

Promoting legal cooperation and commercial law conformation through legal recognition between China and ASEAN¹

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I would firstly like to thank all my fellow panelists for your valuable insights and thank you ALA again for inviting me to such a wonderful event. My name is FAN JIAN and I am from Nanjing University of China. I'd like to take this opportunity to share with you some of my thoughts on how to achieve regional legal cooperation given the unique China-ASEAN context.

With efforts of more than 50 years, ASEAN has become an important force in the current economic structure of the world. "ASEAN Way" is gradually being recognized by all countries of the world, especially among developing countries. The establishment of ASEAN Economic Community (AEC) in 2015 is a mark for the beginning of a new stage in the development of ASEAN's unified economy and trade; it is also conducive to the conformation of the commercial law institute. ASEAN is closely neighboring to China. In recent years, the economic and trade exchanges have reached an unprecedented scale between the two, contributing to a renewed phase of interdependence and market expansion. It is against such background the conformation and coordination between China and ASEAN's commercial laws evolves into a practical issue which requires our close examination.

I. Achievements in Commercial Law Coordination by ASEAN economic community.

Since the 80's, for the purpose of market unification within the economic community, ASEAN has promoted the actions on cooperation and unification of commercial system within the community through multilateral agreements. And so far, a number of specialized multilateral agreements have already covered areas such as trade, services, investment, logistics, cross-border licensing and regional integration. Meanwhile, integrating plans have been made for fields like currency, finance and intellectual properties. More recently, ASEAN has focused its effort on legal cooperation at national levels. In the Asian Conference of Commercial Law Integration in January 2016, His Honor Mr. Sundaresh Menon, Chief Justice of Singapore Supreme Court, promoted the idea of integrating the commercial laws among Asian countries. Moreover, research institutions, led by ALA and Asian Commercial Law Institute, are committed to seek the pathway for the coordination and unification of commercial law systems within ASEAN countries. These excellent efforts marked the achievements in commercial law cooperation in the ASEAN economic community.

II. History of conformation of commercial law

In the past 50 years, the process of globalization and regional integration greatly impacted the development of international laws, regional laws and domestic laws. Recently, while worldwide trade barriers are being raised and trade protectionism emerging, regional economic integration is still in a booming state. Encouraged by numerous achievements of law coordination from regional economic organizations such as EU and OHADA, regional economic integration and regional commercial law conformation has become the new hot topic in place of globalization. EU and

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OHADA undertook a mode of spontaneous regional conformation in respect of commercial law which is rooted in the equality of sovereignty within regional community. Their frameworks, therefore, provide value reference for the ASEAN economic community.

At present, the coordination and conformation of international commercial law mainly occurs in two ways. One is driven by the global treaties or model laws made by international organizations, and the other is led by the community laws made by regional organizations. Although scope-wise, international conformation appears to have a broader impact, yet in practice, regional conformation yields better results due to its flexible organizational model. Regional law conformation has become an essential trend for the development of the commercial law in our world today in the context of regional economic integration.

III. Initiative for regional conformation of commercial law: from law recognition to commercial law conformation

This year marks the 27th anniversary for the establishment of Dialogue between China and ASEAN. With a working relationship for more than 20 years, China and ASEAN have developed mechanism of cooperation in regional economy, politics and culture. ASEAN has always been highly regarded by China in term of foreign cooperation and exchanges. Along with China's "one belt one road" initiative and Asia's economic integration, regional trade and economic cooperation between China and ASEAN will step up to a new level. At the same time, disputes in trade and investment caused by the difference in legal systems, especially in commercial law systems, are mounting. To resolve inter-regional law conflicts between China and ASEAN merely by applicable laws is unable to meet the demands of modern dispute resolution on the requirements of expedience and consistence. Therefore, how to settle commercial disputes promptly via a model devised from commercial law conformation should become a key point of discussion in the inter-regional law cooperation between China and ASEAN.

Early commercial law conformation was mainly pushed by the colonial powers of western countries. This forced conformation model has the advantage of speedy adoption of laws by the recipient countries, but almost always destroy and reconstruct the legal traditions and origins of the developing countries. The intrinsic limitation of this model is that the recipient country would have difficulty reconciling its laws with the initiating country and the neighbor countries; and there would lack the necessary mutual trust between these countries in regard to each other's legal systems, which eventually leads to an unstable relationship. China has realized from its long legal history that the native legal traditions and legal cultures of one country have profound effect on the formulation of its legal system. The forced model which neglects native legal traditions and sovereignty equality is no longer an option. Moreover, China and ASEAN countries have their differences in legal traditions, cultures and structures. Therefore, the concept of legal recognition would assist both China and ASEAN countries to reach commercial law conformation hence better economic cooperation on the premise of mutual respect of each other's domestic laws and basic principles of international laws.

ASEAN is a diverse community with members who share distinct national economic structures, development modes, industry scales, politics and religions. This reality determines that China and ASEAN should not just simply copy the EU or OHADA mode in the process of commercial law conformation, but should establish a unique mode of their own. Currently, within the ASEAN community, a single market structure without the central execution institute (similar to EU Committee's role in EU) has been in contemplation. Furthermore, dispute resolution mechanism is

being introduced while a unified law system is still under construction. This mode is based on the non-intervention principle of domestic affairs which ASEAN holds for all its members. This is the “ASEAN mode” as we normally call it, which is also described as the most fitting model for the regional cooperation between Southeast countries. Similar to the ASEAN mode, China promoted for the first time the “Five Principles of Peaceful Coexistence” which includes the non-intervention of internal affairs, equality and mutual benefit early in 1953, and this principle had been kept as an important criterion in China’s foreign affairs. Under the notion of cooperation, law recognition can help both China and ASEAN countries to erase prejudices in ideologies and political regimes, to fully respect, recognize and trust rational regulations and traditions in each other’s legal systems, and at the same time, seek consensus in the national laws and realize the conformation of regional commercial law eventually by seeking common ground, reserving differences as well as nurturing mutual trust in regard to one another’s legal systems.

IV. Efforts in the Development: China’s self-recognition of Commercial Law

Ever since the envision of founding the socialist market economy, China has been striving to build a commercial law discipline that is compatible with the market mode. Up till now, China has promulgated a large number of commercial laws and regulations involving companies, enterprises, securities, finance, trusts, funds, insurance, commercial bills, electronic commerce, and bankruptcy, hence has built a complete set of commercial legal system. In recent years, China is actively engaged in the codification of Civil Code. At the same time, Chinese jurists are also promoting the formulation of "General Principles of Commercial Law," under the ambit of which researches on drafting of “Commercial Code” are also underway, all in response to the needs of a rapidly developing market economy. For the judiciary, courts have been taking notes of the unique characteristics of commercial case judgements and promoting the development of international commercial arbitration. This year alone, three international commercial courts were created in in Beijing, Xi'an and Shenzhen. The Supreme People's Court also attaches great importance to the cooperation of commercial law with ASEAN community, pushing mutual recognition and enforcement of civil and commercial judgments between China and ASEAN countries.

V. Conclusion

Conformation of commercial law between China and the ASEAN through legal recognition will provide more stable, relatable and predictable commercial law rules for the legislative field; at the same time, it will promote better construction of regional commercial dispute settlement mechanism and cross-border enforcement mechanism in the judicial field. This series of coordination and unification efforts will provide important institutional support for the cultivation of China-ASEAN Regional Comprehensive Economic Partnership, serve as model for the grand blueprint of East Asian Economic Community, and enrich the experiences of regional cooperation worldwide by providing the China - ASEAN perspective.

Thank you!