Regional Arbitration for ASEAN in the Context of Regional Integration

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Abstract: Business transactions among ASEAN member countries are increasingly open, especially with the advent of the ASEAN Economic Community. Nevertheless, the economic development is also followed by the proliferation of international disputes among ASEAN businesses or even the Member States. This paper aims to present the idea of the establishment of an ASEAN Unified Regional Arbitration Center to overcome the problem of recognizing and implementing international arbitration awards by taking advantage of regional unity. At the same time, establishing a unified arbitration organization for the region will also create a stable legal and business environment, attracting foreign investment.

1 INTRODUCTION

The Association of Southeast Asian Nations (ASEAN), established in 1967, is a supranational organization comprised of ten South-East Asian countries: Indonesia, Malaysia, Philippines, Singapore, Thailand. Brunei Darussalam, Vietnam, Laos, and Cambodia. The ASEAN Declaration outlines the key goals and purposes of integrating a regional community with three pillars of Politic-Security, Economic, and Socio-Culture; promoting regional peace and stability through respect for justice and the rule of law in the relations between nations. In which, the major milestone in this economic integration progress is the establishment of the ASEAN Economic Community (AEC). The AEC has been negatively affected by the relatively unreliable dispute settlement system, thus undermining investor confidence in the AEC (Sim, 2020).

In commercial activities, traders are concerned with profit, loss, and business strategy, and the legal aspect when disputes arise. Economic development has always been accompanied by an increase in disputes between the parties. At that time, arbitration is often the choice of business subjects to deal with problems without going through judicial bodies because of this method's advantages, such as effectiveness, flexibility, confidentiality, professionality. However, recognition and enforcement of Arbitral Awards is another story with many difficulties due to differences in legal systems of ASEAN member states. Whether the idea of building a joint arbitration organization for the whole region solve this problem?

2 METHODS

A comparative study of ASEAN performed the study to find the rule of law, legal principles, and legal doctrines to answer legal issues. In addition, Conventions and Agreements are also used as documentary research to study and assess the recognition and enforcement status of international arbitration awards in the ASEAN region.

3 RESULTS AND DISCUSSION

3.1 Recent Regional Arbitration Developments in ASEAN countries

No official reports or statistics evaluate the effectiveness of enforcement of international arbitral awards in the ASEAN area separately. However, in 2018, Herbert Smith Freehills conducted a survey on

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the occasion of the 60th anniversary of the New York Convention that found Singapore had won the leading position in terms of being most effective in recognizing and enforcing arbitration with 91.02% of respondents from the survey. Malaysia has always held the second spot with 69%. Thai and Philippine arbitration are effective. Indonesia and Vietnam are in the least effective jurisdictions, while there is not much information about Brunei, Laos, Cambodia, and Myanmar (School of International Arbitration 2018).

3.1.1 Singapore

Singapore is considered to be the place to have the leading arbitration centre in the ASEAN region. Both the Singapore Arbitration Act and the International Arbitration Act are based on the Model Law. Singaporean law has reasonably applied a reasonably broad view of the arbitrable disputes. Generally, any dispute affecting the civil rights and interests of the parties is deemed to be arbitrable, and this is contrary to Indonesian Law, as discussed later.

In addition, the country has the most advanced judicial body in the region, and it is also among the best in the world. Because Singapore courts are sophisticated, very arbitration-friendly, knowledgeable about the commercial arbitration process, and above all, they tend to uphold the principle that they only interfere in arbitration in minimal cases, where such intervention would assist arbitration. It is challenging to set aside an arbitral award in Singapore, and parties generally do not succeed (Colin n.d.).

According to the Queen Mary University of London International Arbitration Survey 2018, the Singapore International Arbitration Centre ranks third among the world's top five arbitral institutions. It is the most favoured arbitral institution as well as the most preferred arbitration seat in Asia (The Baker McKenzie 2018). Parties from 60 jurisdictions preferred to arbitrate at SIAC even during the COVID-19 pandemic, and as a result, according to SIAC 2020 Annual Report, it received 1,080 new case filings, in which 1,063 (98%) were cases administered by SIAC, and the other 17 (2%) cases were ad hoc appointments. It brought the total sum in dispute for 2020 was USD 8.49 billion (SGD 11.25 billion), which was a 4.9% rise over 2019 (SIAC 2020).

While International Chamber of Commerce (ICC) opened a case management office in Hong Kong (2008), New York (2014), Sao Paolo (2017), Singapore (2018), and the fifth case management office will be located at Abu Dhabi Global Market (ADGM), SIAC also opened its liaison offices. In 2013, the first liaison office was established in Mumbai, India. The second and third liaison offices were opened in Seoul, South Korea, and Shanghai, China, respectively, in 2013 and 2016. SIAC opened its first representative office in the United States in New York City in December 2020.

Furthermore, SIAC signed a Memorandum of Understanding (MOU) with China International Economic and Trade Arbitration Commission (CIETAC) in 2018 to facilitate international arbitration as a favoured method of conflict solution for settling international disputes in order to satisfy the interests of businesses in relation to the Chinese Belt and Road Initiative (SIAC 2018).

3.1.2 Malaysia

Malaysia has a dual judicial system in which modern English common law coexists with Islamic shariah laws (Colin 2021). The Malaysian Government and legal community have made sustained attempts to promote arbitration as a method of dispute settlement, with the Asian International Arbitration Centre (AIAC), also known as Kuala Lumpur Regional Centre for Arbitration, at the forefront.

Since 2017, the AIAC's arbitration caseload has been increasing in response to the steady growth in domestic and international arbitrations seated in Malaysia. The number of AIAC appointments and confirmations more than doubled, from 75 in 2018 to 150 in 2019, with 27 new ad hoc cases and 98 new administered cases (Yap n.d.).

3.1.3 Indonesia

In Indonesia, the legal framework is based on Dutch law, and the primary source of arbitration is the Law on Arbitration and Alternative Dispute Resolution, which is not based on the Model Law but has incorporated key aspects of it. The plurality of arbitrations conducts in Indonesia follows the Badan Arbitrase Nasional Indonesia Rules of Arbitration (BANI Rules 2018). Indonesia's parties also tend to favour arbitration seats in Hong Kong and Singapore while maintaining Indonesian law as governing law. In addition, they also prefer to choose arbitration organizations such as ICC (Singapore) and Hong Kong International Arbitration Centre (Hong Kong) to arbitrate.

3.1.4 Myanmar

The Myanmar legal system is strongly influenced by English law. Until January 2016, Myanmar enacted

the Law on Arbitration to make its arbitration law more consistent with the Model Law. In this country, arbitration was not a common or widely dispute resolution mechanism for local parties. No arbitration centres are operating in Myanmar, and foreign parties are forced to settle their disputes in other neighbouring ASEAN countries, with Hong Kong and Singapore being the most popular.

3.1.5 The Philippines

The Philippines has a common law legal system based on both Spanish (in the Civil Code) and American law (in other commercial laws). In 1966, the Philippines signed and ratified the New York Convention, with the reservation that it would only recognize and enforce an award made in the territory of another contracting state that reciprocates and enforces Philippine arbitral awards.

The Alternative Dispute Resolution Act of 200458 (2004), which adopted most of the Model Law's provisions, governs arbitration in the Philippines. As a result, there are minimal grounds under the Act for setting aside awards or resisting its enforcement. An arbitration award may be set aside only for severe violations of due process or a lack of jurisdiction, or limited public policy reasons. The Philippine Dispute Resolution Center, Inc. is the most prominent local arbitration centre in the Philippines, while international parties prefer ICC arbitration.

3.1.6 Thailand

Under the influence of several common law factors, Thailand is considered a civil law country with a relatively modern law compared to other civil law countries. The Arbitration Act B.E. 2545 (2002), based on the Model Law, has been relatively successful for domestic arbitrations. As a result, arbitration centres such as the Thai Arbitration Institute, the Thai Commercial Arbitration Committee of the Board of Trade of Thailand are quite active.

Similar to Malaysia and Myanmar, many local Thai and foreign companies tend to appoint arbitrators in Hong Kong or Singapore when entering into international contracts. However, the Thai Arbitration Center (THAC) was established in 2015 with the aim of supporting and promoting international arbitration, providing a central arbitrator with modern facilities in Thailand that meet international standards and can serve as an arbitration centre in ASEAN countries (The Baker McKenzie 2019).

3.1.7 Brunei

In Brunei, domestic arbitration is governed by the 2009 Arbitration Order, and the 2009 International Arbitration Order governs international arbitration. Both arbitration laws are based on the 2010 amended Model Law and are subject to international principles and practice that national courts can only assist and not interfere in the arbitration process.

Under the arbitration laws, the Arbitration Association Brunei Darussalam (AABD) is designated as the default appointing arbitration body in the event of default or failure to appoint by the parties. Brunei lawyers have limited international arbitration experience; therefore, more than 90% of arbitrators in the AABD arbitration panel being non-Brunei nationals.

3.1.8 Vietnam

Vietnam is a civil law country with the influence of communist doctrinal rules. The current Arbitration Law, which is based on the Model Law, was adopted in 2010. In addition, the 2015 Civil Procedure Code devotes a chapter to the procedure for the recognition and enforcement of "foreign arbitral awards," bringing the implementation of the Arbitration Law closer to the New York Convention.

Though ad hoc arbitration is relatively unpopular in Vietnam, the Vietnam International Arbitration Centre (VIAC) is regarded as a reputable arbitration institute that has gained the confidence of both domestic and international business communities. With a significant rise in new administered cases filed (274 new cases) and total amount in dispute (6.7 thousand billion VND), VIAC continues to reaffirm its status as the leading arbitral agency in Vietnam (VIAC 2019).

3.1.9 Laos

Similar to Vietnam, the current Lao civil law system is deeply influenced by French law, socialist ideology, and the Chinese communist system. Since 1998, Laos has signed the New York Convention but so far has not ratified the Convention.

The applicable arbitration law in Laos is Law No. 02 / NA on Resolutions of Economic Arbitration, amended in 2018. This Law maintains the fundamental Laotian requirement for parties to mediate their disputes before having the right to arbitrate in Laos. Therefore, foreign parties usually negotiate to have the seat of arbitration outside Laos.

3.1.10 Cambodia

Cambodia is also a civil law country with French laws and communist ideology influences. Although Cambodia became a signatory to the New York Convention in 1960, the Law on the Recognition and Enforcement of Foreign Arbitral Awards was not enacted until 2007.

The Cambodian National Commercial Arbitration Centre, independent of the Government, was officially opened in 2013. Since 2014, commercial arbitration activity in Cambodia has seen some remarkable positive developments. It was the final decision of "the first Cambodian appellate court enfacing a foreign arbitration award and adopting arbitration rules by the NCAC." These improvements have the potential to change Cambodia quickly into a jurisdiction where trade disputes can be settled as efficiently and transparently as possible.

3.2 Recent Position of Arbitration in ASEAN

ASEAN signed the Agreement on Dispute Settlement Mechanism of the ASEAN-China Framework Agreement on Comprehensive Economic Co-Operation (2005), Agreement on Dispute Settlement Mechanism under ASEAN-Korea FTA (2005), Agreement on Dispute Settlement Mechanism under ASEAN-India (2009). The dispute settlement mechanism is included as a chapter in ASEAN-Japan Comprehensive Economic Partnership Agreement. Dispute Settlement Procedure in all the Agreements is similar. The main stages of dispute settlement include the following: Consultations, Conciliation, or Mediation. If a dispute cannot be resolved through consultations [...], the complaining party may make a written request [...] to appoint an arbitral tribunal. An arbitral panel should be established on an exceptional basis for each particular dispute since the arbitral tribunal is not a standing body (Gao, 2018).

The ASEAN Charter mentioned dispute settlement mechanisms, including arbitration, in Article 25. The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (DSMP) was signed in 2010 to implement Article 25 of the Charter. In addition to providing dispute resolution methods such as Good Offices, Mediation, Conciliation, Protocol (Article 10) states that arbitration must be performed in compliance with the Protocol's provisions and the Rules of Arbitration, which are annexed to the Protocol (Annex 4). However, the arbitration procedures could be modified upon the disputing parties' agreements.

Until 2017, all the Member States have ratified the Protocol. Once the Protocol on DSMP entered into force, ASEAN, for the “first time in its history have a settlement mechanism for disputes concerning its Charter,” (Phan, 2013) something other regional organizations have had for a quite long time, such as the Court of Justice of European Union, the African Court of Justice of African Union. Although the DSMP does not create a permanent judicial body for ASEAN like the other regional organizations, it does offer an avenue for ASEAN Member States to pursue in case they have disputes concerning the interpretation and application of the ASEAN Charter (Phan, 2013). It is intended to encourage and provide more efficient and cost-effective judicial systems of dispute resolution in the Member States while still being open to other approaches in order to reduce the pressure on judicial bodies and speed up the resolution of economic disputes. This is aligned with the ASEAN (Asian) way of doing things, which avoids legalistic procedures. However, ASEAN Member States had used WTO's dispute settlement body rather than ASEAN mechanisms to resolve the disputes arising from ASEAN agreements (Saidmukhtorov, 2019).

3.3 The Need of Establishing a Unified Regional Arbitration Institution in ASEAN

3.3.1 The Recognition and Enforcement of International Arbitration Awards Are Not Going Effectively

The number of commercial disputes is increasing, and arbitration has become particularly pertinent in the business sector as dispute resolution institutions because it has distinct advantages over the national justice system. However, putting the arbitration awards into execution would be difficult. For example, winning at the Singapore arbitration institution cannot be immediately carried out in Indonesia, even though the nation has ratified both the New York Convention and the ICSID Convention. The most recent case demonstrates that foreign parties have significant difficulty executing foreign arbitration rulings in Indonesia due to the Indonesian Court's refusal to impose an execution order. There are possible reasons under the Indonesian Arbitration Law that account for the denial of an international arbitration award enforcement, such as the disputes is not arising from legal relationships that are considered "commercial' under Indonesian law; or whether to comply with the arbitration ruling would

violate "public policy." On the other hand, winning in Indonesian arbitration does not imply that Indonesian entrepreneurs can quickly execute the assets of opponents residing in Myanmar.

The reason for the inefficiency in the recognition and enforcement of international arbitral awards is that, unlike the European Union, the ASEAN Member States have very varied political and legal systems caused by their history, such as countries with a civil law system but they are affected by the common law system or the countries with the combination of communism and civil law system as mentioned above. Existing practical problems on recognizing and enforcing international arbitral awards prevent business disputes in the ASEAN region from being effectively resolved, as there is a vacancy for common dispute settlement forums in the ASEAN region. Therefore, the regional arbitration unification is considered a potential solution to solve the issue of recognition and enforcement of the arbitration award in this area (Rahmah and Handayani, 2019).

3.3.2 Issue of Investor-State Arbitration

The above issue on recognition and enforcement of international arbitral awards is for commercial disputes in general. In addition, there are also some issues in the field of investment disputes, especially the settlement of disputes between the host country and foreign investors. Investor-State Dispute Settlement (ISDS) claims are relatively low against the ASEAN Member States with only a handful of adverse awards (Nottage and Thanitcul, 2017). Usually, when resolving international investment disputes, the parties use the consultative and negotiating approach, which is often specified in free trade agreements. ASEAN decision-making is often based on consultation and consensus as a working mechanism of the "ASEAN Way" (Rahmah and Handayani, 2019). This approach can maintain harmonious relations among members but can also bring inadequacies to the disputing parties, causing legal certainty. Therefore, according to the ASEAN Comprehensive Investment Agreement (2009), in case of arising disputes, investors can consider and choose the following ways to resolve their disputes:

The first option is to bring the lawsuit to the host country's local court. However, ASEAN countries have different levels of development in terms of judicial independence and the rule of law. Local courts may be biased in their State and vulnerable to influence or corruption. The State Immunity principle is also a significant hindrance to the choice of the national court as the settlement of the dispute.

Secondly, under the ASEAN Comprehensive Investment Agreement, investors can also settle their disputes with host countries by using international arbitration, including tribunals of International Centre for Settlement of Investment Disputes (ICSID), *ad hoc* arbitration tribunal under the UNCITRAL Rules or any other international institutional arbitrations as agreed by the parties.

ICSID is an international arbitration institution that was established to resolve a dispute between investors and the State, thus the possibility to arbitrate under ICSID is considered as a lucrative option to bring advantages for foreign investors. Moreover, an ICSID award shall be recognized and “automatically enforced” as "binding" and a "final domestic judgment" by the court of the States that are members of the ICSID Convention (Article 54). However, in order to be arbitrated under ICSID, both of the host country and investor's home country must be members of the ICSID Convention. Unfortunately, Laos, Myanmar, Thailand, and Vietnam have yet to accede to the Convention. For example, the Investment Protection Agreement (IPA) 2020 between the EU and Vietnam deals with the settlement of investment disputes between Vietnam and the European Member States as well as their investors by providing a novel provision for a permanent investment tribunal and mentioning the ICSID mechanism. However, since Vietnam is not a member of the ICSID convention, European investors in Vietnam will not benefit from the recognition and enforcement mechanism of arbitral awards under this Convention (ICSID n.d.). And vice versa, it shall be the same for the situation of the dispute concerning Vietnamese investors and the European Union as a disputing party. However, the New York Convention will be an alternative mechanism for the recognition and enforcement of foreign arbitral awards.

For cases involving these non-ICSID Convention and ICSID Convention contracting states, arbitration under the ICSID Additional Facility Rules may be possible. Because it allows arbitration under the Additional Facility Rules when either the host country or the investor's home country is members of the ICSID Convention, however, the selection of the ICSID Additional Facility Rules for arbitration remains impossible if neither the host country and the investor's home country are not a party to the Convention. For example, a dispute between a Thai investor and the Myanmar government will not become arbitrable under the ICSID or the ICSID Additional Facility Rules.

In addition to arbitration institutions, investors can also choose to arbitrate at an ad hoc arbitration under the Rules of the UNCITRAL Rules. However, the poor awards rendered by UNCITRAL ad hoc tribunals and non-ICSID tribunals can be set aside by state courts in the same manner as commercial arbitration awards. As a result, UNCITRAL awards and non-ICSID awards may be refused to recognize and enforce under the grounds of Article V of the New York Convention.

The investor's final option is using international arbitration centres in ASEAN countries. Most ASEAN countries have international arbitration centres. However, in essence, an international investment dispute is always a particular type of dispute involving both private and public entities, while their experience in handling investor-state arbitration is still limited. Therefore, to make the dispute resolution more objective, the establishment of a joint arbitration institution for the ASEAN region may be a promising future.

4 CONCLUSIONS

The growing business relationship in the ASEAN region has always had the effect of increasing disputes among ASEAN business people. Arbitration is considered to be an out-of-court dispute resolution method that has many benefits, but still, this problem arises in the enforcement of arbitral awards due to differences in the legal system of the parties.

To resolve this problem, ASEAN Member States should seek the establishment of a Unified regional arbitration centre for the ASEAN region. It can be central to international dispute resolution and especially for resolving disputes carried out in the ASEAN region. With a regional arbitration forum, the procedure for resolving disputes in this region will be simpler, more efficient, and easier. In particular, the Member States can discuss and agree on the regulation and interpretation of the term "public policy" in such a way as to harmonize the legal systems of ASEAN Member States. Legal barriers that often occur the refusal to recognize and execute international arbitral awards can be reduced if there are legal terms; and arbitration procedures are jointly recognized by all ASEAN member countries. In addition, a stable regional organization with a good legal environment and fair forum will promote and attract the investment capital flows from the third countries and other regions in the world.

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