

**Fair Effective and Efficient Dispute Resolution to
Facilitate the Success of the AEC**

Organised by
ASEAN Law Association (Singapore)

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[The views expressed in this paper reflect only the personal views of the author]

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PART 1: INTRODUCTION TO CURRENT ASEAN DSMs

THE ASEAN DECLARATION 1967

- * ASEAN established on 8 August 1967 with signing of the ASEAN Declaration. Only 5 articles. Aimed to promote :
(a) accelerated econ growth, social progress, culture. (b) regional peace and stability in SEA. (c) collaboration on common interest matter; (d) assistance to members in training/research. (e) Improve agriculture, industries, trade, transportation, communications, raising living standards (f) promote Southeast Asian studies; (g) foster close coop with international and regional bodies with similar aims, explore all avenues for closer cooperation.

PART 1: INTRODUCTION TO ASEAN DSMs

Treaty of Amity and Cooperation 1976

- * ASEAN held its first summit meeting in Bali in 1976.
- * **Treaty of Amity and Cooperation. Six principles :**
 - (i) mutual respect, independence, sovereignty, equality, territorial integrity and national identity of all nations;
 - (ii) right of every state to lead its national existence free from external interference, subversion or coercion;
 - (iii) non-interference in internal affairs of one another;
 - (iv) settlement of disputes in a peaceful manner;
 - (v) renunciation of threat or use of force; and
 - (vi) effective cooperation among the states themselves.

Singapore Declaration - the Framework Agreement on Enhancing ASEAN Economic Cooperation [AFTA Agreement 1992]

- * 28 Jan 1992 - AFTA agreement signed in Singapore.
- * Objective - increase ASEAN's competitive advantage as a production base for the world market.
- * Required liberalisation of trade through elimination of tariffs and non-tariff barriers among ASEAN members.
- * Perm secretariat (Jakarta) headed by a secretary-general.
- * Position rotates every 5 years. After 1992 AFTA Agreement concluded ministerial rank was accorded to the office.
- * Occupant designated as "*The Secretary-General of ASEAN*".

PART 1: INTRODUCTION TO ASEAN DSMs

The ASEAN Charter 2007 (20 Nov 2007)

- * New legal identity and constitution of ASEAN.
- * Charter turned ASEAN into a rule-based organisation.
- * The ASEAN Community would consist of three pillars.
- * ASEAN Political Security Community (APSC), ASEAN Economic Community (AEC), and ASEAN Socio Cultural Community (ASCC).
- * Aim was to establish ASEAN Community by 2020.
- * AEC to be a single market/production base of region.

PART 1: INTRODUCTION TO ASEAN DSMs

An Earlier 2004 ASEAN Enhanced DSM

- * An earlier 2004 ASEAN Protocol on Enhanced DSM.
- * Article 4(1) of EDSM 2004 permits member states at any time to engage in **conciliation or mediation**.
- * EDSM was a time bound mechanism to resolve economic disputes under ASEAN regime.
- * Central Pillar of EDSM is a mandatory panel and appellate panel procedure, IF mediation fails to resolve the controversy. EDSM has never been used.

PART 1: INTRODUCTION TO ASEAN DSMs

An Earlier 2004 ASEAN Enhanced DSM

- * EDSM not practical as Article 1(3) states as follows:
“The provisions of this protocol are without prejudice to **the rights of the member states to seek recourse to other fora** for the settlement of disputes involving other member states. A member state involved in dispute settlement **can resort to other fora** at any stage before a party has made a request to the SEOM to establish a panel pursuant to paragraph 1 Article 5 of this protocol.”

PART 1: THE ASEAN CHARTER 2007

An Earlier 2004 ASEAN Enhanced DSM

- * This non-exclusive jurisdiction allowed members to use other fora to resolve disputes until a request for the setup of a panel is made to the SEOM. [Senior Economic Officials' Meeting]
- * Confusion on choice of forum for dispute settlement.
- * ASEAN countries brought trade and other disputes against each other in forums like the ICJ and WTO.
- * A new DSM had to be developed to break impasse.

PART 1: INTRODUCTION TO ASEAN DSMs

The ASEAN Charter 2007 (20 Nov 2007)

- * Charter conferred legal personality on ASEAN.
- * Established ASEAN Commission on Human Rights.
- * 10 member states ratified Charter (In Force - Dec 2008)
- * It increased frequency of ASEAN summit meetings.
- * AEC to create a stable, prosperous and highly competitive economic region. Free flow of goods, services and investment. Freer flow of capital by 2020.
- * No formal institutionalised DSM until Charter. Member States had adopted peaceful consensus to settle disputes.

PART 1: INTRODUCTION TO ASEAN DSMs

The ASEAN Charter 2007 (20 Nov 2007)

- * AEC came into being on the 31 December 2015.
- * Charter required new appropriate DSMs to resolve disputes concerning interpretation of Charter.
- * S 25 of Charter : *"Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments."*
- * Protocol on DSM (9 April 2010) signed in Hanoi by the 10 ASEAN leaders completed this commitment.

PART 1: THE ASEAN CHARTER 2007

2010 Protocol Dispute Settlement Mechanism

- * The 2010 Protocol now automatically applies to disputes concerning interpretation or application of the ASEAN Charter and ASEAN instruments that expressly provide that the 2010 Protocol is to apply.
- * Protocol will also apply to other ASEAN instruments unless other means of settling such disputes have already been provided for to those instruments.
- * Article 5 of the Protocol dictates that a complaining party is first asked to file a request for consultations.

PART 1: THE ASEAN CHARTER 2007

2010 Protocol Dispute Settlement Mechanism

- * Art 6(1) allows disputing parties to use mediation or conciliation if they are likely to help.
- * Complainant must first file request for consultations.
- * If no response from other party within 30 days from request for consultation, or consultation fails to settle dispute within 90 days, Art 8(1) of Protocol applies.
- * Complainant may then send written notice to other party a request to set up an arbitral tribunal.
- * Follow Protocol terms and Arb Rules annexed to Protocol.

PART 1: THE ASEAN CHARTER 2007

ANNEX 4 to 2010 Protocol to DSM (Arb Rules)

- * Art 15(1): award of arbitral tribunal is final and binding on the parties and must be fully complied with.
- * PROBLEM: What if arbitrator bias; fraud or bribery of arbitrator discovered after the award issued?
- * Rules of Arb contained in Annex 4 of 2010 Protocol.
- * Rule 8(1) Annex 4: “The arbitral tribunal shall apply the procedures provided for in these Rules. The arbitral tribunal may adopt additional procedures which do not conflict with this Protocol or these Rules.”

PART 1: THE ASEAN CHARTER 2007

ANNEX 4 to 2010 Protocol to DSM (Arb Rules)

- * Rule 12(1) Annex 4: “Unless the Parties to the dispute agree otherwise, the place of arbitration shall be the ASEAN Secretariat, Jakarta, the Republic of Indonesia.”
- * Clear that the physical venue is ASEAN Secretariat.
- * BUT does it mean Indonesia is the **seat of arbitration?**
- * If so, Does “Law No. 30 of 1999 Arbitration and Alternative Dispute Resolutions” apply to ASEAN arbs?

PART 1: THE ASEAN CHARTER 2007

ANNEX 4 to 2010 Protocol to DSM (Arb Rules)

- * *Law No. 30 of 1999 Arbitration and Alternative Dispute Resolutions* is NOT based on UNCITRAL Model Law.
- * Rule 16(3) Annex 4: “*In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in its final award.*”
- * **Q: Is the Award enforceable if no real jurisdiction?**

PART 1: Current ASEAN DSMs are limited in scope

- * ASEAN Charter was meant to create legal framework for ASEAN as a rules-based organisation like the WTO.
- * DSMs under ASEAN instruments are limited in scope.
- * They do not allow personal individuals and non-ASEAN States to arbitrate against each other.
- * Majority of arbitrations involve non-State actors.
- * ASEAN needs to cater towards non-G and improve collective due process and shared jurisprudence.

PART 1: Current ASEAN DSMs are limited in scope

- * Why not a single case brought up to ASEAN DSM?
- * Good offices, mediation, inquiry and conciliation essentially are **non-legal modes** of DSM.
- * Non-binding DSM – needs need political negotiations
- * Rule 14 TAC Procedural Rules - non-ASEAN members may appear as observers at meetings of High Council.
- * If unfair or too political, non-ASEAN states can give their opinion at meetings under TAC DSM.

Part 2: Proposal for ASEAN Centre of Arbitration

Part 2:

**Proposal for ASEAN Centre
of Arbitration (ASEAN Rules)**

PART 2: Timely to update ASEAN DSM? **Current ASEAN DSMs are limited in scope**

- * DSM Protocol provides for consultations within a fixed timeframe. Failing which, complainant may request appointment of an arbitral tribunal.
- * If respondent does not agree to appointment of arbitral tribunal, matter will be referred to the ASEAN Coordinating Council (foreign ministers of ASEAN).
- * ASEAN Coordinating Council can direct parties to settle the dispute by good offices, conciliation, mediation or arbitration.

PART 2: Timely to update ASEAN DSM?

Complex Legal Issues involved in Cross-Border transactions

- * How can they resolve their legal disputes efficiently?
- * Complex legal issues involving cross-border laws.
- * Diversity of ASEAN countries and legal systems.
- * Increased prospects of legal systems colliding?
- * SOEs should resolve legal disputes with other ASEAN in a cost efficient and fair manner.
- * Are there "international standards" of laws?

PART 2: Timely to update ASEAN DSM?

Complex Legal Issues involved in Cross-Border transactions

- * JV partners - different countries prefer a neutral DSM
- * **Neutral, non-politicised independent tribunal**
- * Quality of the decision-making process
- * Career judges v experienced arbitrators
- * Possibility of preserving relationships
- * Speed of the arbitral process
- * Reduced overall costs in arbitration (no appeals)
- * Confidentiality and avoidance of negative publicity

PART 2: Timely to update ASEAN DSM?

Challenges faced by ASEAN parties to arbitrate disputes

- * Different legal systems and commercial norms.
- * Different mandatory laws of seat or venue.
- * Different cultures and Different legal cultures.
- * Different languages.
- * Different arbitral institutions and rules of arbitration.
- * Different styles and culture of arbitration
- * Different treatment - enforcement of arbitral awards.

PART 2: Timely to update ASEAN DSM?

1958 New York Convention

- * 1958 New York Convention adopted by 157 countries
- * The United Nations Commission on International Trade Law (UNCITRAL) Model Law in many countries.
- * Arbitration Laws of Indonesia, Vietnam.
- * Desirable to have an ASEAN Arb centre.
- * Enforcement of court judgments - bilateral treaties limited in comparison to NYC (159 countries).

PART 2: Timely to update ASEAN DSM?

Arbitration is effective way to resolve intra-ASEAN Disputes

- * All ASEAN countries are members of 1958 NY Conv.
- * Arbitration is the fastest and most logical path.
- * Arbitration is already a designated DSM for ASEAN.
- * **Neutral** and fair way to resolve cross-border disputes.
- * ICCA, ICC best practices to guide state court judges.
- * Reduced scope of “*Public Policy*” - Art V(2)(b) of NYC.
- * Widened scope of Arbitrability - Art V(2)(b) of NYC.

PART 2: Timely to update ASEAN DSM?

Proposal for ASEAN Arbitration Centre and Rules

- * Hard for parties/insurers to assess legal risk.
- * Cost of doing business increases and passed on. Both the ASEAN Countries want to protect their respective nationals, companies etc.
- * May want special rules built into the existing 2010 UNCITRAL Rules to deal with specific industries. [Eg: Protection of IP Secrets; IT & life sciences etc.]
- * How to set up Confidentiality Clubs etc.

PART 2: Timely to update ASEAN DSM?

Proposal for ASEAN Arbitration Centre and Rules

- * May need to add separate rules for State to State contracts or where SOE companies are involved.
- * Good opportunity to deal with both investment and commercial arbitration at same time by way of Treaty.
- * NYC Conv more appropriate for commercial activities.
- * Legal and commercial certainty for there to be a permanent seat of arbitration for AEC activities.

PART 2: Timely to update ASEAN DSM?

- * 2004 DSM & Protocol to ASEAN Charter cannot cover disputes between non-G v non-G contracting parties.
- * Desirable for ASEAN to have a “NEUTRAL” permanent seat for non-G to G/non-G and non-G v G.
- * This will lower the costs of doing business.
- * Will also accelerate ASEAN Arbitration Centre/Rules.
- * NY Conv would apply. Easier for ASEAN to have joint control over ASEAN Centre. Much harder to agree permanent seat of arbitration in one city/country.

PART 3: Proposed AAC and Rules

Part 3:

Proposed Rules and Soft law for proposed ASEAN Arbitration Centre

PART 3: Proposed AAC and Proposed Rules

Conflict of Laws vital to lawyers intra-ASEAN disputes

- * Impossible to prevent disputes in domestic projects. More so in Cross-Border ASEAN transactions.
- * Parties may agree on CISG as the law to define SoG obligations where Parties in different countries.
- * BUT Cross-border transactions are complex and multi-jurisdictional. Other contractual obligations and laws.
- * Conflict of laws: important role to deal with same facts. Different laws applied in different countries.

PART 3: Proposed AAC and Proposed Rules

Different countries at different stages of development

- * Cross-border transactions involve many layers of domestic regulations for financing and contracts.
- * Different ASEAN countries are at different stages of development. Same goes for the court legal systems.
- * When deciding applicable law, courts apply different judicial principles for resolving Conflict of Law issues.
- * Desirable for ASEAN parties to have a permanent ASEAN Centre to deal with complex disputes.

PART 3: Proposed AAC and Proposed Rules

Too long to harmonise ASEAN Legal Systems

- * ASEAN countries may try to adopt similar multilateral treaties and conventions such as CISG. BUT... only for SoG but not other complex legal disputes.
- * Will take too long to harmonise 10 different legal systems; political systems and cultures.
- * Can adopt Singapore Law as legal *lingua franca* like how English Law used as governing law in contracts.
- * Much more difficult to agree permanent seat of arb.

PART 3: Proposed AAC

Neutral Seat outside ASEAN to resolve disputes?

- * Natural that each ASEAN Party prefers disputes to be resolved in accordance with own laws in own country.
- * Parties would have unfair advantage in litigating before state judges employed by the same state.
- * In Intl Arb disputes, it is usual practice for contracting parties to agree on choice of a neutral seat of arb.
- * In Intra-ASEAN context, Seat should ideally not be in any city in ASEAN. Neutral judiciary needed. All Parties are entitled to expect a truly neutral forum as a place for settling legal disputes.

PART 3: Proposed AAC

Neutral Seat outside ASEAN to resolve disputes?

- * If no permanent seat, different contracts stipulating different Arb seats and Arb rules. Increases costs.
- * Even if a party obtain favourable Ct judgment most ASEAN courts do not enforce each others judgments.
- * Reciprocal Enf of Foreign Judgments Acts are limited.
- * Simultaneously work on Hague Convention on Choice of Court Agreements but HCCCA may take too long.
- * Singapore only ASEAN member to sign to HCCCA.

PART 3: Proposed AAC

Desirability for permanent ASEAN Arbitration Centre

- * Perhaps more ASEAN states adopt HCCCA but when?
- * ASEAN should consider new treaty - provide for DSM to be expanded to include Non-Govt v Non-Govt parties. Arb is only practical way.
- * Desirable to have a dedicated building ASEAN Arbs.
- * Fixed building for all arbitrations taking place within any regional group will reduce overall costs.
- * Peace Palace in The Hague - PCA/ICJ share building.

PART 3: Proposed AAC

Desirability for permanent ASEAN Arbitration Centre

- * Ideal for a new ASEAN Arb Centre.
- * Jointly owned and operated by all ASEAN countries.
- * Can be in any ASEAN city that has best connectivity and easy labour/immigration rules.
- * New set of Arb Rules based on UNCITRAL 2010.
- * Automatic enforcement of arbitral awards unless any exception under New York Convention exists.
- * Define and restrict breadth of “public policy”.

PART 3: Proposed AAC

Proposed ASEAN Centre Rules of Arbitration

- * Proposed ASEAN Arb Rules based on 2010 UNCITRAL Rules with modifications. Opt-out option.
- * ASEAN governments may want to build in certain conditions into the arbitration rules.
- * Centre could be in Singapore but with special status and owned and controlled equally by all 10 ASEAN.
- * No need to debate for another 20 years which city.

PART 3: Proposed AAC

Desirability for permanent ASEAN Arbitration Centre

- * Up to ASEAN if they wish to limit list of limitations under Model Law for setting aside awards.
- * New treaty or framework agreement between ASEAN?
- * Limit grounds of setting aside before [neutral country] Courts on bias or bribery or fraud or lack of jurisdiction.
- * Use ASEAN 2010 Protocol criteria when each country submits list of arbitrators for panel of ASEAN Centre Rules.

PART 3: Desirability for permanent ASEAN Arbitration Centre PANEL OF ARBITRATORS

- * Article 11(2) of ASEAN Charter provides that: All arbitrators shall:
 - (a) have expertise in law, other matters covered by ASEAN Charter or relevant ASEAN instrument, or resolution of disputes arising under international agreements;
 - (b) be chosen strictly on the basis of objectivity, reliability, and sound judgment;
 - (c) be independent to any Party to the dispute;
 - (d) not have dealt with the matter in any capacity; and
 - (e) disclose information which may give rise to justifiable doubts as to independence or impartiality.

PART 3: Desirability for permanent ASEAN Arbitration Centre PANEL OF ARBITRATORS

- * ASEAN may also wish to increase numbers of arbitrators for new panel. Eg: Rule 5(3) Annex 4 to 2010 Protocol to ASEAN Charter provides:
*“If at any time the individuals nominated by a Member State in the list are fewer than **ten**, that Member State shall be entitled to make further nominations as necessary.”*
- * Perhaps more than 10 names for ASEAN as need a larger pool of arbitrators for commercial disputes.

PART 3: Desirability for permanent ASEAN Arbitration Centre PANEL OF ARBITRATORS

- * Each ASEAN State may nominate **25 arbitrators to panel of a new ASEAN Arb Centre.**
- * ASEAN Arb Centre may adopt similar requirements as those set out in the ASEAN Charter 2007.
- * Include additional requirements for arbitrators. Experience in Conflict of Laws; Comparative Laws and International laws etc. Higher academic qualifications.
- * 15 years min active practice as lawyer.
- * Experience of written minimum 10 arbitration awards.

PART 3: Desirability for permanent ASEAN Arbitration Centre

Shared Ownership and Costs of running any new ASEAN Arbitration Centre

- * Criteria - evidence of 10 sanitised arb awards dealing with commercial or investment cases.
- * National arb institutions may propose names of leading arbitrators to their respective governments.
- * The selected country could provide plot of land to ASEAN to build a new arbitration centre.
- * 10 ASEAN countries to share costs of running centre.

PART 3: Desirability for permanent ASEAN Arbitration Centre

Shared Ownership and Costs of running any new ASEAN Arbitration Centre

- * That country must be prepared to allow visa waiver applications to ASEAN nationals to enter country for cases as arbitrator or counsel. [eg: Singapore]
- * Adopt similar position towards ASEAN nationals who have to appear as witnesses or expert witnesses.
- * Allow fly-in/fly-out ASEAN counsel but no right to practice local law connected to court proceedings.
- * Allow counsel of any nationality to act as counsel.

PART 3: Desirability for permanent ASEAN Arbitration Centre

Investment Treaty Arbitration and International Commercial Arbitration (Adoption of UNCITRAL Rules 2010 for both IT and IC Arbitration)

- * UNCITRAL Arb Rules (2010) with modifications if any.
- * No judicial intervention allowed.
- * ASEAN Centre to maintain repository of awards.
- * Sanitised if they are ICA awards but not for ITA.
- * Awards for discussion to develop jurisprudence.
- * Centre to also function as arbitrator training centre.
- * 5 hours per year CPD requirement for all arbitrators.

PART 3: *Desirability for permanent ASEAN Arbitration Centre* Investment Treaty Arbitration and International Commercial Arbitration (Adoption of Best Practices and Established Soft Law)

- * IBA Guidelines on Conflicts of Interest in International Arbitration 2014.
- * The IBA Rules on the Taking of Evidence in International Arbitration 2010 .
- * The Chartered Inst of Arbs' Protocol for Use of Party-Appointed Expert Witnesses in Intl Arbitration.
- * ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arb (2012)

PART 3: Desirability for permanent ASEAN Arbitration Centre **Investment Treaty Arbitration:**

- * Countries have been disillusioned with ICSID and BITs.
- * Indonesia not extending expired BITs nor new ones.
- * ICSID said to be abused by investors against States.
- * ASEAN consider it an opportunity to go its own way.
- * ASEAN Arb Centre can run Investment Treaty Arb.
- * UNCITRAL Arbitration Rules (2010) as default rules.
- * Parties free to choose choice of law in contracts.
- * No judicial intervention allowed.

PART 3: Desirability for permanent ASEAN Arbitration Centre **Investment Treaty Arbitration:**

- * Default number of 3 arbitrators. Each party to appoint one arbitrator and both to agree on 3rd arbitrator.
- * All 3 arbitrators must be a neutral ASEAN national and not same national to any of the parties in dispute.
- * Create ASEAN self-contained regime for annulment.
- * Annulment under ASEAN IT regime must be distinguished from an appeal. May only proceed under annulment grounds provided for in IT Regime.

PART 3: Desirability for permanent ASEAN Arbitration Centre **Investment Treaty Arbitration: Annulment Proceedings**

- * Parties free to choose choice of law in contracts.
- * Default number of 3 arbitrators. Each party to appoint one arbitrator and both to agree on 3rd arbitrator.
- * All 3 arbitrators must be a neutral national and not a the same national to any of the parties in dispute.
- * 5 arbitrators from panel to decide challenges to arbitrators and appoint arbitrator in default situation.
- * Annulment decisions are final and binding.

PART 3: Desirability for permanent ASEAN Arbitration Centre **Investment Treaty Arbitration: Annulment Proceedings**

- * All 5 arbitrators deciding appointment or challenge must be neutral nationals to the parties in dispute.
- * Decision making process of the arbitrators and the 5 appointing arbitrators to be final and binding.
- * All investment treaty awards, decisions and annulments must be upheld by ASEAN courts.
- * ASEAN courts not entitled to injunct arbitrators or counsel or parties to Investment Treaty arbitration.

PART 3: Desirability for permanent ASEAN Arbitration Centre **Commercial Arbitration: Permanent Seat needed**

- * If awards are between non-G to non-G persons, then the right to challenge should be retained.
- * Need a perceived neutral seat (judiciary) outside ASEAN to resolve challenges (arbitrators) and awards.
- * Each ASEAN country would want to be the perm seat.
- * ASEAN parties unlikely to agree to arbitrate against the party in an arb seated in jurisdiction of a party.
- * Eg: Malaysian party unlikely to agree to arbitrate against Indonesian party in Jakarta as seat.

PART 3: Desirability for permanent ASEAN Arbitration Centre **Commercial Arbitration: Permanent Seat needed**

- * Sovereignty and national pride. Perceived ultimate control of judiciary of seat of arbitration over DSM.
- * Without joint ownership and control by all ASEAN, there will be rounds of endless debate as to seat.
- * There will never be any DSM to deal with parties who matter most of all in ASEAN – the people.
- * AEC businesses have no DSM choice - current commercial arb. But no convergence of AEC DSM.

PART 3: Desirability for permanent ASEAN Arbitration Centre **Commercial Arbitration: Permanent Seat needed**

- * Radical proposal: Select permanent seat outside ASEAN. What about a neighbouring non-ASEAN country to be seat? HK, Japan, Korea as possible seat?
- * Courts of non-ASEAN seat to have limited powers - challenges and jurisdiction. Define “public policy” in any treaty that is also to set up new Arb Centre.
- * This might even actually accelerate the proposed ASEAN Arbitration Centre and ASEAN Arb Rules.

PART 3: Desirability for permanent ASEAN Arbitration Centre **Commercial Arbitration: Permanent Seat needed**

- * Arbitration to take place at the proposed ASEAN Arbitration Centre under proposed ASEAN Arb Rules.
- * Setting aside and dealing with challenges are to be in a non-ASEAN seat.
- * Will require a treaty with government of such a seat.
- * Decisions of courts of such a seat has no power over anything outside the parties to the arbitration.
- * Cannot direct ASEAN governments to do something.

PART 3: Desirability for permanent ASEAN Arbitration Centre **Commercial Arbitration: Permanent Seat needed**

- * Decision of such courts of a neutral seat as to challenges and setting aside should be respected.
- * ASEAN Courts should not try to take jurisdiction and hear “appeals” of awards rendered for ICA cases.
- * It would be easier for a non-ASEAN court to hold the mantle of neutral seat – there is no scope to invoke other earlier ASEAN treaties (including TAC) against it.
- * Non-ASEAN seat courts cannot be subject to politics.

PART 4: Cultural Differences in International Arbitration
Arbitration Centre to help build up data base

PART 4:

**Cultural Differences in International
Arbitration – Proposed Centre to
help build up data base of arbitral
awards**

PART 4: Cultural Differences in Intl Arbitration

Arb Centre to help build up data base

- * Another reason for a new ASEAN DSM Agreement is to reduce time and costs in arbitration.
- * Cultural differences in Intl Arb can be misunderstood.
- * May make the difference between success and losing.
- * The arbitration is only as good as the arbitrator.
- * Courts of seat should understand cultural differences if bias challenge made at setting aside applications.

PART 4: Cultural Differences in Intl Arbitration

Legal Culture in International Arbitration

- * Some thinkers have described diversity of culture as leading to an inevitable clash among civilisations. - *Samuel Huntington, **The Clash of Civilizations***
- * Very different cultures exist in arbitration.
- * Essence of legal culture is expressed in codes and rules.
- * In Civil Law, rules of law are articulated through opinions of famous professors on the interpretation of law.
- * In Common Law, principles and rules of law are articulated by judicial decisions from Supreme Courts.

PART 4: Cultural Differences in Intl Arbitration

Legal Culture in International Arbitration

- * Parties; their Lawyers; and arbitrators who are not aware of this problem may fall into a trap.
- * Cultural backgrounds influence how people approach arbitration and what they expect of it in substance and in procedure.
- * impossible to lay down rules for arbitrators to have cultural neutrality - one would never find a perfect arbitrator at all.

PART 4: Cultural Differences in Intl Arbitration

Legal Culture in International Arbitration

- * Legal culture is also affected by local arbitration institutions.
- * False Perception that neutrality of arbitrators is safeguarded by choosing an arbitrator or chairman from a country other than that of the parties.
- * Eg: Dispute between Singapore and Indonesian parties before an Indian or English arbitrator/ chairman. How meaningful is this kind of neutrality?

PART 4: Cultural Differences in Intl Arbitration

Hard to have total absence of preconceptions

** “If a lack of bias is defined to mean the total absence of preconceptions in the mind of a judge, then no one has ever had a fair trial and no one ever will.”*

United States Justice Frank in Re Linahan, 138 F.2d 650 (2nd Cir. 1943) at 651.

PART 4: Cultural Differences in Intl Arbitration

Civil Law v Common Law Divide

- * As decision-makers, arbitrators are only limited by dictates of international public policy.
- * Will be guided by what he personally feels is fair. But his sense of justice is largely influenced by one legal system only - **his own**.
- * Lawyers who appoint arbitrators also need to be aware of cultural neutrality.
- * An arbitrator may not be able to see the limits of his knowledge and understanding.

PART 4: Cultural Differences in Intl Arbitration

Cultural differences in international arbitration?

- * The fact that two teams of lawyers may be trained in different systems with different skills is one matter.
- * An arbitrator who adopts a procedure that favours one of them is another matter. Some procedures may be alien to Civil law legal traditions.
- * There are usually at least 3 legal systems in play in an arbitration. (1) The **law of the contract**, (2) the law of the place where the contract is to be carried out, and (3) the law where the arbitration is conducted.

PART 4: Cultural Differences in Intl Arbitration

Advocacy - Clash of Cultures - Common Law v Civil Law Divide

- * Diverse views of meaning and function of advocacy.
- * A crucial difference between civil law and common law systems is the role of the judge and counsel.
- * The civil-law system — "inquisitorial" in nature.
The common-law system — "adversarial" in nature.
- * Role of judge in common law is acting as a referee.
- * ASEAN panel must have these different considerations to be able to deal with parties fairly.

PART 4: Cultural Differences in Intl Arbitration

Arbitrators who are experts in comparative law

- * Common law lawyers expect a highly adversarial approach to be taken by the arbitral tribunal and the opposing party.
- * Civil law lawyers expect an inquisitorial approach.
- * Such basic differences affect timing; expectations of submission of evidence, witness statements, record-keeping, and procedural matters.
- * Common law lawyers expect an adversarial approach where the arbitrator has a limited role. The adversarial approach is now pervasive in many jurisdictions.

PART 4: Cultural Differences in Intl Arbitration

Arbitrators who are experts in comparative law

- * Generally, lawyers and arbitrators consider their own legal system to be the only system in arbitration.
- * Those with minimal experience as arbitrators or as counsel in Intl cases tend to lack a balanced view.
- * May have preset views of procedural law and how to deal with the taking of evidence.
- * May not know how to position their case. How to present witness in arbitrations outside their country.

PART 4: Cultural Differences in Intl Arbitration

ASEAN Centres have own preference for Common or Civil law arbitrators in Default Situations

- * Preference of SIAC to appoint Australian and English arbitrators. Look at SIAC panel arbitrators and their appointment statistics – mainly Common lawyers.
- * Does not usually happen in ICC arbitrations seated in Singapore. Civil lawyers appointed to civil law cases.
- * Singapore judiciary will not interfere with arb process.
- * This means that one is stuck with arbitrators.

PART 4: Cultural Differences in Intl Arbitration

ASEAN Centres have own preference for Common or Civil law arbitrators in Default Situations

- * International law firms involved in international arbitration tend to be common law lawyers.
- * There is sometimes a lack of understanding as to how to apply **Civil law** (governing law).
- * There are no corresponding concepts of “*good faith*” and “*fairness*” in the Common law system.
- * In absence of agreement, SIAC tend to appoint common law arbitrators as sole arbitrator or chair.

PART 4: Cultural Differences in Intl Arbitration

ASEAN countries with a stake in proposed ASEAN Arb Centre

- * A new ASEAN DSM Agmt can assist the AEC to grow faster and fairly. Helpful to have a permanent arb centre like Peace Palace controlled by ASEAN.
- * Diversity of ASEAN board and panel arbitrators to allow appointment of appropriate arbitrator.
- * ASEAN Arb Centre doubles up as training ground for panel of arbitrators and board members. CPD idea.
- * All awards will be sanitised but are to be accessible to the panel of arbitrators for a start. Later on to public.

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ASEAN countries with a stake in proposed ASEAN Arb Centre

- * National Arb Centres in competition with each other.
- * Own local politics; cultural way of working; ideas of DSM; ideals of how arbitrators are to act.
- * Appointment of Civil or Common law arbitrators?
- * Own ideals of how to interpret ASEAN instruments.
- * Common ownership/control of ASEAN Arb Centre requires co-operation rather than competition.

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ASEAN countries with a stake in proposed ASEAN Arb Centre

- * ASEAN Centre can bridge different conflicts in legal thinking and different ways of handling disputes.
- * Jurisprudence for Interpretation of legal instruments.
- * Use as training centre with collection of books; sanitised awards and train younger arbitrators.
- * Collective interest for success - joint ownership.
- * Co-exists with national centres for Int Com Arb. Work.
- * Compete with ICSID for intra-ASEAN ITA disputes.

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ASEAN countries with a stake in proposed ASEAN Arb Centre

- * Collective scrutiny and adoption of similar public policies towards challenges/setting aside applications.
- * Seat is initially problematic but if ASEAN Centre is successful and high standards, seat not an issue.
- * Helpful to have judiciary seated outside ASEAN countries to be fair to all 10 ASEAN countries to hear challenges and setting aside of awards.
- * Question then is which country? HK; Japan or Korea?

THANK YOU FOR YOUR ATTENTION

Fair Effective and Efficient Dispute Resolution to
Facilitate the Success of the AEC

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[The views expressed in this paper reflect only the personal views of the author]

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