FOREIGN JUDGMENTS IN ASEAN—A PROPOSAL

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THE Association of South East Asian Nations[1] (ASEAN) was formed on 8 August 1967. *Inter alia*, the five founding members of ASEAN agreed in the Bangkok Declaration to "accelerate ... economic growth ... in the region, ... to promote regional peace ... and ... to promote active collaboration and mutual assistance in matters of common interest in the economic ... and administrative fields".[2]

It is well known that since its formation in 1967 ASEAN, as a co-operative grouping, has existed mainly with a political and strategic focus. It is with this focus that ASEAN managed to establish and maintain cohesiveness through the years despite the shaky beginnings of what has been described as a "brittle alliance" born of a common fear of communism.[3] And it is with this focus that ASEAN, as a regional grouping, has generally been hailed as a success.

In contrast, the progress of economic co-operation within ASEAN has been described as slow and reluctant.[4] Whilst economic co-operation has always been part of the avowed reason for the regional grouping,[5] ASEAN's achievements in this area have, until recent years, been insignificant. As ASEAN entered the decade of the 1990s, however, there was a perceptible change in focus that came with the realisation that improving and strengthening intra-ASEAN economic co-operation is necessary to "maintain [ASEAN's] relevance in a changing world".[6] The imperative for the change arose, first, out of the ashes of the Cold War and the rise of a post-Cambodia South East Asia.[7] This precipitated the need for a new

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1. With Indonesia, Malaysia, the Philippines, Singapore and Thailand as founding members. Brunei Darussalam, on attaining independence, became the sixth member with effect from 7 Jan. 1984 and Vietnam became a full member on 29 July 1995. Cambodia is slated to join the Association in 1997.

2. The ASEAN Declaration, Bangkok, 8 Aug. 1967, in ASEAN Documents Series (1967–1988) 3rd edn, ASEAN Secretariat, Jakarta.

3. R. Tasker, A. Schwarz and M. Vatikiotis, "Growing Pains", *Far Eastern Economic Review*, 28 July 1994, p.22.

4. P. Imada and S. Naya (Eds), *Afta: The Way Ahead* (1992), p.xii.

5. See *supra* n.2 and accompanying text.

6. In the words of Kusuma Snitwongse, director of the Institute of Security and International Studies at Chulalongkorn University, Thailand, reported in the *Far Eastern Economic Review*, 28 July 1994, p.24.

7. H. Soesastro, *The ASEAN Free Trade Area and the Future of Asian Dynamism* (1991), p.2.

https://doi.org/10.1017/S0020589300059728 Published online by Cambridge University Press

"glue"[8] to replace the hitherto strong and uniting political and strategic platform. Secondly, the changing international economic situation, particularly the emergence of China, India and other developing nations as economic rivals, has also forced ASEAN to take economic issues more seriously. It is now often asserted that the new *raison d'être* for co-operation in ASEAN is economic.[9] This is not to say that political and security issues are no longer important. These will always be on ASEAN's primary agenda.[10] It is merely that economic issues are no longer ignored but have taken on a new significance. Concrete developments in the area of economic co-operation in ASEAN include the designation of sub-regional areas as economic "Growth Triangles"[11] for investment and economic development, the Common Effective Preferential Tariffs Scheme, and ultimately, by means of this Scheme, the formation of a free trade zone between member countries (the ASEAN Free Trade Area).

At the Fifth ASEAN Summit, held in Bangkok in December 1995, Singapore Prime Minister Goh Chok Tong envisaged an exciting future for South East Asia as it becomes a thriving, well-developed and interconnected region like Europe.[12] He said that "over time, our region's connections will be as dense as Europe's. And we will grow together as a community",[13] and spoke of a strong desire among the ASEAN leaders to widen the areas of economic co-operation.

Increased economic co-operation in ASEAN should lead to increased business ventures between private parties. As intra-ASEAN trade and investment increase, the potential for private disputes between parties of different nationalities rises correspondingly. In the absence of a supranational judicial entity in ASEAN for the settlement of international disputes, domestic courts will continue to fulfil this important adjudicatory function. With the international dimension, however, come the inevitable problems related to the foreign judgment. There is at present no ASEAN convention for the reciprocal recognition and enforcement of ASEAN awards and judgments. However, as economic co-operation within ASEAN accelerates, it is increasingly imperative that a convention on the

8. *Ibid*; T. S. Lee, "The ASEAN Free Trade Area: The Search For a Common Prosperity" (1994) 8 Asian-Pacific Economic Literature 1.

9. See e.g. Lee, *ibid.*

10. Especially since Vietnam, with its long-standing feud with China, has just joined ASEAN and with the dispute over the Spratly Islands, involving four ASEAN members, still unresolved.

11. These seek to link ASEAN regions together on the basis of their resource complementarity so that an efficient mix of production essentials is achieved and presented for investment purposes. For instance, the Southern Growth Triangle brings together Johore's land and semi-skilled labour, Riau's land and low-cost labour and Singapore's high-quality human capital and well-developed infrastructure.

12. Reported in the *Singapore Straits Times*, 16 Dec. 1995, p.1.

13. *Ibid.*

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mutual recognition and enforcement of ASEAN awards and judgments be put in place.

There can be no doubt that international arbitration is increasingly utilised in the adjudication of private commercial disputes with an international aspect. If a regional arbitration centre is ultimately set up in ASEAN,[14] it seems likely that the role of ASEAN domestic courts in the settlement of regional disputes will gradually diminish.

Nevertheless, in the meantime it cannot be denied that domestic courts will continue to remain important as fora for the settlement of international disputes. Particularly as intra-regional trade in ASEAN grows, it can be expected that there will be a corresponding increase in commercial disputes and hence litigation involving ASEAN nationals with assets in one or another of the ASEAN States, necessitating therefore seeking to have a favourable judgment enforced by the domestic courts of the relevant State. Judgments of the courts of one country may come to the attention of a foreign court in one of two ways: the foreign judgment may be used to found an action for enforcement purposes (enforcement), or it may be pleaded as a defence by the original defendant to a new action based on the original cause of action brought by the original unsuccessful plaintiff (recognition). However, because of the different rules and procedures relating to enforcement and recognition of foreign judgments that are operated by the member States of ASEAN, it is difficult at this stage to predict with any degree of certainty whether a particular judgment given by a court of an ASEAN country will be recognised and/or enforced by the courts of any of the other ASEAN countries. Private enforcement, in particular, of legal claims can be complicated and uncertain.

The obstacles encountered by a private litigant seeking to enforce in one jurisdiction a judgment of a court of another jurisdiction arise mainly because of the diverse approaches taken in different countries. Throughout ASEAN the various jurisdictions take differing approaches, with varying degrees of divergence, on when and whether they will recognise a particular foreign judgment.

I. ASEAN REGULATORY REGIMES

THE diversity in regulatory approaches and regimes found in the ASEAN region reflects the different colonial histories of the member States. The legal systems in Brunei,[15] Malaysia and Singapore draw their common heritage from the English common law system, Indonesia and Thailand both operate a civil law system whilst the Philippines has a hybrid common

14. *This is the subject of another yet to be published research paper by the writer.*

15. I have found it difficult to locate relevant and significant material on Brunei. As such, Brunei is substantially left out of the following discussion.

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law/civil law system. The latest entrant to ASEAN, Vietnam, has a legal system that has its roots in communist legal theory and French civil law, having been in part a French protectorate (North Vietnam) and a French colony (South Vietnam),[16] but which is also affected by Confucian ethics[17] and Soviet influences.[18]

The approaches in ASEAN to the recognition and enforcement of foreign judgments have been classified in one study[19] as falling within three methods:[20]

(1) the "English Method" adopted in those member nations which are former colonies of Great Britain, namely Brunei, Malaysia and Singapore;
(2) the "Evidentiary Method" utilised in countries with no special rules for the enforcement of foreign judgments, which judgments are treated as mere evidence of debt, namely Indonesia and Thailand; and
(3) the "Appeal Method" adopted in the Philippines where enforcement of the foreign judgment is allowed in principle but may be refused on grounds of mistake of law or fact.

The study excluded Vietnam as it was done prior to Vietnam's entry to ASEAN. The issue of the enforceability of foreign judgments in Vietnam raises very difficult questions and appears to depend largely upon whether a treaty exists between the country of judgment and Vietnam.

A. Indonesia[21]

The sources of law in Indonesia are diverse, there being not only written law but also unwritten customary law. The latter applies to the majority of the Indonesian people.[22] For the business community, the commercial law of Indonesia can be found in part in the Commercial Code of Indonesia 1847, as revised and amended in 1939. As a former Dutch colony, Indonesia's Commercial Code is based on the Dutch Commercial Code. Indonesia recently enacted a new law on limited liability companies (Law No.1 of

16. B. G. James, "Vietnamese Law in English—A Selected Annotated Bibiliography" (1992) 82 Law Library J. 461, 464.
17. T. E. Dirksen, "Doing Business in Vietnam: The Legal Aspects" (1993) 2 Asia Business L.Rev. 3.
18. M. Sidel, "The Re-emergence of Legal Discourse in Vietnam" (1994) 43 I.C.L.Q. 163, 164.
19. B. A. Caffrey, *International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in the LAWASIA Region: A Comparative Study of the Laws of Eleven ASEAN Countries Inter-Se and With the EEC Countries* (1985).
20. *Idem*, pp.66 *et seq.*
21. S. Gautama, "The Commercial Laws of Indonesia" (1991), in *Digest of Commercial Laws of the World*, p.4.
22. S. Gautama *et al.*, *Credit and Security in Indonesia* (1973), chap.2.

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1995 Concerning Limited Liability Companies).[23] Other provisions governing commerce in Indonesia can be found in the Commercial Code, the Civil Code and the various presidential decrees and regulations.

There is currently no formal legislation for the enforcement of foreign judgments in Indonesia.[24] One of only two references to the enforceability of foreign judgments is found in section 436 of the old Indonesian Code on Civil Procedure.[25] Whilst this Code has been superseded by the *Herzienne Indonesische Reglement*,[26] the 1941 Procedure Code, the Indonesian courts still refer to the old Code where the new is silent or where there is no other relevant legislation.[27] In the matter of the enforceability of foreign judgments, therefore, section 436 remains the authoritative provision. It provides: [28]

> Except for the cases regulated by article 724 of the Commercial Code and other legislative provisions, foreign court decisions cannot be enforced within the territory of Indonesia. The proceedings should be instituted and decided anew before the courts in Indonesia.

The other reference is found in section 22a of the General Rules concerning legislation for Indonesia,[29] which stipulates that the competence of the courts and the execution of judgments and authentic deeds are limited by the principles recognised by the law of nations.[30] Foreign judgments cannot therefore be executed by the courts of Indonesia.[31] All claims must be retried. This is based on the principle of territorial sovereignty, adhered to rather rigidly by the Indonesian legislature, that, in the absence of international agreement to the contrary, a judgment delivered by the courts of one jurisdiction cannot have effect in another jurisdiction.[32] It is, however, the general opinion of many Indonesian academics and practitioners that, in a retrial, the foreign judgment may be used as evidence of the parties' rights *vis-à-vis* each other.[33]

23. This law has been described as "the most-awaited law ever in Indonesian legal history". See A. T. Surowidjojo, "Indonesia's New Company Law" (1996) 11 Asia Business L.Rev. 13 for a full discussion of the law.
24. A. T. Surowidjojo, "Enforcement of Foreign Judgments—Indonesia" (1993) 1 Asia Business L.Rev. 39.
25. Regulation of 8 Nov. 1847, STB.52/1847 and STB.63/1849, Engelbrecht 1135 (1960 edn).
26. STB.44/1941.
27. See S. Gautama, "Recognition and Enforcement of Foreign Judgments and Arbitral Awards in the ASEAN Region" (1990) 32 Malayan L.Rev. 171, 176; R. N. Hornick, "The Recognition and Enforcement of Foreign Judgments in Indonesia" (1977) 18 Harv.I.L.J. 97, 98.
28. Translated by Gautama in *op. cit. supra* n.21, at p.40.
29. Algemene Bepalingen van Welgering, *State Gazette*, 1847 No.23.
30. S. Gautama, *Indonesian Business Law* (1995), pp.519–520.
31. *Idem*, pp.39–40.
32. *Ibid.*
33. Surowidjojo, *op. cit. supra* n.24.

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The exception to this non-recognition rule referred to in section 436 concerns foreign judgments in respect of "general average"[34] in Indonesian maritime law. Such judgments are, by section 724 of the Commercial Code, enforceable by Indonesian courts. Further, section 436 is generally narrowly construed to apply only when the *execution* of foreign condemnatory judgments—in other words, money judgments—is sought in Indonesia.[35] Hence, foreign judgments of a declaratory nature,[36] which require no execution by the Indonesian courts but merely establish the rights and liabilities of parties *inter se* and do not require execution against Indonesian property, are generally recognised if given by competent courts in accordance with the laws of the respective jurisdictions. However, such declaratory judgments must not contradict Indonesian concepts of public policy.[37]

B. Brunei, Malaysia and Singapore

These three countries share a common colonial heritage in that they were former British colonial possessions.[38] Their legal systems are therefore based on the English common law system, with the law being made up of enacted laws (statutes) and unenacted law (case law or judgments). The doctrine of *stare decisis* is an integral part of the common law system where the legal precedent set by a court binds courts of the same or lower status in the court hierarchy.

Much of the legislation in these countries is substantially similar to English Acts and regulations. Where the substantive aspects of a particular area are contained in specific statutes, the statutes form the basic source of law for that particular area, with case law being resorted to for interpretative purposes.[39] Where the statutes are merely regulatory, the common law remains the main source of law. In Malaysia the Civil Law Act 1956 (Rev. 1992) deals with the applicability of English law. Section 3 of the Act provides for the application of English common law and rules of equity as administered in England on 7 April 1956 in West Malaysia[40]

34. Defined in s.698 of the Commercial Code as those special expenses incurred for the safety of the ship and goods transported.

35. Hornick, *op. cit. supra* n.27, at p.99.

36. Such as divorce decrees, bankruptcy decrees and other similar declaratory judgments.

37. Hornick, *op. cit. supra* n.27, at p.101; Gautama, *loc. cit. supra* n.27.

38. The exact and formal classification of British possessions into colonies, protectorates and protected States is a subject in itself. For a discussion of the same, see M. B. Hooker, "English Law in Sumatra, Java, the Straits Settlements, Malay States, Sarawak, North Borneo and Brunei", in M. B. Hooker (Ed.), *The Laws of South-east Asia*, Vol.2 (1986).

39. J. Sihombing *et al.*, *Business Law in Hong Kong, Malaysia and Singapore* (1991), chap.1.

40. In Sabah and Sarawak, in addition to the common law and rules of equity in England, statutes of general application are also applicable. The cut-off dates are, however, different, being 1 Dec. 1951 for Sabah and 12 Dec. 1949 for Sarawak: s.3(1)(b) and (c).

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whilst section 5 preserves the continued reception of English mercantile law in the States of Malacca, Penang, Sabah and Sarawak.[41] While Singapore too preserved the continuing reception of English mercantile law for many years, the Singapore Parliament recently repealed section 5 of the Singapore Civil Law Act[42] and enacted the Application of English Law Act 1993,[43] which now governs the extent to which English law is applicable in Singapore.[44]

In both Singapore and Malaysia legislation lays down the procedure for the registration and enforcement of foreign money judgments, based on the principle of reciprocity of treatment.[45]

In Malaysia the Reciprocal Enforcement of Judgments Act 1958 (Rev. 1972) provides for the registration and enforcement of judgments granted by superior courts of foreign jurisdictions listed in the First Schedule to the Act. The only ASEAN country to which the application of the Act has been extended is Singapore. The foreign judgment will be registered if the Malaysian court is satisfied that the relevant foreign court had jurisdiction over the subject matter and that the judgment is final and conclusive as between the parties. The bases of adjudicatory authority are listed in section 5(2) of the Act. Once registered, the foreign judgment will be treated as a judgment of the High Court of Malaysia.

The position in Singapore is almost identical. Although there are two statutes that govern the registration and enforcement of foreign judgments, only the Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 264) (the "RECJ Act") is operative. The privileges of the Reciprocal Enforcement of Foreign Judgments Act (Cap. 262) have not been extended to any country as yet. The ASEAN countries to which the application of the RECJ Act has been extended are Brunei and Malaysia. The Singapore court has a discretion to register a foreign money judgment from any of the countries to which the RECJ Act applies if certain conditions are met. These conditions include the requirement that the rendering court acted within its jurisdiction, that the judgment debtor was given due process and that the judgment was not tainted by fraud.[46] Upon registration, the foreign judgment would have the same force and effect as if it had been a judgment obtained from the Singapore court on the date of registration.[47]

41. S.5.
42. Which provided for the continued reception of English mercantile law in Singapore.
43. Act No.35 of 1993.
44. See V. Yeo, "Application of English Law Act 1993: A Step in the Weaning Process" (1994) 4 Asia Business L.Rev. 69 for a discussion of the position prior to and after the enactment of the AELA.
45. C. Lim, "Enforcement of Foreign Judgments—Singapore" (1993) 1 Asia Business L.Rev. 37; C. W. M. Abraham, "Enforcement of Foreign Judgments—Malaysia" (1993) 2 Asia Business L.Rev. 37.
46. S.3(2), RECJ Act.
47. *Idem*, s.3(3).

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Where a foreign judgment originates from a country to which the application of the Malaysian Reciprocal Enforcement of Foreign Judgments Act and the Singapore RECJ Act have not been extended, such that registration of the foreign judgment is not available in both Malaysia and Singapore, the judgment creditor may bring fresh proceedings on the judgment debt. The English common law principles of conflict of laws would then govern the recognition and enforcement of the foreign judgment. At common law[48] the basic rule is that any foreign judgment, which is for a debt or a definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature, a fine or other penalty) and is final and conclusive on the merits, may be recognised and enforced in the absence of fraud or some overriding consideration of public policy, provided the foreign rendering court had jurisdiction over the defendant.

C. *The Philippines*[49]

The Philippines has a legal system that is said to be a blend of two of the world's major legal families. The Spanish occupation of the Philippines conferred on it the legacy of the Roman civil law system and the later American occupation grafted on the existing system elements of the common law system.[50] The legal system today existing in the Philippines is mainly a civil law system, with only legislation being absolutely binding. The doctrine of *stare decisis* is not accorded the same significance as in common law countries but, in what may be evidence of the hybrid legal system in the Philippines, the Philippines Civil Code[51] does provide for the judicial decisions of the Supreme Court applying or interpreting existing laws or the Philippine Constitution to be binding on all other courts, thereby conferring on such decisions the same status and authority as statute law.[52]

The sources of commercial law in the Philippines are divided into two categories.[53] The main source is the commercial legislation enacted by the Philippines Congress or by previous legislative bodies that remains in force. In the absence of specific legislation or where the provisions of the written laws are unclear, indirect sources such as commercial usages and practices, foreign commercial legislation and case law are referred to.

The effects of a foreign judgment in the Philippines are governed by section 50(b), rule 39 of the Revised Rules of Court of the Philippines. The

48. See generally P. M. North and J. J. Fawcett (Eds), *Cheshire & North's Private International Law* (12th edn, 1992).
49. J. Gamboa, *An Introduction to Philippine Law* (1969).
50. *Idem*, p.49.
51. Art.8.
52. Gamboa, *op. cit. supra* n.49, at p.13.
53. S. T. J. de Guzman, Jr *et al.*, *Credit and Security in the Philippines* (1973), p.8.

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foreign judgment creates a cause of action upon which an action may be brought in the local courts. Generally, a foreign judgment will be recognised and enforced in the courts of the Philippines if it constitutes a final adjudication on a civil or commercial matter issued by a foreign impartial court of competent jurisdiction, is for a fixed or calculable sum of money, and if it is neither inconsistent with fundamental principles of public morality nor tainted with fraud.[54] In addition, clear mistakes of fact or law are recognised by the Supreme Court of the Philippines as valid grounds for the refusal to enforce a foreign judgment.[55] This means that in an action to enforce a foreign judgment, the possibility of a complete review of the merits of the foreign judgment by the Supreme Court of the Philippines is raised.

D. Thailand[56]

Thailand did not come under colonial rule. Nevertheless, it was Western colonial interests that shaped the modern Thai legal system. Political, mainly external and economic factors triggered the massive reform of the existing traditional legal system[57] in the late 1800s resulting in a legal system based largely on European and Japanese precedents. It was hoped that by emulating Western laws and thus providing a legal system that looked familiar to the Westerners already in the region, Thailand could avoid providing a pretext for being colonised.[58] Thailand therefore has a Civil and Commercial Code that is based on Continental and Japanese precedents, a Criminal Code drafted along the lines specified in French and Belgian laws and a court structure that is based upon the French system.[59]

Today Thailand is considered a civil law country, with Parliament-approved legislation, royal decrees, executive orders and ministerial regulations composing the main regulatory law of Thailand. However, where cases do not come within the provisions of existing statutes, local custom and general principles of law can generally be resorted to.[60] In addition, decisions of the Supreme Court of Thailand are highly persuasive, although not binding, upon courts of inferior jurisdiction and rarely

54. *Idem*, p.28; W. H. Quasha, "Country Report: Philippines", in C. Platto, *Enforcement of Foreign Judgments Worldwide* (1989), p.74.

55. R.39, s.50(b), Revised Rules of Court; s.311(2), Code of Civil Procedure; Caffrey, *op. cit. supra* n.19, at p.70.

56. T. L. McDorman, "The Teaching of the Law of Thailand" (1988) 11 Dalhousie L.J. 915.

57. Based on the 1805 Code of the Three Seals: *idem*, pp.916 *et seq.*

58. *Idem*, p.917.

59. *Idem*, pp.917–918; see also M. B. Hooker, *A Concise Legal History of South-east Asia* (1978), pp.183 *et seq.*

60. S.4, Civil and Commercial Code.

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departed from.[61] A practical complication relating to the certainty of Thai law arises out of the practice of the Thai Bar Association in apparently not publishing the decisions of inferior courts and only periodically publishing Supreme Court decisions.[62]

Like Indonesia, Thailand has no provision for the recognition and enforcement of foreign judgments, unless Thailand is a party to an international treaty which has been ratified by local law. Currently, Thailand is not a party to any international convention on the enforcement and recognition of foreign judgments.[63] Foreign judgments are therefore not directly enforced but must be retried. There is, however, provision under the Thai Act on Conflict of Laws 1938 for the recognition of foreign judgments and orders as evidence of the legal effects of foreign laws. The foreign judgment is therefore accorded substantial evidentiary weight in the retrial, provided that it is not offensive to Thai public policy.[64]

E. Vietnam

Before unification in 1976, North Vietnam was first a French protectorate governed by French-influenced codes and then an independent State known as the Democratic Republic of Vietnam, and South Vietnam was a French colony. The reunified Socialist Republic of Vietnam is essentially a successor to the Democratic Republic of Vietnam. Accordingly, many of the laws of the Democratic Republic of Vietnam continued in force until replaced by those promulgated by the Socialist Republic of Vietnam.[65] A number of influences affected the development of the Vietnamese legal system. "During the system's history, a variety of influences—indigenous, Chinese, French, and American—have combined to produce a unique amalgam, now to become even more complex by the ... addition of socialist law to the mix."[66] The current Vietnamese legal system is therefore said to have its roots in communist legal theory and French civil law[67] and is described as "a civil law system with a socialist overlay".[68] However, because Vietnam has, according to one commentator,[69] for centuries functioned as a semi-feudal society, replete with the symptoms[70] of a profound

61. McDorman, *op. cit. supra* n.56, at p.920.
62. J. P. Raissi, "Arbitrating in Thailand" (1992) 16 Hastings Int. & Comp.L.Rev. 99, 109.
63. P. Dejakaisaya, "Enforcement of Foreign Judgments—Thailand" (1993) 1 Asia Business L.Rev. 40.
64. Tilleke and Gibbons, "The Commercial Laws of Thailand" (1990), in *Digest of the Commercial Laws of the World*, p.38.
65. James, *op. cit. supra* n.16, at p.463.
66. C. Kenyon, Foreword to P. K. Nguyen, *Vietnamese Legal Materials 1954–1975: A Selected Annotated Bibliography* (1977), p.v.
67. James, *op. cit. supra* n.16, at p.464.
68. M. Lockwood and M. E. van Embden, "Vietnam's New Civil Code" (1996) 13 Asia Business L.Rev. 19.
69. Dirksen, *loc. cit. supra* n.17.
70. These are stated to be favouritism, corruption, avoidance of open conflict through

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disregard for the rule of law, its people ranked ethics and flexible moral standards over the rigid rules imposed by a system of laws. It was only in 1992 that the Vietnamese Prime Minister, Vo Van Kiet, declared that there must be "a complete change from bureaucratic management to running the nation by law".[71] Vietnam's new Civil Code, which lays down the basic principles of law governing civil relations in Vietnam and which defines the civil rights of individuals and juridical persons, took effect on 1 July 1996.[72]

The enforcement of foreign judgments in Vietnam is governed by the Ordinance on the Recognition and Enforcement of Civil Judgments and Decisions of Foreign Courts in Vietnam, promulgated on 26 April 1993. The Ordinance applies only to judgments made in countries with which Vietnam has a treaty. At present, Vietnam has only a few such treaties and these are mainly with Eastern European countries.[73] In the absence of such a treaty, application for the recognition and enforcement of the foreign judgment must be lodged with a competent court in Vietnam.[74] A competent court would be the People's Court at the city or province where the person against whom the judgment is sought to be enforced has his residence or where his assets are located. Such judgments must, however, be "of the type which Vietnam recognises".[75] No guidance has been given by the authorities as to the type of decisions that Vietnam recognises or will recognise. The exact scope of what is covered by the Ordinance is therefore not clear.[76]

II. THE NEED FOR A CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF ASEAN JUDGMENTS WITHIN ASEAN

A. The Rationale

It should be clear from the above discourse that the current national laws of the ASEAN countries present a fairly chaotic picture of diverse approaches. As trade and commerce between and among the countries of ASEAN grow, so too will the number of legal conflicts and disputes increase. Against a background of nationalistic protectionalism where countries have a tendency to protect their subjects against the laws and acts of foreign governments and courts, the international business person or entity would face insurmountable problems in any attempt to enforce a

conciliation outside the orbit of the law, and arbitrary intervention through family connections with the centres of power: *ibid.*

71. *Ibid.*

72. See Lockwood and van Embden, *op. cit. supra* n.68, for a full discussion of the Code.

73. W. L. Craig and M. Polkinghorne, "Dispute Resolution In Vietnam" (1995) 14 Int. Financial L.Rev. 36, 38.

74. L. V. Do, "Country Report—Vietnam", in CCH's *Doing Business in Asia.*

75. M. Lockwood and M. E. van Embden, "Enforcing Vietnamese Disputes with Foreign Arbitration" (1996) 15 Int. Financial L.Rev. 23.

76. *Ibid.*

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valid judgment procured against a debtor in another country.[77] The opinion has been expressed that if the enforcement of private legal claims is unduly complicated, time-consuming and expensive, it would prove to be an obstacle to closer economic relations and hamper the development of a stable economic union.[78] This is all the more so if trade relations take the form of an institutional regional arrangement[79] like ASEAN.

It can be generally asserted that the development of the law is affected by the requirements of trade and commerce. As intra-regional and international trade increases, pushed along by the rapid development of communication facilities, the international business person or entity will demand certainty and predictability in the settlement of disputes that straddle two or more jurisdictions. The foreign judgment is in modern times very much a part of business life. The traditional self-protective attitude of domestic courts towards foreign judgments stems from a lack of confidence in the judicial systems of other countries.[80] Such an attitude can no longer be tolerated within ASEAN as the level of association grows. Hence, if the law is to facilitate the growth of regional trade intercourse in ASEAN, there is a current need to address the particular problems of regional recognition and enforcement of judgments brought about by the foreseeable increase in litigation with transnational aspects.

In recent years there have already been calls within ASEAN for either a convention to be established or an agreement to be entered into between ASEAN countries for the recognition and enforcement of ASEAN judgments by ASEAN courts.[81] The very minimum that needs to be achieved in the field of judicial co-operation within ASEAN would be the creation of a regional convention on the reciprocal recognition and enforcement of court decisions in each member country.

As a learned commentator has said:[82]

> Businessmen throughout the world ... share the same tendency to not concern themselves greatly with the complexities, peculiarities and technicalities of the law but rather to be primarily concerned with protecting themselves against recalcitrant and/or defaulting debtors with whom they have transacted business. In other words, the businessman wants and needs predictability, security of transaction and the prompt, efficient and certain enforcement of his claims against his debtors in foreign countries ... With-

77. Caffrey, *op. cit. supra* n.19, at pp.4–5.

78. P. Hay, "The Common Market Preliminary Draft Convention on the Recognition and Enforcement of Judgements—Some Considerations of Policy and Interpretation" (1968) 16 A.J.Comp.L. 149; L. S. Bartlett, "Full Faith and Credit Comes to the Common Market" (1975) 24 I.C.L.Q. 45.

79. Hay, *ibid.*

80. Caffrey, *op. cit. supra* n.19, at p.329.

81. In Indonesia, Gautama, *op. cit. supra* n.27; and in the Philippines, J. F. S. Bengzon, Jr, "Enforcement of Foreign Judgments—Philippines" (1993) 2 Asia Business L.Rev. 42, 43.

82. Caffrey, *op. cit. supra* n.19, at p.6.

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> out this security [of transactions], international trade and commerce will not only not increase, it could conceivably decrease to the manifest detriment of the countries who refuse to grant this most important businessman's demand.

B. The Brussels Convention as a Possible Model for ASEAN

The drafters of the Treaty of Rome[83] realised that to accomplish their vision of a "Community of Nations", wherein goods, capital and persons can circulate freely without the impediment of national boundaries, a solution had to be found to the conflict of laws problems that would inevitably follow such free circulation.[84] Accordingly, Article 220 of the Treaty of Rome required member nations of the European Union to "engage in negotiation with each other with a view to ensuring for the benefit of its nationals ... the simplification of the formalities governing the reciprocal recognition and enforcement of judgments".

The result is the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Convention"[85]), which became effective on 1 February 1973. The success of the Brussels Convention has been described as "singular"[86] and it has been hailed as the "most successful" of all the conventions designed to unify and harmonise the principles of private international law.[87] It is for this reason that ASEAN would do well, in any attempt to establish a similar convention regionally, to study the Brussels Convention with a view to emulating its success.

1. The scope of the ASEAN convention

The scope of the proposed ASEAN convention should be determined with reference to the rationale behind the need for such a convention. For the immediate future, as the main impetus for establishing such a convention is for the benefit of the business person, and in view of the current level of co-operation within ASEAN, the ASEAN convention should therefore be limited to money judgments rendered in commercial matters only.[88]

This is to be contrasted with the Brussels Convention, which applies not only in commercial matters but in civil matters as well. Hence the Brussels

83. Treaty Establishing the European Economic Community, 25 Mar. 1957.
84. Caffrey, *op. cit. supra* n.19, at p.23.
85. The provisions of the Brussels Convention is extended to all States of the European Free Trade Area by the parallel Lugano EEC-EFTA Judgments Convention.
86. Caffrey, *op. cit. supra* n.19, at p.25.
87. Hogan, "The Brussels Convention, Forum Non Conveniens and the Connecting Factors Problem" (1995) 20 E.L.Rev. 471.
88. Cf. Gautama, *op. cit. supra* n.27, at p.180.

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Convention governs tortious actions (both economic and non-economic torts) as well as civil proceedings in criminal courts brought by persons who claim to have suffered loss or injury as the result of a crime or other wrongful act.[89] However, the purpose behind the Brussels Convention is somewhat different in that it is seen as an instrument towards the achievement of the ultimate goal of a "Community of Nations", an economic and political union. In ASEAN, to establish a similar convention would be to facilitate economic activity, but not economic integration as yet. Even with the policy of unification in the European Union, the drafters of the Convention recognised that "no Convention which seeks to alter the diverse and sometimes chaotic relationships of the Member States, developed over a period of 150 years can be expected to encompass all areas of civil and commercial matters".[90] Practical considerations born of the great diversity in European systems *vis-à-vis*, among other things, status and legal capacity, bankruptcy and social insurance therefore dictated their exclusion from the application of the Convention.[91]

2. *Jurisdictional principles*[92]

A common prerequisite for the recognition of a foreign judgment by a domestic court is the requirement that the rendering court should be a court of competent jurisdiction. In determining the jurisdiction of the foreign rendering court as a precondition for the recognition or enforcement of the foreign judgment, the enforcing court applies its own conflicts of laws rules, based on the concept of "international jurisdiction". This concept of "jurisdiction" is to be differentiated from the "jurisdiction" of the rendering court as determined by the laws of its own (i.e. the rendering court's) country. This latter concept of jurisdiction determines whether the rendering court itself had the authority to hear the initial action, which involved a foreign element. Hence, different conflicts of laws rules regarding the assumption of jurisdiction would mean different rules of "international jurisdiction".

These differences in the bases for the assumption of jurisdiction in various States result in uncertainty for the judgment creditor seeking recognition or enforcement of his or her judgment. This problem of conflicting jurisdictional bases among the member States of the European Union is dealt with in the Brussels Convention by the provision of exclusive rules of jurisdiction from which recognition and enforcement automatically flow.[93]

89. P. Byrne, *The EEC Convention on Jurisdiction and the Enforcement of Judgments* (1990), pp.10–11; P. Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments* (1987), Part 4.
90. Bartlett, *op. cit. supra* n.78, at p.48.
91. Hay, *op. cit. supra* n.78, at p.156.
92. *Idem*, p.159.
93. Bartlett, *op. cit. supra* n.78, at p.49; Hay, *idem*, pp.159 *et seq*.

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Thus the rendering court is given the onus of reviewing its own competence in accordance with the provisions of the Convention, whilst the recognising court is bound to accord recognition to decisions from other member countries unless certain expressly enumerated exceptions apply. Article 27 of the Convention enumerates these exceptions:[94]

(1) violation of public policy of the State in which recognition is sought;
(2) improper or untimely service on the defendant in a default proceeding;
(3) if the judgment is irreconcilable with a prior local judgment between the same parties;
(4) use of improper conflicts norms (by local standards) by the rendering court in preliminary decisions involving status, marital property, gifts, wills and inheritances but only if the substantive outcome of the case was affected thereby.

Some commentators have attributed the success of the Brussels Convention to the fact that issues of the assumption of jurisdiction by rendering courts have been explicitly dealt with.[95]

An alternative to the Brussels approach is one which, rather than emphasising the jurisdiction of the rendering court, provides guidance for the recognising court in its acceptance or rejection of the rendering court's judgment by laying down the minimum standards for recognition.[96] The problem with this approach is that interpretation of these standards is left to the recognising court. This could result in conflicts among courts arising from differing national-law-based interpretations, which would mean a loss of the unifying and clarification functions of the proposed convention. This problem is particularly acute in ASEAN where there is no central tribunal for the consistent and uniform interpretation of any ASEAN-based convention or agreement.

Accordingly, in the interests of creating certainty and order, the proposed ASEAN convention should specifically deal with the issue of the rendering court's jurisdiction.[97]

94. See Byrne, *op. cit. supra* n.89, at pp.108 *et seq.* and Kaye, *op. cit. supra* n.89, at Part 8, s.V for detailed considerations of the grounds for denial of recognition and enforcement. See also H. D. Tebbens, "Jurisdiction and Enforcement in International Contract Law (Selected Aspects of the Brussels Convention of 1968/1978)", in P. Sarcevic (Ed.), *International Contracts and Conflicts of Laws* (1990), pp.146 *et seq.*

95. See e.g. Caffrey, *op. cit. supra* n.19, at p.25.

96. Hay, *op. cit. supra* n.78, at p.161.

97. Cf. Gautama, *op. cit. supra* n.27, at p.179, where the learned author was of the opinion that the immediate goal of an ASEAN convention should be one that deals only with the issues of recognition and enforcement and not one which also attempts to settle the question of assumption of jurisdiction.

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3. Recognition and enforcement

The proposed convention's rules on recognition and enforcement should seek to assure a speedy flow of judgment recognition by preventing time-consuming "double review" of the judgment.[98] This can be achieved through the elimination of any national law obstacles to the free circulation of judgments within ASEAN. Hence Philippine courts should not be allowed to review the foreign judgment on the merits, and registration with its attendant requirements would no longer be required as conditions for recognition under Singapore and Malaysia law. There should therefore be a rebuttable presumption that any ASEAN judgment on a commercial matter is to be recognised and enforced in any ASEAN State without the further requirement of having to satisfy the national requirements of the recognising country.

This automatic recognition and enforcement of judgments is achieved in the European Union through the imposition of uniform rules under the Brussels Convention. Recognition does not require a judicial decision in the State in which the recognition is sought. Hence the successful litigant may avail himself of the judgment against the judgment debtor in a member State as if the judgment had been rendered in that State.

The procedure for the enforcement of the foreign judgment is standardised throughout the European Union. The successful litigant has to obtain an enforcement order by supplying stipulated documents to courts authorised under the Brussels Convention to enforce foreign judgments. The defendant is prohibited from bringing adversarial proceedings to contest the enforcement.

Hence, through the imposition of uniform rules for the recognition and enforcement of judgments, the Brussels Convention was able to achieve its goal of advancing the free and rapid flow of judgments within the European Union, thereby fostering closer economic relations. ASEAN too should seek to achieve a similar goal, albeit on a smaller scale.

III. CONCLUSION

IN the past the emphasis by the ASEAN leaders on "co-operation" was often cited as evidence of a certain wariness felt by ASEAN towards "integration" along the lines of the European Union. Although the concept of integration within ASEAN is today less unacceptable than it was in the past, the prospects for a harmonised ASEAN legal regime and uniform laws similar to that found in the European Union remain, for the moment, somewhat bleak. ASEAN cannot be expected to launch into a comprehensive programme of European Union-style legal harmonisation as yet. Economic co-operation in ASEAN is just beginning to take off seriously.

98. Bartlett, *op. cit. supra* n.78, at p.57.

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The extent and degree of legal co-operation that would be appropriate within ASEAN at the moment must be commensurate with the existing level of economic co-operation. As such, a practical step-by-step and hence more acceptable approach towards legal co-operation as an appropriate response to the expansion in economic co-operative activities within ASEAN should be advocated.

This article therefore proposes that one of the immediate concerns for legal co-operation in ASEAN is the establishment of a convention for the mutual recognition and enforcement of ASEAN judgments in ASEAN. Such a convention would do much to promote certainty, and surely such a move cannot but be welcomed by the business community.

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