

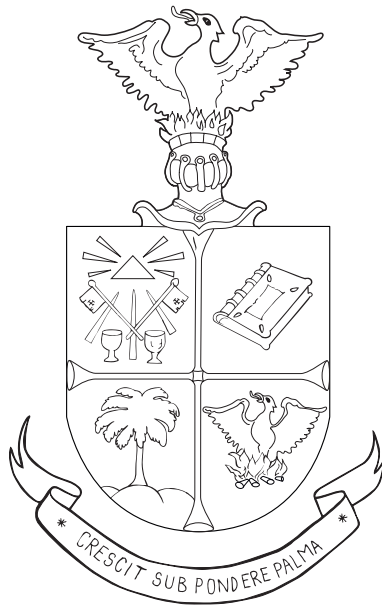
# **Glossa Iuridica**

VII. évfolyam, 3-4. szám



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Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar

# CROSS-BORDER COMMERCIAL DISPUTES IN THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS

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## 1. Introduction

The paper will provide an overview of the private international law aspects of cross-border commercial dispute resolution in Southeast Asia in 2020. The idea of this paper arose from the author's observation, that there is an overwhelming dominance of arbitration institutions as selected forum in the dispute resolution clauses of ASEAN-related international commercial contracts contra national courts. Before discussing the main point, the paper will briefly introduce the Association of Southeast Asian Nations (ASEAN) and the ASEAN Economic Community (AEC). It will present certain economic circumstances, which contribute to the growth in foreign direct investment inflow and, consequently, to an increasing number of cross-border commercial disputes in the Southeast Asian region. Then, the paper will give an insight of the national courts of ASEAN Member States, with special regard to their ability and preparedness for handling the continuously growing number of cross-border commercial litigation. It will further examine the status of arbitration and mediation in the Member States, with particular focus on the legislative and institutional framework of alternative dispute resolution (ADR). All of these will serve as an explanation for the author's observation by pointing to several factors contributing to the supremacy of ADR over litigation in ASEAN related cross-border commercial disputes.

## 2. Brief overview of the ASEAN and the AEC

### 2.1. The foundation of ASEAN

ASEAN, the home of nearly 650 million people (approximately 8.8% of the world's population), includes ten countries with highly diverse economic,

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social, religious and cultural backgrounds.<sup>2</sup> It is noteworthy that the same diversity appears in terms of the legal traditions of the Member States, which is the consequence of to the history of the Southeast Asian nations.<sup>3</sup> In particular, the influence of the European and American colonisation and the close commercial connection of these countries with Muslim merchants. To date, civil law, common law and Shariah law are all present in the Southeast Asian region.<sup>4</sup> ASEAN was founded ten years after the European Economic Community, post the execution of the Treaty of Rome. In 1967, the representatives of Indonesia, Malaysia, the Philippines, Singapore and Thailand, now referred to as the founding fathers of ASEAN, signed the ASEAN Declaration and launched ASEAN.<sup>5</sup> During the following three decades, further Southeast Asian countries, namely Brunei-Darussalam, Laos, Myanmar and Vietnam joined ASEAN with Cambodia being the last joining member in 1999. Since then, the ten countries have been working together on the promotion of regional peace and stability, and on the acceleration of the economic growth,

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- 2 For comparison, this is more than the population of the European Union, which is around 450 million, 27 Member States after Brexit. <https://worldpopulationreview.com> (2020. 10. 10.)
  - 3 Information on the legal systems of ASEAN Member States has been retrieved from the Southeast Asian Research Guide of the University of Melbourne. <https://unimelb.libguides.com/asianlaw> (2020. 10. 10.)
  - 4 Due to the close commercial relationship with Indian, Arabic and Persian Muslim merchants until the end of the 15<sup>th</sup> century, Islam has made a considerable impact on the legal systems of certain coastal commercial hubs located mainly in Maritime Southeast Asia, particularly, on the territories of Malaysia and Indonesia today. Coupled with the spread of Islam in Southeast Asia (SEA), the influence of Islam in the legal system or customary practices in the various jurisdictions of SEA is greatly evinced by the existence and the implementation of Shariah law or laws closely related to Shariah law. Civilian legal traditions originating from the Portuguese, Spanish, Dutch and French colonisation efforts have also taken root and it is still present in countries in SEA. For instance, in the countries of the former French Indochina, namely Cambodia, Laos and Vietnam. The British colonisation has also made an impact on the formation of the legal system of certain countries in SEA. To date, the countries established from territories of the former British colonies, namely Brunei-Darussalam, Myanmar, Malaysia and Singapore, are all common law jurisdictions. However, it is noteworthy that colonisation is just one component amongst several others, which has influenced the development of the legal systems of the Southeast Asian nations. A good example of this is Cambodia, the former French colony, which has received legislative technical assistance from the Japan International Cooperation Agency in the early 2000s. As a result of this, the current Cambodian Civil Code is based on the Japanese Civil Code and not the French.
  - 5 As the signing ceremony took place in Bangkok, it is often referred to as the Bangkok Declaration.

social progress and cultural development. The list of the objectives of ASEAN has expanded over time. They have been updated regularly in order to meet the actual requirements of the Southeast Asian societies and adjusted to combat existing challenges. These objectives are defined and centred around three principle pillars, namely the ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community, a concept which may sound familiar to Europeans.<sup>6</sup> For the purposes of this paper, the pillar which matters the most is the ASEAN Economic Community (AEC).

### **2.2. The AEC and its objectives**

Although the acceleration of the economic growth of the Southeast Asian region has appeared as a primary objective for decades, the official launch of AEC awaited until 2015. The formation of AEC was a major milestone in the regional economic integration agenda. AEC has turned the Southeast Asian block into a single market with free flow of goods, services, investments and skilled labour, and freer movement of capital across the region.<sup>7</sup> The objectives of AEC are set out in the AEC Blueprint 2025 which envisions to achieve a regional economic cooperation that is dynamic, competitive and highly integrated by 2025.<sup>8</sup>

### **2.3. Growing volume of FDI in ASEAN**

Amongst the measures and the initiatives of AEC, there has always been a great emphasis on the promotion and protection of investments. In particular on the facilitation of foreign direct investment (FDI) into and within ASEAN. These efforts have not remained fruitless. Today ASEAN is a highly attractive destination for FDI. Statistics show that ASEAN received USD 154.7 billion as FDI in 2018, which corresponds to the 11.9% of total global FDI inflows of the same year. This volume of FDI inflow ranks third globally after the EU and the US. It is noteworthy that a substantial part of the FDI inflow is intra ASEAN. In other words, these investments and commercial activities

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6 Information on the overview of the establishment of ASEAN retrieved from the official website of ASEAN. <https://asean.org/asean/about-asean/overview/> (2020. 10. 10.)

7 Information on the AEC retrieved from the official website of ASEAN. <https://asean.org/asean-economic-community/> (2020. 10. 10.)

8 The AEC Blueprint 2025. [https://www.asean.org/storage/2016/03/AECBP\\_2025r\\_FINAL.pdf](https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf) (2020. 10. 10.)

are carried out by and between ASEAN Member States. More importantly, the regional FDI inflow to ASEAN is growing each year.<sup>9,10</sup> In addition to the investment promotion efforts and the launch of the single market, which all increased the number and volume of cross-border transactions, the Belt and Road Initiative has further enriched the number and volume of the China financed infrastructural investments in the region.<sup>11</sup>

## **2.4. Legal obstacles of the single market of ASEAN**

For lawyers working in ASEAN countries, all the above appears in a growing number of enquiries related to cross-border transactions and, not surprisingly, in a proportional growth in cross-border commercial disputes. It will

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9 ASEAN Secretariat: ASEAN Integration Report 2019 (2019), Table 2.1, 7.

10 It is noteworthy, however, that the COVID-19 pandemic has put the global economy, including the ASEAN economies, on a standstill. Across the region, the performance of ASEAN Member States in this pandemic varies. Vietnam, which has successfully contained the spread of the virus, is expecting a 4.1% growth this year. Likewise, Brunei Darussalam and Myanmar, which saw relatively small number of cases, may grow by 1.4% and 1.8%, respectively. For the rest of the AMS, contractions are likely, particularly for Singapore (-6.0%) and Thailand (-6.5%). Given the global slowdown, ASEAN's trade and investments are likely to weaken. Merchandise trade amounted to US\$ 2,815.2 billion in 2019, 0.3% lower than the US\$ 2,824.9 billion in 2018, when trade grew by 9.9%. Intra-ASEAN accounted for 22.5% of ASEAN's total trade, followed by China (18.0%), the US (10.5%), and the EU28 (10.0%). In contrast, inflows of foreign direct investments (FDI) bucked the slowdown and rebounded by 4.9% in 2019 (compared to a drop of 1.2% in 2018) to stand at US\$ 160.6 billion. Among external partners, the US contributed the largest inflow with 15.2% of the total, followed by Japan (12.7%) and the EU28 (10.1%), while intra-ASEAN accounted for 13.9%. With the COVID-19 pandemic this year, both trade and investments are expected to manifest the adverse effects. ASEAN Economic Integration Brief. No. 07 July 2020. <https://asean.org/asean-economic-community/aec-monitoring/asean-economic-integration-brief/> (2020. 10. 10.)

11 China's FDI inflows into ASEAN have been growing from about US\$3.5bn in 2010 to about US\$11.3bn in 2017. China's focus has also been shifting from energy into infrastructure (e.g. railway, road), real estate, and other sectors. Most of the BRI projects are developed through joint ventures between an ASEAN host country entity and a Chinese entity, with financing from China's linked financial organisations. BRI projects not only involve investments or flow of capital but also importation of goods from China to ASEAN. JusOH, Sufian: The Impact of BRI on Trade and Investment in ASEAN. In China's Belt and Road Initiative (BRI) and Southeast Asia. CIMB Southeast Asia Research Sdn Bhd (CARI), Kuala Lumpur, 2018. <https://www.cariasean.org/publications/chinas-belt-and-road-initiative-bri-and-southeast-asia-publication/the-impact-of-bri-on-trade-and-investment-in-asean/#.X56G6lhKiMo> (2020. 10. 10.)

later appear that the mechanisms currently available to resolve these cases necessitate further development. Speakers of the ASEAN Law Conference in their presentations about the legal and cross-border obstacles to trade and investment in ASEAN pointed out that several ASEAN countries ranked poorly in civil justice and enforcement of contracts. In particular, the high cost, delays and uncertainty in the laws relating to dispute resolution were noted as serious impediments to commercial activity. It was also mentioned, that these factors may decrease the confidence of foreign investors wanting to open a business in ASEAN.<sup>12</sup> However, the numbers show that cross-border commercial transactions are nonetheless abundant in the Southeast Asian region. This further suggests that issues in the development of cross-border dispute resolution will remain a current issue for the longer term.

This paper will first examine the capability and preparedness of ASEAN courts to resolve cross-border commercial cases, in particular from the perspective of private international law (3). Second, it will examine to what extent ADR institutions in ASEAN are able to cope with the same issues (4). At several instances, reference will be made to the European Union (EU) in order to show how another association of nations stands and resolves disputes arising out of international commercial transactions. The author hopes that this research will help the reader to have an overview of the status and infrastructure of cross-border dispute resolution in ASEAN and may provide some assistance to lawyers in their work when advising clients on the content of dispute resolution clauses in ASEAN-related commercial transactions.

### **3. Cross-border commercial disputes through litigation in ASEAN**

#### **3.1. The practical value and benefits of the private international law**

In the field of cross-border dispute resolution, a harmonised system of the private international laws is highly desirable. If such a system is in place, when a dispute arises, a regional or international treaty indicates the court which is competent to try the case and the law which is applicable to the

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12 Hsu, Locknie: Legal Obstacles to Trade and Investment in ASEAN. In: YEO, Justin – SEE, Alison (eds.): *The ASEAN Law Conference 2018: A Compendium of Speeches, Papers, Presentations and Reports*. Singapore, Academy Publishing, 2019.; NGUYEN, Thi Son: Cross-border Obstacles in ASEAN and Solutions. In: YEO, Justin – SEE, Alison (eds.): *The ASEAN Law Conference 2018: A Compendium of Speeches, Papers, Presentations and Reports*. Singapore, Academy Publishing, 2019.



substance of the dispute. It would not be the cause of problems relating to the delivery of official court documents abroad or the examination of witnesses in foreign jurisdictions. The plaintiff does not need to worry about the frustration of the judgement, because it is recognised and enforced in other countries where the defendant's assets are located. Moreover, asset freezing orders and other interim injunctions issued by the court that is trying the merits of the case are enforceable in foreign countries which efficiently prevents the defendant from dissipating its assets. Consequently, the plaintiff saves time and money on claim enforcement. On the contrary, when private international laws of the countries are unclear and not harmonised within the region, court decisions and their cross-border enforceability are less predictable. The parallel or duplicate proceedings prolong the time needed for its resolution and increases the costs of the claim enforcement which consequentially necessitates the increases in the cost of doing business. Ultimately, it decreases the competitiveness of the region.

### **3.2. The potentials of the harmonisation of private international law at regional level**

The EU is charged with the development of the judicial cooperation between its Member States in civil matters having cross-border implication. Such duties, set out in the Treaty Functioning of the European Union, includes amongst others that the European Parliament and the European Council shall adopt measures to ensure the mutual recognition and enforcement of judgements, the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction, the cross-border service of judicial documents and cooperation in the taking of evidence.<sup>13</sup> Accordingly, Brussels I (recast) Regulation<sup>14</sup> provides solutions for jurisdictional conflicts arising between European Members States and it further provides a facilitated mechanism for enforcement of judgements rendered in another Member State. This mechanism has been established in 2001, reconsidered and revised in 2012 and appears to be one of the most successful regulations of the EU. The introductory part of Brussels I (recast)

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13 Art. 81 of the Consolidated version of the Treaty of the Functioning of the European Union. OJ C 326, 26/10/2012 P. 0001 – 0390.

14 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 351, 20.12.2012, 1-32. (Brussels I recast Regulation)

Regulation points out: “Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential.” The substantive law applicable to contractual and non-contractual obligations is also regulated at European level, under the Rome I and the Rome II Regulations, respectively.<sup>15</sup> Further regulations establish a system of mutual legal assistance in relation to service of foreign court documents or taking evidence in other EU Member States,<sup>16</sup> and facilitate various aspects of the cross-border claim enforcement.<sup>17</sup>

In ASEAN, no such or similar framework exists. Although common law, which is applicable in certain Member States,<sup>18</sup> for instance in Brunei-Darussalam, Singapore and Malaysia provide a framework for private international law, that remains far from covering the whole region. It has been left entirely for the Member States of ASEAN to regulate private international law issues and consequently no harmonised system exists. Even on the level of national legislation, in certain countries, several issues remain under or entirely unregulated. For instance, in Cambodia, no guideline exists, and addresses matters such as the competent jurisdiction or the applicable law. Although, the Cambodian Code of Civil Procedure provides for a mechanism for the recognition and enforcement of foreign judgements, in practice, it has re-

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15 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 4.7.2008, 6-16.; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199, 31.7.2007, 40-49.

16 The Regulation (EC) No 1393/2007 on the service in EU countries of judicial and extrajudicial documents in civil or commercial matters and the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

17 For instance, the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. OJ L 199, 31.7.2007, 1-22; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure OJ L 399, 30.12.2006, 1-32; and the Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

18 In ASEAN, Brunei-Darussalam, Myanmar, Malaysia and Singapore are common law jurisdictions.

mained untested, due to the uncertainty on the existence of reciprocity with the country the judgement is meant to be enforced in.<sup>19</sup>

### **3.3. The potentials of the harmonisation of the procedural aspects of private international law at international level**

In addition to the absence of regulation of private international law on a regional level, the ASEAN Member States in general are not active at an international level either. Amongst the ten countries, only Malaysia, Singapore, the Philippines and Vietnam are members of the Hague Conference on Private International Law (HCCH). In contrast, each country in the EU are members to the HCCH as well. When searching for ASEAN Member States in the status charts of the Hague Conventions, it appears that the HCCH members from ASEAN are typically active in the child protection matters. Only three countries, the Philippines, Singapore and Vietnam are signatory to conventions which are relevant to the procedural aspects of cross-border commercial disputes, such as the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and the Convention of 30 June 2005 on Choice of Court Agreements. The long awaited Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters has no signing party from amongst ASEAN Member States and has yet to enter in force.<sup>20</sup> In conclusion, to date, the above mentioned worldwide conventions do not provide a solution either for cross-border commercial litigation in the Southeast Asian region.

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19 Article 199, paragraph (d) of the Cambodian Code of Civil Procedure provides for the existence of reciprocity in terms of the recognition and enforcement of foreign judgements. However, to date, Cambodia has concluded only one bilateral treaty with Vietnam on the recognition and enforcement of foreign judgements. Beyond that, no information exists about the interpretation of reciprocity or the court's position in this regard. In the absence of better solution, plaintiffs usually initiate parallel proceedings or repeat the proceedings on the merits to obtain a judgement which is enforceable in Cambodia. Considering the expenses of Cambodian court proceedings, which, pursuant to the World Bank's Ease of Doing Business Report of 2020 is the highest in the region, these parallel or duplicate proceedings are extremely burdensome.

20 See HCCH Conventions: Signatures, Ratifications, Approvals and Accessions (1 October 2020). <https://assets.hcch.net/docs/ccf77ba4-af95-4e9c-84a3-e94dc8a3c4ec.pdf> (2020. 10. 10.)

### **3.4. Certain obstacles of the harmonisation of the procedural aspects of private international law in ASEAN**

There is a high level of uncertainty regarding questions related to jurisdictional competence, the applicable law, judicial cooperation and the recognition and enforcement of foreign judgements, as these questions are unregulated to a large extent in ASEAN. Even if the subject matter is regulated in one Member State, it does not consider the rules applicable in other Member States, thus leading to uncertainty in legal practice. The harmonisation of the private international laws of the Member States would be highly desirable to enhance cross-border dispute resolution. One may believe that it is easier to harmonise the laws of ASEAN which includes only 10 countries, than doing the same in the EU with its 27 Member States. However, besides the number of jurisdictions to deal with, there are several other factors which makes the process of legal harmonisation challenging.

The first factor is the divergence of the legal traditions of the association of nations. In the EU, apart from Ireland following the common law tradition, and Malta and Cyprus being mixed jurisdictions, the remaining European countries are civil law jurisdictions. The situation is more complex in ASEAN, where civil and common law both have equal presence and Sharia law co-exists in these legal traditions in almost half of the Member States.

The second factor which contributes to the challenge of legal harmonisation is the lower average development level of the Member States in ASEAN than in the EU. The difference between the average development rate between the EU and ASEAN Member States appears not only in terms of economic development but also from the perspective of their average performance in serving justice.

In the EU, with the exception of Bulgaria and Romania, which are both upper middle-income countries, all other 25 Member States classify as high-income countries. Meanwhile in ASEAN, only Brunei-Darussalam and Singapore, qualify as high-income countries while the remaining countries qualify as either upper-middle income or lower-middle income countries, of which the latter form the half of the bloc of Member States.<sup>21</sup> If we consider other socioeconomic factors and the Human Development Index of these countries, in addition to the income generation perspective, Myanmar, Laos and Cambodia further qualify as least developed countries. This means that

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<sup>21</sup> See World Bank's country ranking by income. <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> (2020. 10. 10.)

these three countries in ASEAN are confronting severe structural impediments to sustainable development, are highly vulnerable to economic and environmental shocks and have low levels of human assets.<sup>22</sup>

Although a high-income status does not necessarily guarantee a proportionally high quality of civil justice in an economy, worldwide surveys show that the best civil justice indicators are achieved by high-income countries.

In order to understand and to get an overview of the performance of the civil justice system in the EU and ASEAN, the following indicators have been examined: (i) The World Bank's Doing Business Report in 2020, in particular its indicators measuring the ease of enforcing contracts. This indicator scores the quality of the judicial process, the time and the costs that are necessary for enforcing a contract; (ii) The World Justice Project's Rule of Law Index of 2020, specifically its component measuring the level of the rule of law in the civil justice system; and (iii) worldwide surveys on corruption, including Transparency International's Corruption Perception Index of 2019 and the absence of corruption component of the World Justice Project's Rule of Law Index of 2020. The analysis of the above indexes clearly shows that the average performance of the EU Member States is significantly higher than that of the ASEAN Member States from the perspective of nearly every indicator.<sup>23</sup>

Third, it also appears that the same economic and justice-related indicators show much more diversified results in ASEAN than within the EU. In terms of economic development, while countries in the EU are all considered developed countries, in ASEAN, the range is much wider, where countries such as the financial and commercial hub Singapore or the oil rich Brunei-Darussalam are considered as wealthy countries while Laos and Myanmar lie at the other end of being considered as poor countries. Similarly, the justice related indicators show a much more varied performance amongst the ASEAN Members States than in the EU. In other words, there is a larger gap between the best and the weakest performer in ASEAN than in the EU

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22 Department of Economic and Social Affairs of the United Nations: The Least Developed Country Category 2018 Country Snapshots. <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/Snapshots2018.pdf> (2020. 10. 10.)

23 See the Enforcing Contracts indicator of World Bank's Doing Business Report 2020. <https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts> (2020. 10. 10.); the Civil Justice and the Absence of Corruption indicators of World Justice Project's Rule of Law Index 2020. [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf) (2020. 10. 10.); and the Corruption Perception Index of Transparency International 2019. <https://www.transparency.org/en/countries/afghanistan?redirected=1> (2020. 10. 10.)

from the perspective of nearly every indicator. In ASEAN, regarding the rule of law, civil justice, the ease of enforcing contracts and the perceived level of corruption, Singapore generally stands out with the highest scores, followed by Malaysia. While on the lower end stand Cambodia, Laos and Myanmar. In the EU, the best performers are the Scandinavian countries and the weakest performers are Bulgaria, Romania and Hungary.

Lastly, it is also noteworthy that, whereas in the EU, the European Parliament and the European Council may collectively adopt regulations by majority decision, which are binding instruments and directly enforceable in all Member States,<sup>24</sup> no similar power exists in ASEAN where consensus is required for every decision. The method of the decision making of the ASEAN Member States, often called as the 'ASEAN Way' refers to an approach to resolving issues while respecting the cultural norms of Southeast Asia. Masilamani and Peterson summarize it as "[...] a working process or style that is informal and personal. Policymakers constantly utilize compromise, consensus, and consultation in the informal decision-making process. While the doctrine of 'quiet diplomacy' is ambiguous, it above all prioritizes a consensus-based, non-conflictual way of addressing problems. Quiet diplomacy allows ASEAN leaders to communicate with- out bringing the discussions into the public view. Members avoid embarrassment that may lead to further conflict."<sup>25</sup> Consultation, consensus, and non-interference, however, allows ASEAN to adopt policies only which satisfy the lowest common denominator.

#### 4. Cross-border commercial disputes through ADR in ASEAN

Foreign investors are not only looking for economies which can offer good business opportunities, but also efficiency and legal certainty during claim enforcement proceedings. Where the national court system cannot provide the above, investors and contracting parties will more likely opt for an alternative to the court system, such as arbitration, conciliation or mediation.<sup>26</sup>

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24 Art. 289 and Art. 294 of the Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, 47-390.

25 MASILAMANI, Logan – PETERSON, Jimmy: The 'ASEAN Way': The Structural Underpinnings of Constructive Engagement. *Foreign Policy Journal*, Asia Pacific Essays, 2014. <https://www.foreignpolicyjournal.com/2014/10/15/the-asean-way-the-structural-underpinnings-of-constructive-engagement/> (2020. 10. 10.)

26 Through commercial arbitration, the parties agree to submit their dispute to an independent and impartial arbitral tribunal which issues a final and binding arbitral award. Mediation is a structured and interest-focused process enabling the parties, facilitated

These specific procedures for settling disputes outside of court litigation are collectively referred to as alternative dispute resolution (ADR).

In 2013, the World Bank made an attempt to capture the level of development of ADR in 100 jurisdictions. Under this initiative, a system of indicators has been set up to measure the strength of the legal and institutional framework of ADR, the ease of initiating and conducting arbitration proceedings and the length of arbitration and recognition and enforcement proceedings in the surveyed economies. Although the data collected in 2013 may not be accurate anymore, the type of indicators examined in the survey are still relevant and enable researchers to compare the status and the level of development of ADR in different jurisdictions. More importantly, the results can be compared with the FDI-related indicators of the same jurisdictions.<sup>27</sup>

In this section of the paper, the author attempts to follow up on the performance of ASEAN countries of the World Bank survey. However, this will be limited to the legislative and institutional framework, given the lack of data in relation to the ease of initiation and continuation of ADR proceedings and the lengths of the proceedings. A substantial part of the data referred to in this section has been retrieved from the International Bar Association's survey on *The Current State and Future of International Arbitration: Regional Perspectives (2015)*<sup>28</sup> and the Queen Mary University of London's and White & Case's *2018 International Arbitration Survey: The Evolution of International Arbitration*.<sup>29</sup> In addition to these international surveys, the author has collected data from the website of the ADR institutions. This section first provides an overview on the legislative framework of ADR in the ASEAN countries, both on an international and national level (4.1). Then, it will cover the ADR institutions across ASEAN, in general, and two specific institutions in a more detailed fashion (4.2).

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by one or more mediators, to agree on the resolution of their dispute through a mediation agreement. Conciliation is a process where the parties are assisted in their attempt to reach an amicable settlement of their dispute.

27 POUGET, Sophie: *Arbitrating and Mediating Disputes. Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment*. World Bank, 2013. <http://documents.worldbank.org/curated/en/554271468340163221/pdf/WPS6632.pdf> (2020. 10. 10.)

28 Arb40 Subcommittee of the IBA Arbitration Committee: *The Current State and Future of International Arbitration: Regional Perspectives (2015)*. [https://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Arbitration/Publications.aspx#filter=.2015](https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx#filter=.2015) (2020. 10. 10.)

29 Queen Mary University of London - White & Case's. *2018 International Arbitration Survey: The Evolution of International Arbitration*. <http://www.arbitration.qmul.ac.uk/research/2018/> (2020. 10. 10.)

## **4.1. Legislative framework of ADR in ASEAN Member States**

### **4.1.1. Arbitration related treaties and laws of ASEAN countries**

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the ‘New York Convention’, is a key instrument in international arbitration. It is a key instrument because it ensures that arbitral awards rendered in one signatory state will be recognised and enforced in all the other signatory states. To date, the total number of the signatory states to the Convention are 164 states, which, importantly, includes all the ten ASEAN Member States<sup>30</sup> Cross-border enforceability is a highly important characteristic of arbitral awards and it is considered even more relevant when judgements of foreign courts cannot offer the same, as in ASEAN where there are either little or no reciprocal and regional enforcement of judgements mechanism.

Regarding investor-state disputes, with the exception of Laos, Myanmar and Vietnam, the remaining 7 ASEAN States are amongst the 155 contracting states of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965) (ICSID Convention), although Thailand has yet to ratify it.<sup>31</sup> ICSID exists within the World Bank group and its centre, the ICSID Center, operates as a neutral administering institution. An award of an ICSID tribunal is considered equivalent to a final judgment of a court in all ICSID contracting States and is hence directly executable. ICSID awards do not require domestic enforcement procedures, as it is required for awards under the New York Convention, and cannot be challenged before national courts. The only recourse to a losing party is to invoke the ICSID annulment procedure, upon which ICSID will appoint an ad hoc committee, which conducts a limited scrutiny of the award, to see if the tribunal transgressed the ICSID Convention. Regardless of whether a State is a member of the ICSID Convention, the jurisdiction of ICSID can be established through other means, typically by bilateral investments treaties (BIT). The statistics shows that the majority of the basis of consent invoked to establish ICSID jurisdiction is the existence of a BIT. During the last five years, Laos twice, Indonesia, Vietnam and the Philippines each once, were cited before an ICSID tribunal. In all the five cases, the jurisdiction of ICSID was established by a BIT.<sup>32</sup>

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30 <http://www.newyorkconvention.org/countries> (2020. 10. 10.)

31 See the status chart of the ICSID Convention <https://icsid.worldbank.org/about/member-states/database-of-member-states> (2020. 10. 10.)

32 See the case database of ICSID. <https://icsid.worldbank.org/en/Pages/cases/Advanced->



To date, each ASEAN Member State has adopted a law which sets out the framework for commercial arbitration or exhaustively covers the same subject along with the regulation of other ADR technics. In addition, and where this is appropriate, ASEAN countries have amended their code of civil procedure to implement and provide for the procedural rules and conditions of the mechanism for the recognition of foreign arbitral awards.<sup>33</sup>

Commercial arbitration laws of the majority of ASEAN Member States is based on the UNCITRAL Model Law on International Commercial Arbitration (Model Law on Arbitration), which has been designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, to the extent of court intervention through to the recognition and enforcement of arbitral awards. The Model Law on Arbitration reflects a worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world. The Model Law on Arbitration largely contributed to diminish the disparity between the national laws governing arbitration proceedings. Consequently, it decreases the parties' costs for the assessment of the procedural framework of arbitration in the country in question. Although the main objective of the Model Law on Arbitration was to improve and facilitate the framework of commercial arbitration in international context, several states in the region extended their enactments of the model law to cover domestic disputes. The fact that a country's arbitration law is based on the Model Law on Arbitration suggests that the country has an arbitration-friendly regime. Furthermore, it contributes to the popularity of the given seat as it reassures the users of arbitration that the country has a concept of arbitration which they might be familiar with. Seven of the ten ASEAN Member States have transplanted

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Search.aspx (2020. 10. 10.)

33 Information on the national legislative enactments regarding international commercial arbitration regarding Cambodia, Indonesia, Laos, Malaysia, Myanmar, Singapore, Thailand and Vietnam. Arbitration in ASEAN. In ASEAN Insiders Series, September 2016. [http://zico.group/wp-content/uploads/resources/asean\\_insiders/ASEAN\\_Insiders-Arbitration-in-ASEAN.pdf](http://zico.group/wp-content/uploads/resources/asean_insiders/ASEAN_Insiders-Arbitration-in-ASEAN.pdf) (2020. 10. 10.); regarding Brunei-Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Vietnam in the comparative research on international arbitration acts of ICLG on International Laws and Regulation, 2019. <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations> (2020. 10. 10.)

the Model Law on Arbitration.<sup>34</sup> It is typically the original text of 1985 of the Model Law on Arbitration<sup>35</sup> which appears in the national legislative enactments of the ASEAN Member States. However, for instance, Singapore has further aligned their arbitration laws to comply with amendments of the Model Law on Arbitration made in 2006.<sup>36</sup> The revised version of the Model Law on Arbitration recognises verbal arbitration agreements and empowers the tribunal to issue interim and preliminary orders and ensures the enforceability of these measures beyond the boundary of the issuing country, which, in certain cases, is almost as important as the cross-border enforceability of the award.<sup>37</sup>

#### 4.1.2. The Singapore Mediation Convention and the mediation related laws of ASEAN countries

Mediation is another popular dispute settlement method in ASEAN countries. In contrast with the role and power of arbitral tribunals, mediators are not there to adjudicate and make a decision binding on the parties, but rather to facilitate discussions between disputing parties to arrive at a mutually acceptable solution. The mediation process appears to be more flexible and more efficient both in terms of cost and time than arbitration.<sup>38</sup> Indeed, mediation fits very well in Asian dispute resolution culture in which confrontative ways of resolving disputes is not or less welcomed than in western cultures.<sup>39</sup>

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34 The seven ASEAN Member States which have adopted the Model Law on Arbitration are Brunei-Darussalam, Cambodia, Malaysia, Myanmar, the Philippines, Singapore and Thailand. [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status) (2020. 10. 10.)

35 Original text of the UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985. [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf) (2020.10.10.)

36 ASTON, Paul – MEIKLEJOHN, Suzanne: Singapore: International Arbitration 2019. In ICLG, International Arbitration Laws and Regulation 2020. <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/singapore> (2020. 10. 10.)

37 The UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf) (2020.10.10.)

38 The case statistics of more than 4,400 cases handled by the Singapore Mediation Centre shows that over 70% of the cases has been settled, amongst which 90% in less than 24 hours. <https://www.mediation.com.sg> (2020. 10. 10.)

39 GIROUD, Sandrine – ARO, Ilona: Cultural Issues in Litigation in the Asia Pacific Region: Myth or Reality? In IBA Annual Conference 2010: Report on the Joint Session of the IBA

In spite of the several advantages of mediation compared to arbitration, until very recently, mediation did not have a similar framework as the New York Convention in the field of commercial arbitration. This became a significant disadvantage of international commercial disputes resolved by mediation. In practice, it meant that settlement agreements resulting from mediation were not enforceable in countries other than the one in which the settlement agreement was concluded.

To overcome this obstacle, certain dispute resolution centres have combined mediation and arbitration. Under this concept, often referred to as 'Arb-Med-Arb', parties who have signed an arbitration agreement or commenced arbitration may wish to refer their dispute to mediation, either before they commence arbitration or during arbitration. If the parties settle their dispute through mediation, their mediated settlement may be recorded as a consent award and thus will be enforceable in all economies which are members of the New York Convention. If mediation fails, the parties may continue with the arbitration proceedings. Arb-Med-Arb successfully combines the advantages of mediation with the enforceability and finality of arbitral awards.<sup>40</sup>

However, a change is expected to take place with the entry into force of the United Nations Convention on International Settlement Agreements Resulting from Mediation on 12 September 2020. The convention became open for signature in 2019 in Singapore, which is why it is referred to as the 'Singapore Convention on Mediation'.<sup>41</sup> It applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute and provides an efficient and harmonised framework for the enforcement of international settlement agreements resulting from mediation. It ensures that a settlement reached by parties becomes binding and enforceable in accordance with a simplified and streamlined procedure in the contracting States. The Singapore Convention on Mediation has been designed to become an essential instrument in the facilitation of international trade and in the promotion of mediation as an alternative and effective method of resolving cross-border trade disputes. Though the Singapore

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Litigation Committee and the Asia Pacific Forum. [https://www.lalive.law/wp-content/uploads/2019/10/2011-SGIIAR-IBA-Cultural\\_issues\\_in\\_litigation\\_in\\_the\\_Asia\\_Pacific\\_Region.pdf](https://www.lalive.law/wp-content/uploads/2019/10/2011-SGIIAR-IBA-Cultural_issues_in_litigation_in_the_Asia_Pacific_Region.pdf) (2020. 10. 10.)

40 For instance, the Singapore International Arbitration Centre offers such Arb-Med-Arb procedure. <https://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause> (2020. 10. 10.)

41 See the website of the Singapore Convention on Mediation. <https://www.singapore-convention.org> (2020. 10. 10.)

Convention has yet to enter into force, already half of the ASEAN Members States, namely Brunei-Darussalam, Laos, Malaysia, the Philippines and Singapore, are amongst the 53 signatories.<sup>42</sup>

Several ASEAN Member States have enacted laws on commercial mediation. Amongst those which have regulated mediation, Malaysia adopted a UNCITRAL Model Law on International Commercial Conciliation (2002).<sup>43</sup> In 2018, a new version of the model law came out, mainly to comply with the Singapore Mediation Convention that is to address the issue of cross-border enforceability of commercial settlement agreements arising from conciliation or mediation.<sup>44</sup>

## **4.2. Institutional framework of ADR in ASEAN Member States**

### **4.2.1. ADR institutions in ASEAN**

Parties often decide that their arbitration or mediation should be administered by an institution. If this is the case, the ADR institutions provide the necessary framework, support and control over the proceedings. They typically have a roster of arbitrators and mediators, though, in general, parties are free to appoint arbitrators and mediators beyond the roster. Such institutions have a very important role in promoting arbitration and they are considered an important factor in surveying the strength of ADR systems of the economies. At several occasions, they have proven to be the catalyst of introducing new ideas, offering innovative services such as on-line arbitration or enabling the parties to opt for time-bound arbitration proceedings often referred to as fast-track arbitration.

To date all ASEAN Member States have at least one ADR institution which offers arbitration services and most of them offer mediation services as well. Whereas in Cambodia, Brunei-Darussalam, and Myanmar the arbitration or

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42 See the status chart of UNCITRAL Model Law on International Commercial Conciliation (2002) on the website of UNCITRAL. [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements/status](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status) (2020. 10. 10.)

43 See the status chart of the UNCITRAL Model Law on International Commercial Conciliation (2002). [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_conciliation/status](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status) (2020. 10. 10.)

44 See the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018). [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex\\_ii.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf) (2020. 10. 10.)

arbitration and mediation institutions are relatively young,<sup>45</sup> at least one arbitration institution had been established by the end of the 90s in the other ASEAN jurisdictions.<sup>46</sup> Some of them have achieved international reputation or even become one of the most selected arbitration institutions in a worldwide context.<sup>47</sup>

For the purposes of this paper, the author has chosen two institutions to introduce to the reader. The first is the Singapore International Arbitration Centre (SIAC) which is the most popular ADR institution in ASEAN chosen for trying international commercial disputes. The second is the National Commercial Arbitration Centre in Cambodia (NCAC) which is a relatively young institution, though it has several completed cases. It is amongst the ambitions of this paper to show that the promotion and the success of ADR in a jurisdiction is a complex task in which, besides the ADR institution, the government, the legislation, and the courts all play an important role. ADR institutions cannot reach far if the legislative framework is not strong enough. A legislation, and a convergent court practice is highly desirable, under which the courts refrain from interfering in disputes that the parties have been subjected to arbitration proceedings. In the meantime, they effectively enhance, recognise and enforce arbitral awards, or grant interim measures in aid of arbitration. Therefore, in this section, some references will be made to Singapore's and Cambodia's legislative and judicial circumstances, in particular to their relationship with ADR.

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45 The National Commercial Arbitration Centre (NCAC) in Cambodia, for instance, was established in 2014, the Brunei-Darussalam Arbitration Centre (BDAC) in the same year, the Myanmar Arbitration Centre (MAC) in 2019.

46 The Singapore International Arbitration Centre (SIAC) in Singapore, Badan Arbitrase Nasional Indonesia (BANI) in Indonesia, Asian International Arbitration Centre (AIAC), formerly known as the Kuala Lumpur Regional Centre for Arbitration (KLRCA) in Malaysia, Philippine Dispute Resolution Center, Inc. (PDRCI) in the Philippines, Thai Arbitration Institute (TAI) in Thailand, Vietnam International Arbitration Centre (VIAC) are all ASEAN ADR institutions with a longer history.

47 For instance, SIAC which is globally the third most popular arbitration institution, after the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA), and thus the first in the APAC region, recently overtaken this position from Hong Kong International Arbitration Centre (HKIAC). Or, the AIAC (former KLRCA), a well-established institution in Malaysia, particularly popular for its niche area in Islamic-law-related disputes.

#### 4.2.2. The SIAC, the reputable ADR institution of Singapore

It is undisputable that the institution which succeeded the most in the ASEAN region is the SIAC. The SIAC was established in 1991, and since then the number of cases administered by the SIAC has been increasing continuously. 2019 is the third consecutive year that the SIAC's caseload has exceeded 400 and, over the last decade, new case filings at the SIAC have increased by more than four times.<sup>48</sup> An interesting feature of arbitrations in Singapore is that many of them do not involve Singaporean entities. In this regard Singapore is considered a neutral venue for the resolution of international commercial disputes. The annual case load before the SIAC is higher now than the case load before the Hong Kong International Arbitration Centre (HKIAC).<sup>49</sup> Today, the SIAC is considered as the most preferred arbitration institution, not only in ASEAN but also in the whole APAC<sup>50</sup> region. In 2018, the SIAC was ranked the 3<sup>rd</sup> most preferred arbitral institution globally, after the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA), according to the survey of the Queen Mary University of London and White & Case.<sup>51</sup> This success has not come without efforts. The SIAC has been working hard for this reputation. To get closer to potential clients and to promote itself, The SIAC has opened representative offices in India, Korea and China. It was always amongst the first institutions to have introduced innovative practices, like expedited procedure, emergency arbitration or early dismissal procedure.<sup>52</sup> It is highly active in organising and hosting professional networking events and conferences. Young SIAC (YSIAC) provides a platform for young professionals for trainings, networking and publication. The SIAC has signed memoranda of understanding with several law schools under which

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48 See the SIAC Annual Report 2010-2019. <https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report> (2020. 10. 10.)

49 In 2019, 308 and 479 new arbitration cases were submitted to HKIAC and SIAC, respectively. Information retrieved from the website of the institutions.

50 Asia-Pacific.

51 Op.cit. footnote 30.

52 Under the SIAC Rules, the Expedited Procedure allows for a complete arbitration to take place in a time period of 6 months from the appointment of the tribunal. The Early Dismissal is aimed at allowing a tribunal to dismiss patently unmeritorious claims and defences without having to conduct full-fledged proceedings. The Emergency Arbitrator provisions were introduced in the SIAC Rules in order to address situations where a party is in need of emergency interim relief before a Tribunal is constituted. Information retrieved from the website of SIAC.

the SIAC offers internship opportunities to law students and introduces a module of the SIAC and Institutional Arbitration in their teaching programs.<sup>53</sup>

However, this success could not have been achieved without legislative support. Singapore is active in terms of joining ADR conventions, being a signatory to the New York Convention, the ICSID Convention and the name giver of the Singapore Mediation Convention.<sup>54</sup> The national legislation related to ADR has continuously been amended to reflect the best international practices. There has been a strong willingness to make Singapore not only a commercial and financial hub but also to achieve the same success in terms of dispute resolution.

SIAC enjoys an ADR supportive judiciary system, which stands out not only amongst the ASEAN economies or the broader APAC region but also worldwide according to international indicators which may be associated with the level of development of the judiciary system of economies. In Singapore, the quality of the justice service is the highest and the time of claim enforcement is the shortest amongst the ASEAN countries.<sup>55</sup> Singapore's indicators of the adherence to the rule of law, both in general and in particular focusing on civil justice, are the highest amongst the ASEAN countries.<sup>56</sup> The same stands for the perceived level of corruption.<sup>57</sup> The courts have proven to be knowledgeable on international arbitration and extremely supportive of it. There are many decisions of Singaporean Courts striving to uphold arbitra-

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53 <https://www.siac.org.sg> (2020. 10. 10.)

54 *Op.cit.* footnotes 31, 32 and 42.

55 According to the World Bank's Ease of Doing Business 2020 index, which measures the quality of judicial process in 190 economies, Singapore scores 15.5 in 2020. According to this index the best available score is 18 and the worst is 0. For comparison, in the 2020 report the average score of ASEAN countries was 8.4, whilst in the EU it was 11.6.

56 World Bank's Worldwide Governance Indicators, Rule of Law in 2018 (0 is worst and 100 is best, Singapore scores at 97.12, the ASEAN average is 47.79, the EU average is 81.34). World Justice Project's Rule of Law indicators 2017-18, the worst available score is 0, the best is 1. Singapore achieved 0.8 which is the highest in ASEAN. For comparison, the ASEAN average is 0.51 and the EU average is 0.72. This result remained the same in 2019. The result is even better considering the civil justice component of the rule of law indicator, in which Singapore scores 0.83 which is even farther above the ASEAN and the EU average, 0.48 and 0.69 respectively.

57 Transparency International measures and publishes the perceived level of corruption in economies worldwide each year. In accordance with the corruption perception index, economies may score from 0 as worst to 100 as best. Both in 2018 and 2019, Singapore scored 85 whereas the ASEAN average was 42 and 42, the EU average was 65 and 64, respectively.

tion agreements, enforcing foreign awards and expressing a public policy that the decision of contracting parties to arbitrate their disputes should be upheld and given effect except in the most extreme situations. In their many decisions examining the scope of the public policy doctrine, the obligation to enforce arbitration agreements and foreign awards, the Singapore courts have demonstrated a clarity of analysis and a knowledge and understanding of international commercial arbitration which is equal to that of the courts in London, Paris and Switzerland. Not only are Singaporean Courts reluctant to set aside awards or refuse enforcement of foreign awards, they will strive, wherever possible, to uphold the validity and effectiveness of an arbitration agreement.<sup>58</sup>

#### 4.2.3. The NCAC, the newcomer of Cambodia

Although Cambodia was amongst the first countries acceding to the New York Convention, the Pol Pot regime at the end of the 70s and the subsequent civil war, which lasted for about a decade, have erased every previous achievement of the service of justice. The security and politics in Cambodia only stabilised around the beginning of the 90s after the 1991 Paris Peace Accords. A United Nations peacekeeping operation, the United Nations Transitional Authority in Cambodia (UNTAC) was formed in 1992-1993. It was actually the first occasion in which the United Nations had taken over the administration of an independent state, organised and ran an election, had its own radio station and jail, and been responsible for promoting and safeguarding human rights at the national level.<sup>59</sup> In terms of the service of justice, a significant development took place in 2006 by the adoption of the Law on Commercial Arbitration,<sup>60</sup> the necessary related amendments of the

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58 PRYLES, Michael: *Singapore: The Hub of Arbitration in Asia*. <https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/198-singapore-the-hub-of-arbitration-in-asia> (2020. 10. 10.)

59 The UNTAC was established to ensure implementation of the Agreements on the Comprehensive Political Settlement of the Cambodia Conflict, signed in Paris on 23 October 1991. The mandate included aspects relating to human rights, the organization and conduct of elections, military arrangements, civil administration, maintenance of law and order, repatriation and resettlement of refugees and displaced persons and rehabilitation of Cambodian infrastructure. <https://peacekeeping.un.org/sites/default/files/past/untac.htm> (2020. 10. 10.)

60 Law on Commercial Arbitration of the Kingdom of Cambodia (2006). [http://cambodi-aip.gov.kh/DocResources/372a361b-7a97-44b3-9810-79e5e6ea85f4\\_c786a043-b88d-](http://cambodi-aip.gov.kh/DocResources/372a361b-7a97-44b3-9810-79e5e6ea85f4_c786a043-b88d-)



Code of Civil Procedure in the same year and the establishment of the NCAC. A few years later, in 2009, the Sub-Decree on the Organization and Functioning of the National Commercial Arbitration Centre was adopted. However, the official launch of the NCAC awaited until 2013 in which the NCAC was established by initial funding and assistance provided by the Asian Development Bank and the International Finance Corporation. In 2014, the NCAC adopted its procedural rules (NCAC Rules) and became fully operational, and received and tried its first case in 2015.<sup>61</sup> Since then, the NCAC has successfully closed further cases and has set up a roster of arbitrators who are able to conduct the arbitration proceedings in Khmer, English and other foreign languages. At the time of the writing of this article, the Secretariat of NCAC, working closely with legal professionals and the users of the arbitration centre, is revising the NCAC Rules and is discussing on the new set of rules to be adopted in order for the NCAC to keep up with best international practices.

In 2014, the Supreme Court of Cambodia rejected a motion to annul the decision of the Court of Appeal, in the first ever case, publicly known, where the Cambodian courts recognized and enforced a foreign arbitral award. The underlying dispute arose between a Korean company and a Cambodian company over a large-scale commercial and residential real estate development in Phnom Penh. The Supreme Court affirmed the decision of the Court of Appeal to enforce the award against the Cambodian party.<sup>62</sup>

However, the international indicators associated with service of justice casts a shadow on the overall picture. This is because, arbitration cannot be entirely dissociated from the performance of the national courts of the seat. The seat of arbitration is a vital aspect of any arbitration proceeding. It is not just about where the arbitral institution is based, and where hearings will be held or who would make up a good pool of arbitrators. It is also about which country's courts have the supervisory power over the arbitration proceedings and the scope of those powers. In this respect, it is noteworthy that the Cambodian courts perform far below the ASEAN average in terms of quality of judicial process.<sup>63</sup> Regarding corruption and adherence to the rule

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4f64-9429-60a330efdc5f-en.pdf (2020. 10. 10.)

61 Op.cit. footnote 34.

62 BOLTENKO, Olga: *Cambodia's Arbitration Centre sets off on its First Flight*. Kluwer Arbitration Blog, 2015. <http://arbitrationblog.kluwerarbitration.com/2015/06/10/cambodias-arbitration-centre-sets-off-on-its-first-flight/> (2020. 10. 10.)

63 According to the World Bank's Ease of Doing Business 2020 index which measures the quality of judicial process in 190 economies, Cambodia scores 4.5 in 2020. According to this index the best available score is 18 and the worst is 0. For comparison, in the 2020

of law, Cambodia has historically the weakest records amongst the ASEAN countries.<sup>64 65</sup> A progress in these circumstances may contribute to the increase of commercial contracts that the parties submit to NCAC, instead of appointing SIAC or HKIAC, which is currently a frequent practice.

## **5. Conclusion**

Although no statistics have been found which quantify cross-border commercial disputes in ASEAN, the increasing volume of cross-border commercial transactions suggests a proportional increase in the number of cross-border business disputes. In an interdependent and interconnected world, where FDI inflows are vital to economic growth, economies need to have an attractive investment climate. This means that economies should be able to answer the growing and more complex needs of the business community.

As previously described, although a harmonised system of private international laws on a regional, if not a worldwide level, would be highly desirable, the facts show that such ambitions do not exist on a regional level and it does not appear to be amongst the current priority issues of ASEAN. Though there are certain initiations in this field, the research is typically in a mapping phase.<sup>66</sup> Under the current circumstances, it is rather unlikely

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report the average score of ASEAN countries was 8.4, the whilst in the EU it was 11.6.

64 Transparency International measures and publishes the perceived level of corruption in economies worldwide each year. In accordance with the corruption perception index economies may score from 0 as worst to 100 as best. Both in 2018 and 2019, Cambodia scored 20 whereby the ASEAN average was 42, 42, the EU average was 65 and 64, respectively.

65 World Bank's Worldwide Governance Indicators, Rule of Law in 2018 (0 is worst and 100 is best, Cambodia scores at 11.06, ASEAN average is 47.79, EU average is 81.34) and World Justice Project's Rule of Law indicators 2017-18. The best available score is 1, the worst is 0. Cambodia achieved 0.32 which is the lowest in ASEAN. For comparison, the ASEAN average is 0.51 and the EU average is 0.72. This result for Cambodia remained the same in 2019. The result is even more disappointing considering the civil justice component of the rule of law indicator, in which Cambodia scores 0.23 which is even farther below the ASEAN and the EU average 0.48 and 0.69, respectively.

66 Amongst these initiations, there is a particularly interesting recent project of the Asian Business Law Institute (ABLI), which aims to promote the harmonisation of foreign judgment rules in the region. First, a mapping exercise has been conducted to identify the existing recognition and enforcement of foreign judgment rules of the ten ASEAN countries and their major APAC trading partners (Australia, China, India, Japan and South Korea). The output of the first phase was a compendium of 15 concise jurisdictional reports written by legal scholars and legal practitioners in the respective coun-

that the harmonisation of the private international laws of ASEAN Member States, on a regional stage, would reach a level of development which, in the near future, could provide solutions for resolving cross-border commercial disputes efficiently within ASEAN.

On the other hand, the ASEAN countries are much more active in supporting the development of their ADR systems. Though the infrastructure and quality of the currently available ADR systems shows big differences between the Member States, the fact that each ASEAN state is a member to the New York Convention, places arbitration in a privileged position against national courts. To be fair, it must be also noted that irrespective of the territorial scope of this paper, i.e. beyond ASEAN as well, whether as a stand-alone process or along with other ADR mechanisms, arbitration is a far more preferred way of resolving cross-border commercial disputes than litigation.<sup>67</sup> This research shows that this is even more the case in ASEAN wherein the level of preparedness of the national courts to resolve cross-border commercial disputes, on average in the region, are far below that which ADR can offer.

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tries, released in 2017. The compendium acted as a springboard for phase two of the project which considered whether sufficient areas of commonality existed for convergence in this area of the law and how convergence may best be achieved. The aim of phase two was to publish a set of Asian Principles for the Recognition and Enforcement of Foreign Judgments. The Asian Principles for the Recognition and Enforcement of Foreign Judgments was published in September 2020. <https://abli.asia/Projects/Foreign-Judgments-Project> (2020. 10. 10.)

67 Op.cit. footnote 30.