of recognition and enforcement under these statutes, a judgment must be one that:

- is obtained in a jurisdiction which is a party to the relevant statute set out below; and
- satisfies the criteria under the statutes set out below.

2. What are the applicable statutes?

Applicable statutes are the Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 264, 1985 Rev. Ed.) (RECJA)*, the Reciprocal Enforcement of Foreign Judgments Act (Cap. 265, 2001 Rev. Ed.) (REFJA)* and the Choice of Court Agreements Act (Cap. 39A, 2016 Ed.) (CCAA).

The RECJA deals with judgments issued by a superior court and where money is payable. Geographically, the RECJA is valid in the UK, Malaysia, Brunei Darussalam, India (except the State of Jammu and Kashmir),

Pakistan, the Commonwealth of Australia, and the states of New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia, the Australian Capital Territory, Norfolk Island and the Northern Territory, Sri Lanka, Windward Islands, Papua New Guinea and Hong Kong (for judgments obtained on or before 30 June 1997). On 5 August 2019, the Reciprocal Enforcement of Commonwealth Judgments (Repeal) Bill was read in Parliament. The Bill aims to repeal the RECJA but has not come into force as at the time of writing (i.e. as of 12 May 2020). Once the repeal of the RECJA comes into operation, Singapore will move to a single statutory regime.

The REFJA applies to interlocutory and final judgments in any civil proceedings, or a judgment or order made by the court in any criminal proceedings for the payment of money as compensation to an injured party. The judgment must be final and conclusive between the parties, unless it is an interlocutory judgment. The sum payable cannot be in relation to taxes or a fine or other penalty. With the amendments to the REFJA that came into force on 3 October 2019, both money judgments and non-money judgments may be registered for enforcement under the REFJA. The applicable jurisdiction is the Hong Kong Special Administrative Region of the People's Republic of China (HK SAR).

The CCAA applies to foreign judgments given in international cases where there is an exclusive choice of court agreement concluded in a civil or commercial matter, not extending to personal law matters such as family law, succession, etc. Applicable jurisdictions are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Montenegro, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden, the United Kingdom.

3 What are the important judicial precedents?

The principles of law on the enforcement of foreign judgments are well-established and uncontroversial. In *Poh Soon Kiat v Desert Palace Inc* (trading as Caesars Palace) [2010] 1 SLR 1129, Singapore's Court of Appeal (the highest judicial authority in Singapore) confirmed the position on common law action for enforcement of a foreign judgment.

4. Does the exequatur procedure mean that the case must be retried on the merits?

No. For enforcement of a foreign judgment at common law, the party seeking to enforce the judgment may commence the claim on the basis of a judgment debt, i.e. the judgment is sufficient proof of the debt owed to the claimant without having to revisit the merits of the judgment.

For a judgment which is registrable under statute (e.g. the RECJA or REFJA), the process is far more streamlined and once the judgment is registered it has the same force and effect as from the date of registration as if it had been a judgment originally obtained before the Singapore courts.

5. How long does the exequatur procedure take?

If permission to enforce is not resisted, the process is generally prompt and inexpensive. However, if enforcement is resisted, a full hearing may be required.

The time and expense will therefore depend on the nature and complexity of the issues that arise.

6. Is the opponent given the opportunity to challenge the exequatur?

Yes. We set out briefly the various grounds to challenge the recognition/enforcement of a foreign judgment under the common law and various statutory regimes below.

6.1 Common Law

Where the recognition or enforcement of a foreign judgment is sought under common law, a defendant may challenge the action on the following grounds:

- that the foreign judgment had been procured by fraud;
- that the enforcement or recognition of the foreign judgment would be contrary to Singapore's public policy;



- that the enforcement or recognition of the foreign judgment would be tantamount to the direct or indirect enforcement of foreign penal, revenue or other public laws; or
- that the foreign judgment had been obtained in breach of natural justice.

6.2 RECJA

A foreign judgment will not be registered if:

- the foreign court acted without jurisdiction;
- the judgment debtor did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the foreign court;
- the judgment debtor was not duly served with the process of the foreign court and did not appear or agree to submit to the jurisdiction of the foreign court;
- the judgment was obtained by fraud;
- the judgment debtor satisfies the Singapore Court either than an appeal is pending or that he is entitled and intends to appeal against the foreign judgment; or
- the judgment was in respect of a cause of action which for reasons of public policy or for some similar reason could not have been entertained by the Singapore court.

6.3 REFJA

A foreign judgment will not be registered if:

- the foreign court had no jurisdiction in the circumstances of the case;
- the judgment debtor did not (notwithstanding that process may have been duly served on him) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;
- the judgment was obtained by fraud;
- the enforcement of the judgment would be contrary to public policy in Singapore; or
- the rights under the judgment are not vested in the person by whom the application for registration was made.

Additionally, the Singapore Court may refuse registration if it is satisfied that the matter in dispute in the proceedings in the foreign court had before the date of the judgment in that foreign court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter (i.e. there was a prior final and conclusive judgment).

6.4 CCAA

Grounds on which the Singapore Court must refuse recognition and enforcement:

- the defendant in the proceedings in which the foreign judgment was obtained was not notified of the document by which the proceedings were instituted, including the essential elements of the claim, in sufficient time to defend the proceedings unless the law of the foreign state allows the notification to be challenged and the defendant had entered an appearance and presented the defendant’s case without challenging the notification in the foreign court;
- the foreign judgment was obtained by fraud in connection with a matter of procedure;
- the recognition or enforcement of the foreign judgment would be manifestly incompatible with the public policy of Singapore, including circumstances where specific proceedings leading to the judgment would be incompatible with the fundamental principles of procedural fairness in Singapore.

Grounds on which the Singapore court may refuse recognition and enforcement:

- the exclusive choice of court agreement is null and void under the law of the state of the chosen court (unless the chosen court has determined that the agreement is valid);
- a party to the exclusive choice of court agreement lacked capacity under Singapore law to enter into that agreement;
- the defendant in the proceedings was notified of the document by which proceedings were instituted, including the essential elements of the claim, in a manner incompatible with the fundamental principles in Singapore concerning the service of documents;
- the foreign judgment is inconsistent with a judgment given by a Singapore court in a dispute between the same parties;

- the foreign judgment is inconsistent with an earlier judgment given in another state between the same parties on the same cause of action and the earlier judgment satisfies the conditions necessary for recognition in Singapore under Singapore law;
- the foreign judgment is being reviewed or appealed against in the state of origin or the time for applying for a review or appeal in the state of origin has not expired;
- the exclusive choice of court agreement designates a particular court and the chosen court has the discretion to transfer the case to another court in the same state and does so, and the transferee court issues a judgment against a party who had objected in a timely manner to the transfer; or
- if, and to the extent that, the foreign judgment awards damages (including exemplary or punitive damages) in excess of compensation for the actual loss of harm suffered by the party awarded damages.

7. Is there a procedure for the enforcement of arbitral awards?

Yes. Both domestic and international awards may, with the permission of the Singapore court, be enforced in the same manner as a judgment or order of the court.

The application for permission is to be made in the manner prescribed in the Rules of Court, and must include copies of the award and the arbitration agreement.

Foreign convention awards are enforceable in Singapore under Part III of the International Arbitration Act (“IAA”), which incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“New York Convention”). into domestic law. They may be enforced in the same manner as awards made in Singapore.

However, Singapore’s ratification of the New York Convention is subject to the reservation that that its provisions will be applied only to the enforcement of awards made in the territory of other contracting states.

Part III of the IAA provides that the party seeking permission to enforce a foreign award shall produce to the court originals or certified copies of the award and the arbitration agreement (with English translations if necessary). Section 31 of the IAA sets out exhaustively the grounds on which a court may refuse permission to enforce a foreign award in terms which mirror Article V of the New York Convention.

International Centre for Settlement of Investment Disputes (ICSID) awards are enforceable pursuant to the provisions of the Arbitration (International Investment Disputes) Act.



8. What are the important judicial precedents?

In *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, the Court of Appeal held that the courts have the power to refuse enforcement of international arbitration awards issued in Singapore under section 19 of the IAA, even if the award debtor has not actively challenged the award at an earlier stage under Articles 16(3) or 34 of the Model Law.

9. How long does the recognition/enforcement procedure take?

If permission to enforce an award as a judgment of the court is not resisted, the process is generally prompt and inexpensive. However, if permission is resisted or not given, or an application is made to have that permission set aside, a full hearing may be required.

The time and expense will therefore depend on the nature and complexity of the issues that arise.

10. Can an award debtor challenge the recognition/enforcement of an award?

Yes, but only on limited and narrowly defined grounds set out in the IAA and the New York Convention. This includes situations where:

- A party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him, under some incapacity at the time when the agreement was made;

- The arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made;
- A party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;
- The award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration;
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- The award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made;
- The subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under Singapore law; or
- The enforcement of the award would be contrary to Singapore's public policy.



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Indonesia

1. Is there an exequatur procedure?

No. In general, foreign judgments are not enforceable in Indonesia (see Article 436 (1) of the *Reglement op de Rechtvordering (Rv)*).

Foreign judgments are only enforceable in Indonesia if there is a bilateral or multilateral treaty for the reciprocal enforcement of foreign judgments, or if there is a specific national law that permits the enforcement of a foreign judgment such as the provision of Article 724 of the Indonesian Commercial Code on the distribution of losses in sea transportation.

In order to enforce a foreign judgment in Indonesia, the judgment creditor must ordinarily submit the case as a fresh claim to be re-litigated before an Indonesian court. The foreign judgment could serve as prima facie evidence in such a fresh claim. It is important to note that Indonesian judges also have wide discretion to evaluate and assess the foreign judgments on a case-by-case basis. This would mean that it is also possible for Indonesian courts to reject the claim if the relevant foreign judgment is held to be in contravention of public order, public policy or any prevailing Indonesian laws and regulations.

2. What are the applicable statutes?

There are no applicable statutes.

3. What are the important judicial precedents?

Indonesia adopts the principle of non-binding force of precedent. As such, Indonesian judges are not required to follow the ruling of judicial precedents. Nonetheless, in practice Supreme Court rulings are considered as having persuasive authority and are often followed or used as reference by the lower courts.

A notable judicial precedent relating to the application of a writ of execution is the case of *Astro Nusantara International B.V., et all ("Astro") vs. PT Ayunda Prima Mitra, et all ("Ayunda")*, where the Central Jakarta District Court rejected (and affirmed by the Supreme Court) Astro's application for a writ of execution on the basis that the arbitral award rendered under the auspices of the Singapore International Arbitration Centre ("SIAC") was in contravention with public order/policy. The court held that the SIAC award issuing an anti-suit injunction against Ayunda and ordering it to cease all ongoing legal proceedings in Indonesia violated

the principles of non-intervention of judicial process and state sovereignty. It was also held that it was not within the ambit of commercial laws, but within the ambit of civil procedural laws.

4. Does the exequatur procedure mean that the case must be retried on the merits?

As discussed in Question 1 above, foreign judgments are not recognized in Indonesia and therefore the enforcement of which can only be made by way of submitting a fresh claim to the Indonesian courts. The case must be re-litigated on its merits.

5. How long does the exequatur procedure take?

As discussed above, there is no exequatur procedure in Indonesia and the disputing party(ies) will have to file a fresh claim before the Indonesian courts. and follow the procedures applicable to a civil claim proceeding. This could take months or even years to complete.

6. Is the opponent given the opportunity to challenge the exequatur?

As discussed in Question 1 above, foreign judgments are not recognized in Indonesia and therefore the enforcement of which can only be made by way of submitting a fresh claim to Indonesian courts.

7. Is there a procedure for the enforcement of arbitral awards?

Yes, although there is a distinction between the enforcement procedure of domestic arbitral awards and foreign or international arbitral awards.

7.1 Domestic Arbitral Awards

Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (the "**Arbitration Law**") prescribes the following procedures for the enforcement of domestic arbitral awards:

- Registration of the domestic arbitral award – the domestic arbitral award must be registered at the district court having jurisdiction over the respondent (the "**Local District Court**") within 30 days from

the date of issuance of the award. The Arbitration Law requires the registration to be made directly by the arbitrator(s) or by the disputing party(ies) pursuant to a power of attorney from the arbitrator(s).

- Issuance of a deed of registration –a deed of registration of the arbitral award shall be issued and shall serve as evidence that the domestic arbitral award has been registered at the Local District Court.
- Issuance of a writ of execution (application for an exequatur order) - The claimant may now issue a writ of execution and apply for an exequatur order from the Chairman of the Local District Court.
- Execution of the arbitral award – If the losing party refuses to voluntarily comply with the writ of execution, the winning party may: (i) file a petition with the court requesting the court to formally summon the losing party and ordering it to comply with the award within 8 days of the date of the summons (*aanmaning*); and (ii) request for the seizure of the losing party's assets to be sold at a public auction.

7.2 Foreign Arbitral Awards

Indonesia has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"). The procedure for enforcing a foreign arbitral awards is set out in Articles 65 to 69 of the Arbitration Law.

Pursuant to the Arbitration Law, an "*International Arbitral Award*" is defined as "*an award which is rendered by an arbitral institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award which is rendered by an arbitral institution or individual arbitrator, of which, pursuant to legal provisions of the Republic of Indonesia, shall be deemed as an international arbitral award.*"

Provided that the international or foreign arbitral award fulfils the following prerequisites, it would be enforceable in Indonesia:

- the award is rendered by an arbitrator or arbitration panel in a country that is a party to a bilateral or multilateral treaty on the recognition and enforcement of international arbitral awards (e.g. the New York Convention);¹

- the subject matter of the award must be within the ambit of commercial law (e.g. trade, banking, investment, industry, financing, and intellectual property);²
- the award does not contravene public order/policy;³
- the award must be registered at the Registrar of Central Jakarta District Court;⁴ and
- a writ of execution (exequatur order) for the award has been issued by the Chairman of Central Jakarta District Court (save for arbitral awards which involve the State of the Republic of Indonesia as one of the disputing parties, in which case the writ of execution shall be issued by the Supreme Court).⁵

Below is a brief overview on the procedures for the enforcement and execution of foreign arbitral awards.

- Registration of the foreign arbitral award - the foreign arbitral award must be registered at the Central Jakarta District Court. The Arbitration Law requires the registration to be made directly by the arbitrator(s) or by the disputing party(ies) by virtue of a power of attorney from the arbitrator(s). Unlike the registration of domestic arbitral awards, there is no time limit prescribed for the registration of foreign arbitral awards.
- Issuance of a deed of registration – a deed of registration of the arbitral award shall be issued and shall serve as evidence that the foreign arbitral award has been registered at the Central Jakarta District Court.
- Issuance of a writ of execution (application for an exequatur order) - The claimant may now issue a writ of execution and apply for an exequatur order from the Chairman of Central Jakarta District Court. If the execution is to be effected in a place which falls under the jurisdiction of another district court, the Central Jakarta District Court will transfer the writ of execution to the relevant district court for execution purposes.

1 Article 66, the Arbitration Law.
2 Article 66, the Arbitration Law.
3 Article 66, the Arbitration Law.
4 Article 65, the Arbitration Law.
5 Article 66, the Arbitration Law.

- d. Execution of the foreign arbitral award – if the losing party refuses to voluntarily comply with the writ of execution, the winning party may: (i) file a petition with the court to request the court to formally summon the losing party and ordering it to comply with the award within 8 days of the date of the summons (*aanmaning*); and (ii) request for the seizure of the losing party’s assets to be sold at a public auction.

8. What are the important judicial precedents?

Please see our discussion in Question 3 above.

9. How long does the recognition/enforcement procedure take?

Indonesian laws do not prescribe a specific time limit for the exequatur procedure. In practice, it typically takes 2 to 3 months to obtain an exequatur order for a domestic arbitral award, and about 5 to 8 months for a foreign arbitral award, from the Central Jakarta District Court, depending on the complexity of the case and whether or not the application for an exequatur order is challenged.

As for the execution process, if the losing party refuses to voluntarily comply with the writ of execution, it may take 6 months or more depending on the complexity of the case (i.e if there is a challenge on the ownership of the assets that will be executed to satisfy the arbitral award).



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10. Can an award debtor challenge the recognition/enforcement of an award?

10.1 Domestic Arbitral Awards

The application for an exequatur order for domestic arbitral awards is an *ex parte* proceeding. This means that the order could be issued without needing to hear the award debtor. However, it is not uncommon for the losing party to challenge the enforcement and execution process. Based on our experience, a losing party will usually rely on the absence of clarity on the definition of public order/policy grounds to challenge the enforcement of a domestic arbitral award on the basis that the arbitral award violates Indonesian public policy.

10.2 Foreign Arbitral Awards

The application to obtain an exequatur order for foreign arbitral awards is also an *ex parte* proceeding. Furthermore, Article 68 of the Arbitration Law provides that an exequatur order of the decision of Central Jakarta District Court cannot be challenged (no appeal or cassation can be filed). In considering whether to recognize and enforce foreign arbitral awards, Central Jakarta District Court will not review the awards on the merits of the case.

As it is possible to refuse the enforcement of a foreign arbitral award under the New York Convention on the grounds of violation of public policy/order, in practice a losing party will try to block the enforcement of a foreign arbitral award by filing a lawsuit and arguing that the recognition and enforcement of such an award will violate Indonesian public order/policy.



Malaysia

1. Is there an exequatur procedure?

Yes. The enforcement of a foreign judgment in Malaysia could be effected through either statutory enforcement or the common law rules of enforcement.

There are three statutes which each sets out the legal framework on the recognition and enforcement of: (a) foreign monetary judgments; (b) maintenance orders; and (c) probate or letters of administration; which were made in or granted from the countries stipulated therein. This Guide will only address foreign monetary judgments.

For foreign monetary judgments from countries that are not covered by any of the statutes, enforcement can be carried out by way of an action in common law. A fresh action will have to be commenced in court for the enforcement of such foreign judgement.

2. What are the applicable statutes?

The Reciprocal Enforcement of Judgment Act 1958 (“REJA”)

REJA is the applicable statute for the enforcement of foreign monetary judgments obtained in the United Kingdom, Hong Kong Special Administrative Region of the People’s Republic of China, Singapore, New Zealand, Republic of Sri Lanka (Ceylon), India (excluding State of Jammu and Kashmir, State of Manipur, Tribal areas of State of Assam, Scheduled areas of the States of Madras and Andhra), and Brunei Darussalam¹.

A foreign monetary judgment from a REJA stipulated country may be enforced by way of an application to the High Court in Malaysia.

To qualify for registration, the foreign judgment must be:

- (i) from a superior court of the stipulated country;²
- (ii) must be final and conclusive under which a sum of money (not being taxes, or charges of like nature, or in respect of a fine or penalty) is payable;
- (iii) must be within a six-year period from the date of the judgment;
- (iv) must not have been fully satisfied by the judgment debtor; and
- (v) must be enforceable by execution in the country of the original court.³

Once registered, the foreign judgment will be treated as though it was a judgment given by the High Court in Malaysia.

The procedure to apply for registration of a foreign monetary judgment under REJA is briefly as follows:

- (i) The judgment creditor files an originating summons supported by an affidavit exhibiting the original copy of the foreign judgment or a verified, certified or authenticated copy of the same, in the High Court.
- (ii) The affidavit must state, among others, that: (i) the judgment creditor is entitled to enforce the judgment; (ii) the judgment debt has not been satisfied at the date of the application; (iii) the judgment does not fall within any case in which a judgment may not be ordered to be registered under REJA (elaborated below); and (iv) the judgment can be enforced by execution in the country of the original court at the date of the application.
- (iii) The grounds upon which a judgment may not be ordered to be registered or which would entitle a judgment debtor to set aside the registration are set out in section 6 below.
- (iv) Upon satisfying the criteria, a registration order would be pronounced by the High Court. The registration order and a notice of registration must be served personally on the judgment debtor.⁴
- (v) The registration order shall state the period within which an application may be made to set aside the registration (typically 14 days from service of the registration order) and shall contain a notification that execution on the judgment will not issue until after the expiration of that period. The High Court may also, on an application made at any time while it remains competent for any party to apply to have the registration set aside, extend the period within which an application to have the registration set aside may be made.⁵
- (vi) The notice of registration must set out: (i) the full particulars of the judgment registered and the order for registration; (ii) the name and address of the judgment creditor or his solicitor on whom any summons/application issued by the judgment debtor may be served; (iii) the right of the judgment debtor to apply to have the registration set aside; and (iv) the period within which an application to set aside the registration may be made.⁷

3. What are the important judicial precedents?

In respect of the statutory registration via REJA:

- 1. the foreign court must have exercised jurisdiction which the Malaysian courts will recognise, the judgment must be final and conclusive, and the judgment must be for a fixed debt if the action is in *personam*.⁸
 - 2. a Malaysian court may refuse to register a foreign judgment or set aside a registered foreign judgment on one or more of, among others, the following grounds:-
 - (a) the judgment is not final or conclusive e.g., the order provides parties with an avenue to apply to vary or modify the order;⁹
 - (b) the judgment is not a judgment to which REJA applies e.g., an arbitration award instead of a foreign judgment;¹⁰
 - (c) the original court which issued the judgment had no jurisdiction e.g., a judgment of the Singapore subordinate courts is not registrable under REJA;¹¹ and
 - (d) the judgment contradicted public policy e.g., the registration of a judgment that offends the principle of *res judicata*.¹²
- II In respect of registration of foreign monetary judgments by way of an action under common law:
- 1. the action may be instituted by way of a writ action. Upon service of the writ and statement of claim on the judgment debtor, the judgment creditor may file for summary judgment to be entered against the judgment debtor. Alternatively, the action may be commenced by way of originating summons supported by an affidavit. An order in terms of the originating summons would be granted if the court is satisfied that the judgment ought to be enforced.¹³
 - 2. the judgment must be final and conclusive, the foreign court has jurisdiction which is in accord with the private international law of Malaysia, and that there is no defence to its recognition.¹⁴

4. Does the exequatur procedure mean that the case must be retried on the merits?

No. Upon registration under REJA, a foreign judgment will have the same force and effect from the date of registration as if it had been a judgment obtained in the Malaysian court.

The Malaysian courts would also not revisit the factual or legal findings in a judgment from the original court as a foreign judgment is not impeachable on its merits.¹⁵

5. How long does the exequatur procedure take?

The enforcement procedure is generally straightforward and can be completed within 1-2 months, provided that there is no challenge.

1 First Schedule of REJA.
2 Section 3(1); First Schedule of REJA.
3 Section 4(1) of REJA.
4 Section 4 of REJA; O. 67 r. 3 of the Rules of Court 2012.
5 O. 67 r. 5(2) of the Rules of Court 2012.
6 O. 67 r. 5(3) of the Rules of Court 2012.
7 O. 67 r. 7(3) of the Rules of Court 2012.
8 *Sakuragawa Pump (S) Pte Ltd v Perkapalan Mesra Sdn Bhd* [2007] 7 MLJ 555 (High Court).
9 *Charles Priya Marie v Koshy A/L Cherian* [2010] MLJU 425 (High Court).
10 *Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software Gmbh & Co Kg* [2018] MLJU 2116 (High Court).
11 *Charles Priya Marie v Koshy A/L Cherian* [2010] MLJU 425 (High Court).
12 *Mann Holdings Pte Ltd & Anor v Ung Yoke Hong* [2019] 8 MLJ 186 (High Court).
13 *Png Oxygen Ltd v Lim Kok Chuan* [2018] MLJU 283 (High Court); *Delta Design Decor LLC v Pembinaan SPK Sdn Bhd* [2015] 5 CLJ 509 (High Court).
14 *PT Sandipala Arthaputra v Muehlbauer Technologies Sdn Bhd* [2021] MLJU 1063 (High Court).
15 *Malayan Banking Berhad v Ng Man Heng* [2005] 1 MLJ 470 (High Court); *MBF Finance Bhd v Yong Yet Miaw & Anor* [1991] 2 MLJ 320 (High Court).

6. Is the opponent given the opportunity to challenge the exequatur?

A judgment debtor may challenge the registration of a judgment under REJA by applying to set aside the same on any one of the following grounds:

- a. The judgment is not a judgment to which REJA applies or was registered in contravention of REJA;
- b. The original court which issued the judgment had no jurisdiction in the circumstances of the case;
- c. The judgment debtor, being the defendant in the proceedings in the original court, did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;
- d. The judgment was obtained by fraud;
- e. The enforcement of the judgment would be contrary to public policy in Malaysia;
- f. The rights under the judgment are not vested in the person by whom the application for registration was made;
- g. The matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter; ¹⁶ and
- h. The service of the notice of registration on the judgment debtor was badly effected.¹⁷

To set aside the registration of a judgment, the judgment debtor must file a notice of application supported by affidavit and shall serve a copy of the same on the judgment creditor. The court will fix a hearing date thereafter to determine the application.¹⁸

In an action for enforcement of a foreign judgment at common law, the following defences, which are similar to the grounds to set aside the registration of a judgment under REJA, can be raised to challenge enforcement of the judgment:

- a. The original court which issued the judgment had no jurisdiction in the circumstances of the case;
- b. The judgment was obtained by fraud or collusion;
- c. The enforcement of the judgment would be contrary to public policy in Malaysia;

- d. The proceedings in which the judgment was obtained were opposed to natural justice¹⁹. Breach of natural justice focuses on the irregularity of the proceedings, whether the defendant was properly notified of the proceedings, legally represented at every stage of the proceedings or given the opportunities to be heard at every level of the judicial system.²⁰

7. Is there a procedure for the enforcement of arbitral awards?

Yes. Section 38 of the Arbitration Act 2005, supplemented by Order 69 Rule 8 of the Rules of Court 2012, provides a summary procedure for the recognition and enforcement of arbitral awards that is applicable both to arbitral awards where the seat of arbitration is in Malaysia and to foreign awards sought to be enforced in Malaysia.

A party seeking to recognise an arbitral award will need to make an application to the High Court in Malaysia by way of an originating summons, and this can be done on an ex-parte basis.²¹

The application must be accompanied by a duly authenticated original copy of the award or a duly certified copy of the same, and the original arbitration agreement or a duly certified copy of the same.²² In practice, a duly certified copy of the award as well as the arbitration agreement by an authorised person (solicitor/notary public) will be accepted by the court as prima facie evidence in support of the enforcement application.

A copy of the application and the order giving permission to enforce the award must be served on the respondent. The respondent has 14 days from the service of the order to apply to set aside the order, failing which the applicant will be entitled to enforce the arbitration award.²³

Upon the lapse of the said 14 days from the service of the order, assuming there is no application to set aside the order, the arbitration award can be enforced as if it were a judgment of the High Court in Malaysia.

8. How long does the recognition/enforcement procedure take?

It very much depends on whether there is any application to challenge the recognition/enforcement of an award.

If not challenged, the recognition/enforcement procedure should take around 1-2 months.

9. Can an award debtor challenge the recognition/enforcement of an award?

Yes. An award debtor may challenge the recognition/enforcement of an award in limited circumstances.

Section 39 of the Arbitration Act 2005 sets out the exhaustive grounds for refusing recognition or enforcement, which corresponds with Article 36 of the UNCITRAL Model Law if the party making the application proves that:

- a. a party to the arbitration agreement was under any incapacity;
- b. the arbitration agreement is invalid under the law to which the parties have subjected it;
- c. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party’s case;
- d. the arbitration award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- e. the arbitration award contains decisions on matters beyond the scope of the submission to arbitration;
- f. the composition of the arbitral tribunal or arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Arbitration Act 2005 from which the parties cannot derogate, or, failing such agreement was not in accordance with this Act;
- g. the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which the award was made;
- h. the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
- i. the award is in conflict with the public policy of Malaysia.

In practice, parties seeking to challenge an application to recognise or enforce an arbitral award would usually file an application to set aside the arbitral award. The grounds to set aside an arbitral award are similar to the grounds for challenging the recognition/enforcement of the Award, except for paragraph g. It is also further provided in section 37 that an award is in conflict with the public policy of Malaysia where:-

- a. the making of the award was induced or affected by fraud or corruption; or
- b. a breach of the rules of natural justice occurred –
 - i. during the arbitral proceedings; or
 - ii in connection with the making of the award.

To this end, both applications are usually heard together by the High Court. A dismissal of an application to set aside would conversely result in the arbitral award being registered, and vice versa.

10. What are the important judicial precedents?

The general approach of the Malaysian courts in dealing with an application to challenge the enforcement of an arbitral award/set aside an arbitral award is set out below:

- a. Recognise that the arbitration award is final, binding and conclusive and can only be challenged in exceptional circumstances.²⁴
- b. The listed grounds for refusal of recognition are exhaustive. Therefore, if no ground is present, the award must be recognised.²⁵
- c. Only the dispositive portion of the arbitral award, and not the reasoning or findings of the arbitral tribunal, is to be registered. As the whole intent and purpose of section 38 is to ensure that the reliefs granted by the arbitral tribunal can be enforced by way of execution proceedings through the courts, the reasoning or findings of the arbitral tribunal would not be relevant.²⁶

16 Section 5(1) of REJA.
17 The Ka Wah Bank Ltd v Low Chung Song & Ors [1998] 2 MLJ 507 (High Court).
18 O. 67 r. 9 of the Rules of Court 2012.
19 See Hua Daily News Bhd v Tan Thien Chin & Ors [1986] 2 MLJ 107 (Supreme Court).
20 PT Sandipala Arthaputra v Muehlbauer Technologies Sdn Bhd [2021] MLJU 1063 (High Court).
21 O. 69 r. 8(1) of the Rules of Court 2012; Section 38(1) of the Arbitration Act 2005.
22 O. 69 r. 8(3) of the Rules of Court 2012; Section 38(2) of the Arbitration Act 2005.
23 O. 69 r. 8(7) of the Rules of Court 2012.
24 Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401 (Federal Court).
25 CTI Group Inc v. International Bulk Carriers SPA [2017] 5 MLJ 314 (Federal Court).
26 Siemens Industry Software Gmbh & Co Kg (Germany) v Jacob and Toralf Consulting Sdn Bhd [2020] 3 MLJ 1 (Federal Court).

- d. The recognition and enforcement process under sections 38 and 39 of the Arbitration Act 2005 read together with Order 69 of the Rules of Court 2012 is a two-stage process starting with an ex parte proceeding (subject to the power of the court requiring service of the application) to obtain an order giving permission to enforce an arbitral award and a subsequent inter partes proceeding stage where the court will deal with the application to set aside the ex parte order giving leave to enforce the arbitral award.²⁷
- e. The courts do not exercise appellate jurisdiction over arbitration awards and therefore will not examine correctness of a claim on its merits.²⁸
- f. The courts cannot sit in appeal over the views of the arbitral tribunal by re-examining and re-assessing the materials before the material tribunal.²⁹
- g. The jurisdiction to set aside or remit an arbitral tribunal's award is one that should be exercised with great care and a proper sense of responsibility.³⁰
- h. Lack of appraisal of the law or the evidence is not a ground to set aside or remit an award for reconsideration.
- i. The arbitral tribunal should be regarded as the master of the facts ³¹ and of the arbitral process.³²
- j. The court would also bear in mind the background policy of encouraging arbitral finality and minimalist intervention approach to be adopted in line with the spirit of UNCITRAL Model Law. ³³

27 CTI Group Inc v. International Bulk Carriers SPA [2017] 5 MLJ 314 (Federal Court).
28 Garden Bay Sdn Bhd v Sime Darby Property Bhd [2018] 2 MLJ 636 (Court of Appeal).
29 Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang and another appeal [2015] 4 MLJ 766 (Court of Appeal).
30 Garden Bay Sdn Bhd v Sime Darby Property Bhd [2018] 2 MLJ 636 (Court of Appeal).
31 Georges SA v Trammo Gas Ltd, The Balears [1993] 1 Lloyd's Rep 215 (Court of Appeal).
32 Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals [2018] 1 MLJ 1 (Federal Court).
33 Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee YOUNG & Anor [2019] 2 MLJ 413 (Federal Court).



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Philippines

1. Is there an exequatur procedure?

Yes. Rule 39, Section 48 of the Rules of Court governs the recognition and enforcement of foreign judgments. Pursuant to this rule, the effect of a judgment or final order of a tribunal of a foreign country having jurisdiction to render the judgment or final order is as follows:

- (a) In case of a judgment or final order upon a specific thing, it would be conclusive as to the title to the thing, and
- (b) In case of a judgment or final order against a person, it would be presumptive evidence of a right as between the parties and their successors-in-interest.

The Philippine Supreme Court has ruled in *BPI Securities Corporation v. Guevara* (G.R. No. 167052, March 11, 2015) that the recognition and enforcement of a foreign judgment or final order requires only proof of fact of the said judgment or final order and that once proven, it would enjoy a disputable presumption of validity with regard to the title of the said thing or the right as between the parties and the successors-in-interest, as the case may be.

2. What are the applicable statutes?

The Supreme Court explained in *Mijares v. Ranada* (G.R. No. 139325, April 12, 2005) that foreign judgments may be enforced in the Philippines under: (i) procedural rules; or (ii) jurisprudence. The applicable procedural rules are set out in the Rules of Court (Rule 39, Section 48). The decisions of the Supreme Court applying or interpreting the rule form part of the legal system of the Philippines pursuant to Article 8 of the Civil Code of the Philippines.

3. What are the important judicial precedents?

In *Asiavest Merchant Bankers v. Court of Appeals* (G.R. No. 110263, July 20, 2001) the Supreme Court ruled that a judgment of a foreign tribunal may be recognized in the Philippines provided that it can be “shown that there has been an opportunity for a full and fair hearing before a court of competent jurisdiction; that the trial upon regular proceedings has been conducted, following due citation or voluntary appearance of the

defendant and under a system of jurisprudence likely to secure an impartial administration of justice; and that there is nothing to indicate either a prejudice in court and in the system of laws under which it is sitting or fraud in procuring the judgment.”

The Court has also ruled that the oppositor is entitled to defend against the enforcement of such decision since “it is essential that there should be an opportunity to challenge the foreign judgment, in order for the court in this jurisdiction to properly determine its efficacy.” [*Mijares v. Ranada* (G.R. No. 139325, April 12, 2005)]

If the defendant had also been a party to and actually participated in the proceedings in the foreign court, he is bound by the judgment and the doctrine of res judicata will apply to such foreign judgment. [*General Corporation of the Philippines v. Union Insurance Society of Canton, Ltd., et al.* (G.R. No. 2684, September 14, 1950)]

4. Does the exequatur procedure mean that the case must be retried on the merits?

No. Foreign judgments enjoy a presumption of validity and the party who seeks to challenge such foreign judgment has the burden of overcoming this presumptive validity [*BPI Securities Corporation v. Guevara* (G.R. No. 167052, March 11, 2015)]. Rule 39, Section 48 of the Rules of Court limits the grounds to question the validity of foreign judgments to the following: want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact. The ability to challenge the validity of foreign judgments is discussed further in paragraph 6 below.

In this regard, the Supreme Court recognized that “[t]he limitation on the review of a foreign judgment is in place in order to avoid repetitive litigation on claims and issues, prevent harassment of the parties and avoid undue imposition on the courts,” thus:

“The policy of preclusion rests on principles of comity, utility and convenience of nations. As a generally accepted principle of international law, it is part of the law of the Philippines by virtue of the incorporation clause of the Constitution (Sec. 2, Art. II).” [*Raytheon International, Inc. v. Rouzie, Jr.* (G.R. No. 162894, Feb. 26, 2008)].

Further, the Supreme Court explained that “[t]he rule on limited review embodies the policy of efficiency and the protection of party expectations, as well as respecting the jurisdiction of other states.” [*Fujiki v. Marinay* (G.R. No. 196049, June 26, 2013)].

Notably, raising the ground of “clear mistake of law or fact” can be considered as a merit-based defence, and the Supreme Court had ruled in *BPI Securities Corporation v. Guevara* (G.R. No. 167052, March 11, 2015) that it is not necessary to look into the merits of the foreign judgment because “a Philippine court will not substitute its own interpretation of any provision of the law or rules of procedure of another country, nor review and pronounce its own judgment on the sufficiency of evidence presented before a competent court of another jurisdiction.” The Supreme Court further clarified that “if every judgment of a foreign court were reviewable on the merits, the plaintiff would be forced back on his/ her original cause of action, rendering immaterial the previously concluded litigation.”

5. How long does the exequatur procedure take?

The proceeding may take at least 12 to 18 months, subject to the extent and nature of the challenge lodged by the adverse party and the congestion of the court’s docket.

6. Is the opponent given the opportunity to challenge the exequatur?

Yes. Rule 39, Section 48 of the Rules of Court provides that the recognition and enforcement of the judgment or final order may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

An oppositor or the defendant may also raise the defence that the foreign judgment is contrary to public policy. [*Bayot v. Court of Appeals* (G.R. No. 155635 and G.R. No. 163979, November 7, 2008) citing *Llorente v. Court of Appeals* (G.R. No. 124371, November 23, 2000) and *Mijares v. Ranada* (G.R. No. 139325, April 12, 2005)].

7. Is there a procedure for the enforcement of arbitral awards?

Yes. Under the Special Rules of Court on Alternative Dispute Resolution (or the Special ADR Rules, A.M. No. 07-11-08-SC), the Alternative Dispute Resolution Act of 2004 (Republic Act No. 9285), the Implementing Rules and Regulation of the Alternative Dispute Resolution Act of 2004, UNCITRAL Model Law and the New York Convention, any party to a foreign arbitration and at any time after receipt of a foreign arbitral award can file a petition to the local courts to recognize and enforce the arbitral award.

The petition can be filed in the Regional Trial Court of the place in the Philippines: (a) where the assets to be attached or levied upon are located, (b) where the act to be enjoined is being performed, (c) in the principal place of business in the Philippines of any of the parties, (d) if any of the parties is an individual, where any of those individuals resides, or (e) in the National Capital Judicial Region. (Rule 13.3 of the Special ADR Rules and Section 47 of the Alternative Dispute Resolution Act of 2004)

It is presumed that a foreign arbitral award was made and released in due course of arbitration and is subject to enforcement by the court. The decision of the court recognizing and enforcing a foreign arbitral award is immediately executory. (Rule 13.11 of the Special ADR Rules)

8. What are the important judicial precedents?

The Supreme Court has ruled that “[f]oreign arbitral awards while mutually stipulated by the parties in the arbitration clause to be final and binding are not immediately enforceable or cannot be implemented immediately.” The award must be confirmed and will be subject to judicial review by a Philippine court under limited circumstances, and the court also has jurisdiction to issue interim measures of protection. [*Korea Technologies Co., Ltd. v. Lerma* (G.R. No. 143581, January 7, 2008)]

In *Tuna Processing, Inc. v. Philippine Kingford, Inc.* (G.R. No. 185582, February 29, 2012), the Supreme Court ruled that even if the petitioner is not licensed to do business in the Philippines, it may seek the enforcement and recognition of a foreign arbitral award under the Alternative Dispute Resolution Act of 2004. This is because the grounds to deny the enforcement of a foreign judgment or arbitral award are specific and limited, and do not require of the party the capacity to sue.

In *Mabuhay Holdings Corp. v. Sembcorp Logistics Limited* (G.R. No. 212734, December 5, 2018), the Supreme Court ruled that the Philippines adopts a policy in favour of arbitration. This is shown by the Alternative Dispute Resolution Act of 2004 and the Special ADR Rules, which “[b]oth declare as a policy that the State shall encourage and actively promote the use of alternative dispute resolution, such as arbitration, as an important means to achieve speedy and impartial justice and declog court dockets.” This pro-arbitration policy is further bolstered by the Special ADR Rules on the presumption in favour of enforcement of a foreign arbitral award. Thus, “it is the party attacking a foreign judgment that had the burden of overcoming the presumption of its validity.” [*Philippine National Bank v. D.B. Teodoro Development Corp.* (G.R. Nos. 167925 & 169362, July 29, 2015)]

9. How long does the recognition/enforcement procedure take?

As with the recognition and enforcement of foreign judgments, a proceeding to confirm and enforce a foreign arbitral award may take at least 12 to 18 months, subject to the extent and nature of the challenge lodged by the adverse party.



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10. Can an award debtor challenge the recognition/enforcement of an award?

Rule 13 of the Special ADR Rules allows the adverse party to oppose the recognition and enforcement of a foreign arbitral award under limited grounds set out in rule 13.4:

- (i). A party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereof, under the law of the country where the award was made; or
- (ii). The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii). The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv). The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where arbitration took place; or
- (v). The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which that award was made.

The oppositor may also raise the defence that the foreign judgment is contrary to public policy. [*Bayot v. Court of Appeals*, (G.R. No. 155635 and G.R. No. 163979, November 7, 2008)]



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Thailand

1. Is there an exequatur procedure?

There is no exequatur procedure for enforcement of a foreign judgment applicable in Thailand.

A party wishing to enforce a foreign judgment in Thailand must commence fresh litigation proceedings in the Thai courts, in which the foreign judgment may be accepted by the Thai courts as evidence of the case.

2. What are the applicable statutes?

There is no legislation in Thailand that specifically deals with the enforcement of a foreign judgement.

3. What are the important judicial precedents?

Two oft-cited examples of Supreme Court decisions dealing with the enforcement of a foreign judgment in Thailand are set out below:

- (a) In **Supreme Court Decision No. 585/2461 (1918)**, the Supreme Court held that Thai courts would deem an entitlement under a foreign judgement enforceable only when: (i) the foreign judgment in question was rendered by a court of competent jurisdiction; and (ii) the foreign judgment in question is final and binding upon parties. In this case, the Supreme Court denied an application for enforcement of a judgment of a Vietnamese court obtained in default of the defendant's appearance, as based on Thai laws, such a judgment would not be considered final.
- (b) In **Supreme Court Decision No. 6565/2544 (2001)**, the Supreme Court considered that a decision by the English Commercial Court ordering payment of court fees, attorney fees, and relevant fees incurred in proceedings before it to be part of the final decision rendered by the English Commercial Court. Further, the Supreme Court was also of the view that the proceedings in the English Commercial Court did not violate public policy.

4. Does the exequatur procedure mean that the case must be retried on the merits?

As mentioned in Question 1 above, there is no exequatur procedure applicable in Thailand. Under the Thai legal system, a foreign judgment will be treated as mere evidence in a fresh litigation case to enforce a foreign judgment in a Thai court. Accordingly, a Thai court may revisit the merits of the case.

5. How long does the exequatur procedure take?

N/A

6. Is the opponent given the opportunity to challenge the exequatur?

N/A

7. Is there a procedure for the enforcement of arbitral awards?

Yes, Arbitration Act, B.E. 2545 (2002) (the **"Thai Arbitration Act"**) applies to the recognition and enforcement of both domestic and foreign arbitral award sought in Thailand. In the case of the latter, Article 41 Paragraph Two of the Thai Arbitration Act states as follows:

"In case where an arbitral award was made in a foreign country, the award shall be enforced by the competent court only if it is subject to an international convention, treaty, or agreement to which Thailand is a party. Such award shall be applicable only to the extent that Thailand accedes to be bound."

Thailand is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the **"New York Convention"**) by way of accession on 21 December 1959. Moreover, the texts under the Thai Arbitration Act pertaining to the recognition and enforcement of arbitral award closely follow the UNCITRAL Model Law on International Commercial Arbitration (1985) (**"UNCITRAL Model Law"**).

In this regard, Article 9 of the Thai Arbitration Act enlists certain courts of competent jurisdiction over the recognition and enforcement of an arbitral award as follows:

- (a) the Central Intellectual Property and International Trade Court (or Regional Intellectual Property and International Trade Court);
- (b) a court where the arbitral proceedings are conducted;
- (c) a court in which either party is domiciled; or
- (d) a court which has jurisdiction over a dispute submitted to an arbitration.

As to the last category in sub-paragraph (d) above, the Thai legal system adopts the dual court approach to determine whether a court has jurisdiction over a dispute, thus resulting in the separate courts of competent jurisdictions as follows:

- I. **Courts of Justice** have jurisdiction over the recognition and enforcement of an arbitral award where the underlying dispute pertains to civil and commercial relationships, as well as those adjudicated under an international investment agreement, for instance, a bilateral investment treaty.
- II. **Administrative Courts** have jurisdiction over the recognition and enforcement of an arbitral award where the underlying dispute relates to an administrative contract. Pursuant to Article 3 of Establishment of Administrative Courts and Administrative Court Procedure Act, B.E. 2542 (1999) in conjunction with Resolution of Assembly of Judges in Supreme Administrative Court No. 6/2544 (2001), an administrative contract is a contract (a) where at least one party is an administrative agency or a person acting on behalf of a state (an administrative party), and (b) which exhibits certain characteristics, including:
 - (i) a concession contract;
 - (ii) a contract providing public service;
 - (iii) a contract for a construction of public work;

- (iv) a contract for an exploitation of natural resource;
- (v) a contract authorising a private person to directly carry out or cooperate in executing public service; or
- (vi) a contract which stipulates an exorbitant clause that allows an administrative party to exercise its prerogative.

Pursuant to Article 42 paragraph Two of the Thai Arbitration Act, an applicant may seek recognition and enforcement of an arbitral award by filing an application with the relevant court, together with (a) an original or certified copy of the arbitral award, (b) an original or certified copy of the relevant arbitration agreement, and (c) a Thai translation of the arbitral award and the arbitration agreement by a certified translator, or by a Thai envoy or consul in the country where the arbitral award or the arbitration agreement was made.

Once the court of first instance enters a judgment recognising and enforcing an arbitral award, Article 45 paragraph One of the Thai Arbitration Act provides that no appeal against such judgment is allowed, unless:

- (i) the recognition and enforcement of the arbitral award would be contrary to public policy or good moral of people;
- (ii) the judgment would be contrary to legislative provisions concerning public policy;
- (iii) the judgment is not in accordance with the arbitral award;
- (iv) a judge who sat in the case at first instance gave a dissenting opinion; or
- (v) the award was in respect of a provisional measure pursuant to Article 16 of Thai Arbitration Act.

In case of the above, an appeal must be lodged directly with the Supreme Court (in case where the court of first instance is the Court of Justice of First Instance) or the Supreme Administrative Court (in case where the court of first instance is the Administrative Court of First Instance) pursuant to Article 45 Paragraph Two of the Thai Arbitration Act.

8. What are the important judicial precedents?

- (a) **Supreme Court Decision No. 5560-5563/2562 (2019)** pertains to the interpretation of the term ‘public policy or good moral of people’ which as stated in Question 7 above is a ground for refusing the recognition or enforcement of an arbitral award pursuant to Article 44 of the Thai Arbitration Act. The Supreme Court held that such phrase does not have an exact or precise legal definition, and therefore a court is to exercise its discretion in interpreting the same in accordance with the context of the dispute and the social values of the present era, while safeguarding public interests, public services, and common goods. A court is not to interpret the phrase for the benefit of the parties or the legality of the arbitral proceedings. The Supreme Court further noted that the interpretation of this matter is to be decided on the facts of each case.
- (b) This approach laid down in **Supreme Court Decision No. 5560-5563/2562 (2019)** has been adopted by the Administrative Courts as well. In the **Supreme Administrative Court Decision No. Or. 221-223/2562 (2019)** (“Hopewell Decision”), the Supreme Administrative Court held that the interpretation of an administrative contract in dispute is a matter between the parties and is not a matter that relates to public policy or the good moral of people.
- (c) In **Supreme Court Decision No. 7277/2549 (2006)**, the Supreme Court ruled that a contract procured through a corruption does not bind a government party; therefore, the recognition and enforcement of an arbitral award that is based upon such a contract would be contrary to public policy or good moral of people.
- (d) In **Supreme Court Decision No. 7635/2562 (2019)** and **Supreme Court Decision No. 6741/2562 (2019)**, the Supreme Court ruled that a misapplication of the law by the arbitral tribunal would cause the recognition and enforcement of an arbitral award to be contrary to public policy or good moral of people.

9. How long does the recognition/enforcement procedure take?

Ordinarily, it may take approximately 1 to 1.5 years for an application before the Courts of Justice of First Instance; and approximately 1.5 to 2 years for an application before the Administrative Courts of First Instance.

10. Can an award debtor challenge the recognition/enforcement of an award?

Yes, an award debtor is entitled to set aside or resist the recognition and enforcement of an arbitral award.

Similar to the provisions under the New York Convention and the UNCITRAL Model Law, a court may set aside an arbitral award only on grounds which can be categorised into two groups:

- I. The grounds a party is required to establish and prove pursuant to Article 40 Paragraph Three (1) of the Thai Arbitration Act which are:
 - (i) a party to the arbitration agreement was under some incapacity under the law applicable to that party;
 - (ii) the arbitration agreement is not binding under the law of the country agreed to by parties, or failing any indication thereon, under Thai law;
 - (iii) a party making the application was not given proper advance notice of the appointment of the arbitral tribunal or of the arbitral proceedings or was otherwise unable to defend its case in the arbitral proceedings;
 - (iv) the arbitral award deals with a dispute not falling within a scope of the arbitration agreement or contains a decision on a matter beyond the scope of the arbitration agreement; or
 - (v) the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the agreement of the parties or, if not otherwise agreed by the parties, not in accordance with the Thai Arbitration Act.
 - II. The grounds that courts may raise *sua sponte* pursuant to Article 40 Paragraph Three (2) of the Thai Arbitration Act:
 - (i) the arbitral award involves a dispute not capable of settlement by arbitration under the law; or
 - (ii) the recognition and enforcement of the arbitral award would be contrary to public policy or the good moral of the people.
- In a similar vein, a court may refuse the enforcement of an arbitral award only on grounds which can be categorised into two groups:
- I. The grounds a party is required to establish and prove pursuant to Article 43 of Thai Arbitration Act which are:

- (i) a party to the arbitration agreement was under some incapacity under the law applicable to that party;
 - (ii) the arbitration agreement is not binding under the law of the country agreed to by parties, or failing any indication thereon, under the law of the country where the arbitral award was made;
 - (iii) a party making the application was not given proper advance notice of the appointment of the arbitral tribunal or of the arbitral proceedings or was otherwise unable to defend its case in the arbitral proceedings;
 - (iv) the arbitral award deals with a dispute not falling within a scope of the arbitration agreement or contains a decision on a matter beyond the scope of the arbitration agreement;
 - (v) the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the agreement of the parties or, if not otherwise agreed by parties, not in accordance with the law of the country where the arbitral award was made; or
 - (vi) the arbitral award has not yet become binding, or has been set aside or suspended by a competent court or under the law of the country where the arbitral award was made.
- II. The grounds which may be raised *sua sponte* by a court, pursuant to Article 44 of Thai Arbitration Act:
 - (i) The arbitral award involves a dispute not capable of settlement by arbitration under the law; or
 - (ii) The recognition and enforcement of the arbitral award would be contrary to public policy or the good moral of the people.



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Vietnam

1. Is there an exequatur procedure?

Yes. Article 432 of the 2015 Code of Civil Procedure (“CPC”) provides for the recognition and enforcement of foreign judgments in Vietnam as below:

*“Within 03 years from the day on which the civil judgment/decision of a foreign Court takes legal effect, the judgment/decision creditors, persons with relevant legitimate rights and interests or their lawful representatives may submit their application to Vietnam’s Ministry of Justice according to provisions of International treaty to which the Socialist Republic of Vietnam and home country of such foreign Court are co-signatories or to a competent Vietnam’s Court specified in this Code to request recognition and enforcement in Vietnam of such civil judgment/decision.”*¹

A foreign judgment regarding civil, marriage, family, trade, business, and labour related matters may be recognised and enforced in Vietnam if the foreign country where the judgment was made and Vietnam are members of a multinational or bilateral treaty (on judicial assistance) under which the recognition and enforcement of judgments by the court of each member state are stipulated.

In the absence of such a treaty, recognition and enforcement will be taken on case-by-case basis and on the reciprocity principle (i.e., a court in Vietnam will check whether or not a court in the foreign country of such judgment had recognised a judgment of Vietnamese court) (Article 423 of CPC).

2. What are the applicable statutes?

The applicable statutes are:

- (a) Chapters 35 and 36 of the CPC which provide the procedures for recognition and enforcement of foreign judgments; and
- (b) The 2008 Law on Enforcement of Civil Judgment (“**LECJ**”) which deals with the enforcement of the foreign judgments.

Further, to date, Vietnam has bilateral agreements on judicial assistance with seventeen (17) countries, namely Algeria, Belarus, China, Cuba, France, Hungary, Kazakhstan, North Korea, Laos, Mongolia, Poland, Russia, Ukraine, Taiwan, Cambodia, Bulgaria, Czechoslovakia (Czech Republic and Slovakia).

3. What are the important judicial precedents?

Vietnamese law is based on a civil law system. However, Vietnam has recently started using case precedents for the purpose of having a consistent application of law and court decisions. A person may recommend that a court judgment with identical facts be used as precedent in a matter. The recommendation will be made to the Supreme Court for consultation via a website. A committee set up by the Supreme Court will then examine and select such judgment for submission to the Chief Justice. If accepted, the judgment will be announced as a judicial precedent for that particular case. It is noted that judicial precedent in Vietnam is not the judge-made-law but rather a “sample” judgment for all cases with identical facts.

With respect to the recognition and enforcement of foreign judgments, there has been no such judicial precedents.

4. Does the exequatur procedure mean that the case must be retried on the merits?

No. In principle, the courts do not re-examine the merits of foreign judgments. Instead, the courts will review the evidence provided by the judgment debtors and identify whether or not there are any grounds to refuse the recognition and enforcement of the foreign judgment based on the exhaustive list set out in Article 439 of CPC as reproduced below:

- The foreign judgment does not satisfy conditions for recognition and enforcement in Vietnam set out in Question 1 above;
- The foreign judgment has not taken legal effect in accordance with the law of the country of the court which issued it;
- The debtor or his/her legal representative was absent at the hearing session of the foreign court because he/she was not duly summoned, or process of the foreign court was not served on him/her within a reasonable period in accordance with the law of the country of such foreign court for him/her to exercise the right to defence;
- The court issuing the judgment or decision does not have the jurisdiction over the case;

- There has been a civil judgment by a Vietnamese court on the case which has taken legal effect; or before jurisdiction was accepted by the foreign judicial body, a Vietnamese court had already accepted jurisdiction over the case and was resolving it; or a civil judgment of a court of a third country had already been recognised and enforced by a Vietnamese court;
- The limitation period for the enforcement of the judgment has expired under the law of that foreign country or the law on civil judgment enforcement of Vietnam;
- The enforcement of the judgment has been rescinded or suspended in that foreign country; and
- The recognition and enforcement of the foreign judgment in Vietnam is contrary to the basic principles of the law of Vietnam.

5. How long does the exequatur procedure take?

The total time limit for the procedure of recognition and enforcement of a foreign judgment is around 8 months for the first instance stage and 5 months for the appeal stage.

However, as a matter of practical fact, the timeframe for procedure of recognition and enforcement of foreign judgments depends on the complexity of the case and may take more than the stated 8 or 5 month period.

6. Is the opponent given the opportunity to challenge the exequatur?

Yes. The judgment debtor is given the opportunity to request the Vietnamese court not to recognise and enforce the foreign judgment in Vietnam (Article 425(2) of CPC), and to actively oppose such recognition under Article 444(1) of CPC as set out below:

“Within 03 years from the day on which the civil judgment/decision of a foreign Court takes legal effect, the judgment debtors or their lawful representatives may request Vietnam’s Court to not recognize such civil judgment/decision”.

Articles 425 (3) and 447 of CPC provides the judgment debtor and related parties with the right to block the

recognition of the foreign judgments but not for the enforcement in Vietnam as set out below:

“Within 06 months from the day on which the civil judgment/decision of a foreign Court takes legal effect but there is no request for enforcement of such Judgment/decision in Vietnam, then involved parties and persons with relevant legitimate rights and interests or their lawful representatives may submit their application to Vietnam’s Ministry of Justice according to provisions of International treaty to which the Socialist Republic of Vietnam and home country of such foreign Court are co-signatories or to a competent Vietnam’s Court specified in this Code, in case the International treaty to which the Socialist Republic of Vietnam is a signatory does not provide for or there is no relevant International treaty provisions, to request the Court to not recognize such civil judgment/decision” (Article 447 of CPC).

In addition, the judgment debtor may challenge the exequatur by: (i) raising an objection to a petition for recognition and enforcement of a foreign judgment at a hearing of considering a request for exequatur in the proceedings of the first instance (Article 438 of CPC); or (ii) filing a challenge the court’s decision of the first instance accepting the recognition of the foreign judgment by an appeal procedure (Article 426 of CPC).

The grounds for the judgment debtor to oppose or challenge the exequatur will be based on the grounds provided in Article 439 of CPC as listed in Question 4 above.

7. Is there a procedure for the enforcement of arbitral awards?

Yes. Both domestic and foreign arbitral awards may be enforced according to procedures for enforcement of a domestic civil judgment following LECJ.

Vietnam is a state member of 1958 New York Convention on recognition and enforcement of foreign arbitral awards (“**New York Convention**”). Therefore, arbitral awards made by a member state of the Convention will be recognised and enforced in Vietnam.

The **Decision No. 453/QĐ-CTN** of the President of Vietnam dated 28 July 1995 on the Accession of Vietnam to the New York Convention stated that: (i) the Convention applies only to disputes arising from commercial legal relations; and (ii) any interpretation of the Convention before the court or other competent authorities of Vietnam must comply with the provisions of the Constitution and laws of Vietnam.

This Decision also provided that arbitral awards by non-member states may be recognised in Vietnam based on the reciprocity principle.

This is stated in Article 424 of the CPC which provides that the recognition and enforcement of foreign arbitral awards shall be considered if: (i) the award is from a country which has signed or acceded to a relevant international convention with Vietnam (e.g., New York Convention); or (ii) on the basis of reciprocity principle in the absence of such international commitments.

Article 451 of the CPC provides as follows:

“Within 03 years from the day on which the foreign arbitrator’s award takes legal effect, the judgment creditors and persons with relevant legitimate rights and interests or their lawful representatives may submit their application to Vietnam’s Ministry of Justice according to provisions of International treaty to which the Socialist Republic of Vietnam is a signatory or to a competent Vietnam’s Court specified in this Code, in case the International treaty to which the Socialist Republic of Vietnam is a signatory does not provide for or there is no relevant International treaty provisions, to request the Court to not recognize and enforce such award”.

The petition is submitted to the court as described in Question 1 above. The petition in a foreign language must be accompanied by a Vietnamese translation, which is lawfully notarized or certified (Article 452(2) CPC). The original or certified true copy of both the foreign arbitral award and the arbitration agreement must be attached to the petition (Article 453(1) CPC).

Further, the foreign arbitral award to be recognised and enforced must be a final award addressing the dispute in its entirety.

8. What are the important judicial precedents?

As mentioned in Question 3 above, Vietnamese law is based on the civil law system.

In any event, there has been no judicial precedent on this matter.

9. How long does the recognition/enforcement procedure take?

The total time limit for the procedure of recognition and enforcement of a foreign arbitral award is about 6 months during the first instance stage and 4.5 months during the appeal stage.

However, as a matter of practical fact, the timeframe for procedures of recognition and enforcement of a foreign arbitral award depends on the specific circumstances and may take more than the stated 6 or 4.5 month period.

10. Can an award debtor challenge the recognition/enforcement of an award?

Yes. In the same manner as a foreign judgment is challenged as set out in Question 6 above, an award debtor and related parties are also given the opportunity to: (i) raise an objection to petition for recognition and enforcement of a foreign arbitral award at hearing of considering petition in the proceedings of the first instance (Article 458 CPC); or to (ii) file an appeal against the Vietnamese court’s decision to recognise and enforce or to not recognise a foreign arbitral award (Article 426 CPC).

Article 459 of the CPC provides an exhaustive list of the grounds on which a Vietnamese competent court may refuse to recognize and enforce a foreign award in terms which mirror Article V of the New York Convention. These are also the grounds that an award debtor may rely on the request for the refusal of recognition and enforcement of a foreign arbitral award. Such grounds exhaustively include:

- The parties of the arbitration agreement do not have capacity to enter into such agreement according to law applicable to each party;
- The arbitration agreement is not legally effective according to the applicable law or according to the law of where the award was made in case the parties cannot did not choose a governing law of such agreement;
- The award debtor was not notified in a timely and proper manner of the appointment of arbitrators, of the procedures for resolution of the dispute by foreign arbitration, or cannot exercise its litigation rights due to another legitimate reason;
- The foreign arbitral award was issued on a dispute for which resolution was not requested by the parties, or which exceeds the request of the parties who signed the arbitration agreement;

- The members of foreign arbitral tribunal or the procedures for dispute resolution of foreign arbitrations did not conform with the arbitration agreement or with the law of the country where the award was made, if the arbitration agreement is silent on such issues;
- The foreign arbitral award is not yet binding on the parties;

- The foreign arbitral award has been set aside or suspended from enforcement by a competent agency of the country where the award was made, or of the country of the applicable law;
- According to Vietnamese law, the dispute is not one that could be settled by way of arbitration;
- The recognition and enforcement of the foreign arbitral award in Vietnam is contrary to the basic principles of the law of Vietnam.




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