



## Current Dispute Resolution Framework within ASEAN

Current framework relating to dispute resolution within ASEAN:

- Dispute Settlement Mechanisms under ASEAN Agreements provide for dispute resolution between Member States
- ASEAN Comprehensive Investment Agreement (2009) – only available for foreign investors from another ASEAN country where the investment is a covered investment under the Agreement
- Differences in procedures for seeking annulment and enforcement of arbitral awards between ASEAN countries even if the grounds upon which the application is to be decided is similar



## Current Dispute Resolution Framework within ASEAN

- ASEAN has a mix of common law, civil law and mix law jurisdictions. The civil law jurisdictions include Cambodia, Lao PDR, Indonesia, Thailand and Vietnam. The common law jurisdictions include Myanmar and Singapore. The mixed jurisdictions include Brunei Darussalam, Malaysia and Philippines
- Differences in the conflict of law rules in the jurisdictions for the determination of the applicable law to the dispute
- No neutral choice for parties except in a third State with the prospect of unfamiliarity with respect to the *lex arbitri*
- No single treaty for the enforcement of foreign judgments between ASEAN States

## Proposal for an ASEAN Arbitration Center (AAC)

A single arbitration institution with predictable rules and procedures familiar to ASEAN parties:

- The AAC may have arbitral rules that combine procedures common to practices from the various legal systems with ASEAN
- As there are differences in language, a common center can have expertise in all the languages represented by the ASEAN countries
- Single list of expert arbitrators from all ASEAN countries or an arbitrator that has presided over cases in connection with a dispute where one of the parties was from an ASEAN country



## **Benefit of the AAC**

Promoting a user-friendly center taking into account different practices from ASEAN Member States:

- Every member of ASEAN country will be treated with equal respect and has a part ownership in the AAC
- AAC will foster more cooperation and solidarity among all 10 ASEAN countries, which is far better than competing with each other
- Certainty in the appointment of independent and impartial arbitrators with a track record of having had significant experience in arbitration

## Benefit of AAC

- Simple and clear rules for the conduct of the arbitration in line with local traditions relating to dispute resolution
- Scrutiny of awards by a members of a Court composed of ASEAN expert arbitrators
- Relatively inexpensive administrative fees and other costs
- Predictable advance costs of the arbitration such as through *ad valorem* institutional and arbitrator fees



# NOTES

- The seat of AAC
  - Seat in the neutral country could reduce controversies among ASEAN countries
  - ASEAN must enter into negotiation with the third country which might be a complicated process
  - The negotiation must include the minimization of the difficulties that regulate the entry and exit of foreign arbitrators, counsel and other persons coming for the purpose of an arbitration
  - Also, it may need an agreement between ASEAN and 3<sup>rd</sup> country which would bring more complication

# NOTES

- Annulment and Enforcement of the awards
  - The proposal to limit the setting-aside grounds or even the definition of “public policy” may not be possible if non-ASEAN member will be the seat
  - Differences and inconsistency in the interpretation of provisions relating to enforcement in domestic courts cannot be fixed by the AAC
  - ASEAN may need an agreement to recognize and enforce the seating’s courts judgment to bypass the UNCITRAL model law implemented in each ASEAN countries OR
  - The Model of the Common Court of Justice and Arbitration (CCJA) in OHADA



# Organization for the Harmonization of Business Law in Africa (OHADA) Framework for Arbitration

- One of its objectives was the promotion of arbitration in its 17 Member States
- Two separate regimes for arbitration under the OHADA framework:
  - Institutional arbitration under the Common Court of Justice and Arbitration (CCJA) Arbitration Rules which are similar to the ICC Rules of Arbitration where an arbitration may be commenced under these Rules if at least one party is domiciled or if the contract is wholly or partially performed in an OHADA Member State
  - Ad hoc arbitration under the Uniform Act on International Arbitration 1999 administered by an institution other than the CCJA if the seat of arbitration is located in an OHADA Member State
- CCJA acts as an administering authority similar to the ICC Court of Arbitration

# Common Court of Justice and Arbitration (CCJA) and an ASEAN Court

- The CCJA judicial court rules on challenges to the validity and enforceability of arbitral awards rendered pursuant to the CCJA arbitral proceedings
- CCJA awards are enforced by an order of exequatur issued by the CCJA
- One can question that can be raised is whether there is a need for a supervisory judicial court to the AAC similar to the OHADA structure whereby there is consistency in the review of arbitral awards





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