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Harmonisation of Contract Laws in ASEAN: Completeness of Contract

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Abstract

This documentary research aims to compare and analyze the different contract laws of 10 ASEAN countries under the issues of Completeness of Contract. The research is carried out by surveying and collecting data from Contract Laws in ASEAN, Principles of European Contract Law (PECL) and International Institute for the Unification of Private Law (UNIDROIT). It was found that each member country classifies definitions and completeness differently. However, they all share similar general principles. Consequently, it is possible to harmonise ASEAN contracts as this study has presented contract laws by adhering to Basic Principles of ASEAN Contract Law (BPACL), of which when compared with PECL and International Institute for the UNIDROIT was found to correspond to each other.

Key Words: Harmonisation, ASEAN, Contract Laws, Basic Principles of ASEAN Contract Law, BPACL

1. Introduction

In 2003, leaders of ASEAN member nations signed a declaration known Bali Concord II. The purpose of this declaration is the precipitation into establishment of the ASEAN Community by the year 2015. In further step, ASEAN will initiate a blueprint to create an "ASEAN Common Market" within 2015, the huge market of US$2.6 trillion, over 622 million people. When the market is regulated, there will be a crucial change in freedom movement of goods, services, investment and capital in economic and society in the region. The ASEAN market will serve as a sustainable source of comparative advantage and dynamic potentials for participation in the global market. [1]

Legal differences, specifically on trade and services, are noteworthy as legal restrictions under agreement of the countries can decrease presumed difficulties and problems in ASEAN Common Market. The latter were those which directly control foreign trade and investment such as Law of Torts, Law of Property, Law of Person, Business Law, including other Specific Contracts. For that reason, these laws, specifically the Law on Negotiable Instruments, the Bankruptcy Law and the Law of the Establishment of the Bankruptcy Court and its Procedure, the competition law, the Laws on the Protection of Intellectual Properties, the Law on the Protection of Environment and Ecology, the Application of the I.T. or Information Technology Trade, and the Labor Law, should be arranged in the form of the

unification of law. Harmonisation of laws in ASEAN is not only a matter of law but also a national policy or political will of each country. Harmonisation will obtain its meaning and be truly workable when the Free Trade Area is adopted [2]. One of challenges to economic integration is harmony of domestic rules and reformation of the domestic legal system, because it does not remain on the ground of tariff barriers (TB) and border restriction but also harmonisation of domestic laws. To unite regional market should be on the basis of the principle of free flow of goods, services, investments, capital and skilled labor. Hence, commercial laws such as contract law should, consequently, in harmonisation [3].

Comparative study of contract laws in ASEAN, conducted to develop the BPACL, is therefore essential to bring ASEAN contract laws into the condition which potentially serve cooperation among ASEAN member countries. This will empower the region to endure changes and prevail in world competition.

2. Research Methodology

This research is focused on the problems or conflicts resulting from the application of International Contract Laws. In so doing it investigated the background and significance of construction problems caused by different Contract Laws. To achieve that goal, Research Hypotheses have been established in order to solve the aforementioned problems for the construction industry among the 10 ASEAN countries, including determining whether and how they would be able to harmonise Contract Construction Laws in ASEAN. This study applied Mixed Research Methodology, and Mixed Planning Exploratory Design in Grounded Theory Development Model consisting of two key components, namely: (1) the study and comparison of Contract Laws in 10 ASEAN countries using Comparative Law [4, 5], Functional Comparison [6], and (2) the development of the basic principles of ASEAN Contract Law using Population Weighted method. This paper was limited in the study and comparison of contract laws across member countries of ASEAN with a focus on the issues of Completeness of Contract.

3. Results and Discussion

3.1 Harmonisation in ASEAN Contract Law

This study aims to survey and compare contract laws in ASEAN and develop the BPACL and introduce completeness of contract. "The Principles of ASEAN Contract Law (PACL)" is omitted in the study as it is irrelevant to laws which are derived from an individual or a company. The BPACL is employed as it is more coherent in demonstrating the principle

developed by cooperation of the commission from each ASEAN country to raise consensus and people oriented method to create harmonisation of law, like the Lando commission [7], comprising of representatives from all EU countries, which developed and proposed the PECL [8].

3.2 Completeness of Contract in the Context of ASEAN Contract Law

ASEAN contract laws belong to one of the two classifications: (1) Contract laws originating from Civil Law manifesting in the form of Code, which either developed from or were influenced by European laws e.g. Cambodia, Laos, The Philippines, Thailand and Vietnam; and (2) Contract laws originating from Common Law which either developed from England or were influenced by Commonwealth nations manifesting in forms of Code found in Brunei, Malaysia, Myanmar and in the form of Judge-Made Rules found in Singapore.

Upon studying the definitions of completeness of contract laws in ASEAN countries, it was found that the completeness of contract laws required the presence of six elements as follows: (1) "consent", (2) "free", (3) "law", (4) "public order", (5) "good morals" and (6) "impossible". These six elements were discovered to possess unique characteristics as they contained portions which both were identical and different when compared across ASEAN countries.

The first element: "consent" is defined as a unified notion across all countries despite slight differences in word choice. On the other hand, Brunei, Malaysia and Myanmar which employ legal systems originating from Common Law use the phrase "free consent". Cambodia interprets "consent" as "free agreement" whereas Vietnam interprets it as "freedom to enter into contracts." Upon comparison, the distinctive characteristic of "consent" that was found to be similar across the countries of Brunei, Malaysia, Myanmar, Cambodia and Vietnam in that they all apparently defined the notion of "free" in an explicit fashion. On the other hand, the notion of "free" was found to be implicitly defined in other member countries of ASEAN as well.

The second element: "free", which is required for a contract to be complete, is defined both explicitly and implicitly. This characteristic is shared among all ASEAN countries with certain degrees of difference in the meaning component of "free". The majority of ASEAN countries specify definitive contexts in which the notion "free" is absent. This is another distinctive characteristic where elements are defined in a negative fashion, which can be attributed through the following example terminology such as "mistake[1]", "violence[2]",

[1] All ASEAN countries use the term "mistake" except for Indonesia, who uses the term "error."

"duress[3]", "fraud[4]", etc. Nonetheless, certain member countries of ASEAN specify different additional definitive contexts in which the notion "free" is absent by using other types of terms. On the other hand, there is an intriguing instance in Viet Nam who specifies definitive context where the notion "free" is present. This positively defined distinctive characteristic has yet to be found in other member countries of ASEAN[5].

The third element: "law", which is required for a contract to be complete, is defined as a unified notion across all countries with minor differences in terminology. For example, the majority of member countries of ASEAN use the term "law." On the contrary, Thailand and Cambodia both use the term "lawful" whereas Laos and Singapore use the terms "legal" and "illegal" respectively. It is worth of notice to highlight Singapore who uses the term "illegal" in which the element is defined in a negative fashion, making it a distinctive characteristic.

The fourth element: "public order", which is required for a contract to be complete, is defined as a unified notion across all countries with small differences in terminology. For instance, the majority of member countries of ASEAN use the term "public order" whereas Brunei, Malaysia and Myanmar whose laws originate from the Common Law all use the term "public policy." Nonetheless, this element is not defined in contract laws of Singapore and Vietnam. The absence of this element is also considered a distinctive characteristic.

The fifth required element for completeness of a contract is "good morals." All member countries of ASEAN define this notion identically with slight differences in terminology. For example, the majority of member countries of ASEAN use the term "good morals." However, Cambodia and the Philippines both use the term "good customs whereas Indonesia and Vietnm use the term "good conduct" and "social ethics" respectively. On the other hand, this element is not defined in contract laws of Laos and Singapore.

A contract cannot be complete if the purpose of the contract is "impossible", the sixth element. This element is defined under a unified notion across all member countries of ASEAN with minor differences in terminology. For instance, the majority of member countries of ASEAN use the term "impossible." Nevertheless, Indonesia uses the term "implausible" to illustrate this notion. Laos, on the contrary, is different from other member countries of ASEAN in defining this notion under the distinctive characteristic of positivity by defining the notion as "capacity to act."

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[2] Laos and the Philippines use the term "violence" whereas Brunei, Malaysia, Myanmar and Singapore use the term "coercion."
[3] Cambodia, Indonesia, Singapore and Thailand use the term "duress", Laos and Singapore use the term "threats" and the Philippines and Vietnam use the term "intimidation."
[4] All member countries of ASEAN use the term "fraud" with the exceptions of Brunei, Malaysia, Myanmar and Singapore who use the term "fraudulent."

Upon conducting the method of Comparative Contract Law by considering Population Weight, we proposes the concept of "completeness of Contract" in the BPACL by dividing this concept into three components as follows: (1) the "Completeness of Contract" is defined as "a contract is made by free consent[6] and is not contrary to law, public order and good conduct[7]"; (2) "Free consent" is defined as "a contract where consent is nor given through mistake[8], violence, duress[9], or fraud[10] is valid"; (3) "Impossible" is defined as "a contract where the object is impossible is invalid[11]."

Ultimately, it is dependent on the vision of the leaders of ASEAN countries that determines how and when the PACL will transpire because the leaders, who administrate in Top Down fashion, will decide whether to promulgate the PACL as a harmonious effort between ASEAN country members.

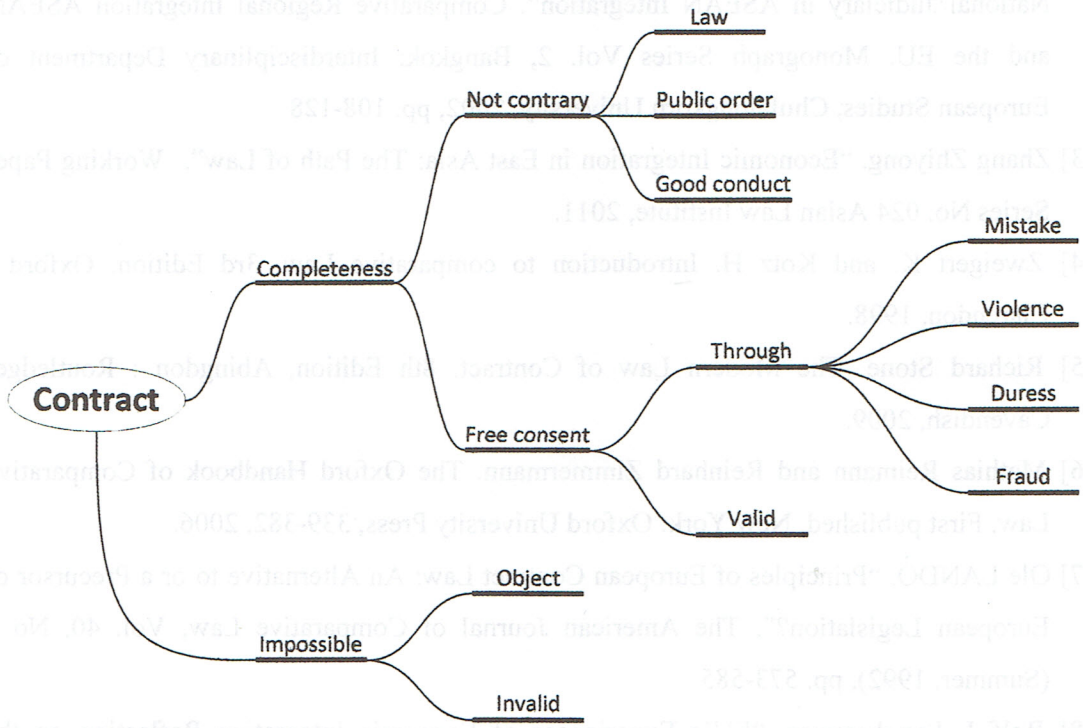

Fig. 1. The Basic Principles of ASEAN Contract Law: Completeness of Contract

3.3 Concluding observations

[5] Although Cambodia uses the term "real", it is not clear whether it is specified in definitive contexts in a positive or negative fashion.

[6] See Article 1:102 Freedom of contract PECL and Article 1.1 Freedom of contract UNIDROIT 2010

[7] See Article 4:101 (ex art. 6.101) - Matters not Covered PECL and Article 2.1.15 Negotiations in bad faith and Article 3.1.4 Mandatory character of the provisions UNIDROIT 2010

[8] See Article 4:103 (ex art. 6.103) - Mistake as to facts or law and Article 4:104 (ex art. 6.104) - Inaccuracy in communication PECL and Article 3.2.1 Definition of mistake, Article 3.2.2 Relevant mistake and Article 3.2.3 Error in expression or transmission UNIDROIT 2010

[9] See Article 4:108 (ex art. 6.108) - Threats PECL and Article 3.2.6 Threat UNIDROIT 2010

[10] See Article 4:107 (ex art. 6.107) - Fraud PECL and Article 3.2.5 Fraud UNIDROIT 2010

[11] See Article 4:102 (ex art. 6.102) - Initial Impossibility PECL and Article 3.1.3 Initial impossibility UNIDROIT 2010

Comparison of contract laws across member countries of ASEAN with a focus on the issues of Completeness of Contract shows that member countries interpret the terms "definitions" and "completeness" differently. However, they all share similar general principles. Consequently, it is considered plausible to harmonize ASEAN contracts as presented in this study by adhering to the BPACL, of which when compared with the PECL and International Institute for the UNIDROIT was found to correspond to each other, as shown in Figure 1.

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