

IN QUEST OF A CASE LAW E-REPOSITORY FOR ASEAN ECONOMIC COMMUNITY WITH PARTICULAR REFERENCE TO LEGAL HARMONIZATION OF ELECTRONIC COMMERCE

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ABSTRACT

Chaired by Malaysia, the ASEAN Economic Community (AEC) came into being in 2015 to create a single market comprising free movement of goods, services, investment, capital and skilled labor. To realize this, the ASEAN Charter emphasizes harmonized rules aside of the reduction/removal of tariff and technical barriers as this will place all ASEAN international traders on an equal footing apropos the law governing their transactions. To this end, ASEAN has paid particular attention to electronic commerce. However, the legal harmonization is not all. There should be a coordinated system of dispute resolution to facilitate harmonization. As there is no ASEAN Court, domestic courts have to settle disputes. In that case, unless they are coordinated or connected, domestic courts may come up with conflicting interpretations of law and legal decisions. To solve this issue, there should be a central e-repository system that will hold all the domestic courts' decisions classified into various categories of law. The legal community including the judges, arbitrators, lawyers, and academics will be able to know how differently legal rules have been interpreted and decisions made by the law courts and arbitration tribunals of different Member States. This will help them research further to develop a unified approach, namely ASEAN approach of interpretation, which will facilitate integration in the real world. By a theoretical and qualitative research, this paper focuses on the ASEAN legal harmonization agenda, the likely difficulties in achieving uniformity in the judicial interpretation and decision making with examples of a couple of decided cases, and the role of an e-repository system to remove those difficulties. It concludes that the ASEAN should establish a case law e-repository implementing a modality framework suggested herein.

Keywords: Legal harmonization; Judicial interpretation; Electronic commerce; e-Repository

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1. INTRODUCTION

With its inception in 1967 merely as a regional association of a number of neighboring States, today Association of South East Asian Nations (ASEAN) is a legal body founded on three fundamental pillars, namely Political-Security Community, Economic Community, and Socio-Cultural Community (Association of South East Asian Nations, 2008). The combined aim of these three Communities is to create an area of sustainable peace, security, stability, economic growth and prosperity, and social advancement (Association of South East Asian Nations, 2008). The purpose of the Economic Community, in particular, is to create a single market consisting of five freedoms- free movement of goods, services, investment, capital and skilled labor (Association of South East Asian Nations, 2008). In other words, the free movement of these five will turn ASEAN into a single market- an integrated economy. This integration will bring benefits to the Community Members in many ways, such as increase in open competition among business enterprises across the border, generating Gross National Production (GDP) and employment for the people (ASEAN, 2008).

In this context, a relevant question may arise- how to bring about the abovementioned integration. There are two types of barriers to integration- tariff and non-tariff barriers. Through the agreement of ASEAN Free Trade Area (AFTA) a significant progress has been achieved in the removal of tariffs (ASEAN, 2008). Non-tariff barriers, which are technical and legal in nature, remain there yet to be removed. The removal of legal barriers is of special importance to the establishment of ASEAN as a rule-based organization (Danvivathana, 2010). This may be attained by harmonization of the relevant laws of the Member States as underlined below:

One way for ASEAN countries to help its businessmen to cope with the uncertainty and cost of having to deal with different legal regimes in business transactions between ASEAN countries would be for the states to harmonise their international trade laws. If this is achieved, the businessmen who conduct business across ASEAN would have to consider only one set of rules applicable to their transaction, rather than many different sets of rules. This would remove uncertainty, reduce cost, generate greater business confidence and, as the final outcome, promote greater intra-ASEAN trade (cited in Chong, 2013).

To harmonize the law, the Working Group of the ASEAN Senior Law Officials Meeting (ASLOM) is entrusted with the drafting of the framework legislation. The policy decisions are, however, made by the ASEAN Law Ministers. They make decisions by consultation and consensus (Wong, 2013), which delays their work progress. As a result, there has not been much harmonization. The Working Groups are working in different areas, such as trade law, e-commerce law, extradition, criminal laws. However, along with the harmonization, there is a need of uniform application of the harmonized legal rules in the national jurisdictions of the Member States. This requires, in turn, the legal community, especially lawyers, judges, arbitrators, academics, regulatory authorities, to have regular updates of the judicial application of the harmonized laws in the Member States. Since there is no ASEAN Court to interpret the laws, there is a need to update the case law development regularly in the Member States to bring interpretational uniformity throughout the region. This gives rise to the need of an e-repository system of case laws, which will hold the case law reports coming from national jurisdictions. From there, the legal community will be able to keep themselves abreast of the judicial decisions. This may contribute to the development of a uniform

line of interpretation through research or various community interactive activities like conferences and discussion forums.

This paper argues for the establishment of a case law repository. Section 2 briefly states the development of legal harmonization in ASEAN. Section 3 reviews some case laws to underline how national courts have come up with conflicting or differing legal interpretations despite harmonization, which justifies the argument for the case law e-repository. Section 4 proposes a possible modality framework of the proposed repository. Finally, Section 5 concludes with a call for its establishment.

2. ASEAN LEGAL HARMONIZATION IN ELECTRONIC COMMERCE

ASEAN took a number of initiatives towards economic integration and priority is given to information and communication technologies (ICTs) as the major enabler in this respect. Those initiatives include the e-ASEAN initiative (1999), the e-ASEAN Framework (2000) and the ASEAN Economic Community (AEC) Blueprint (2007). The latest one is ASEAN ICT Masterplan 2015, which sought to establish “an empowering and transformational ICT” aimed at creating “an inclusive, vibrant and integrated ASEAN” (ASEAN, 2015, p. 17). It adopted six strategic thrusts to focus on: economic transformation, people empowerment and engagement, innovation, infrastructure development, human capital development, and bridging the digital divide (ASEAN, 2015). In these focused areas, ASEAN had planned certain initiatives, which include harmonization of ICT regulation throughout the region. As part of this, the Masterplan envisaged “the establishment of harmonized e-commerce laws in each member country to create a conducive ICT environment for businesses and to build trust in particular by promoting secure transactions within ASEAN, developing a common framework for information security and promoting cybersecurity” (UNCTAD, 2013). However, as of 2013, ASEAN made progress most in electronic transactions law. Nine out of the ten Member States had electronic transactions laws in place. All Member States had laws, full-fledged or partial, in domain-name area. The weakest progress was made in privacy law. In other areas, namely cybercrime, consumer protection and content regulation, the progress has been encouraging (UNCTAD, 2013). To overcome these problems, legal awareness shall be made among concerned or relevant persons and authorities (i.e. lawyers, judges, companies, Government organizations, etc.).

Since ASEAN has achieved harmonization in electronic transactions law area the best, a brief account of the Member States’ legislative initiatives will be given below.

2.1. Brunei

Electronic Transactions Act (ETA) (Laws of Brunei, 2008) embodies the main principles of the *UNCITRAL Model law on Electronic Commerce 1996 (MLEC)* (UNCITRAL, 1996). It aims to facilitate e-commerce by removing barriers created by legal uncertainties over writing and signature requirements. It also intends to bolster the confidence of the public in electronic transactions. Consisting of 61 Sections, the *ETA* provides that electronic signature and e-writing should not be questioned in relation to validity, enforcement, authentication and legal effect due to their electronic nature. Under this law, liability for networking service providers is limited in relation to third party materials subjected to exceptional circumstances and innocent mistakes. It emphasizes, in addition to the normal rules of communication (offer, acceptance, revocation, etc.), the acknowledgement of communication and the time of receipt. It deals with secure procedures

of both e-signature and e-writing by different means and disregards unreliable e-signature and e-writing. *ETA* further provides for authentication of certificate procedure by basing on good faith.

2.2. Cambodia

Initiated in 2013, the draft e-commerce law of Cambodia is in process. It is expected to be presented for parliamentary review in 2017 (<http://schmitt-orlov.asia/cambodias-new-e-commerce-law/>). It is modeled on the *MLEC*. It purports to protect both the investors and consumers. It covers a wide range of matters, such as validity of electronic communications, communication process, security service providers, intermediaries and electronic commerce service providers, consumer protection, electronic fund transfer and Government acts and transactions.

2.3. Indonesia

Law of Electronic Information and Transactions (Law No. 11) 2008 (*LEIT*) is of wide ranging scope. It adopts major provisions of the *MLEC*. It consists of 54 Articles. Its main purpose is to upgrade the national law of electronic transactions to international standard by complying with globalization of information. It may be applicable to both inside and outside jurisdictions of Indonesia regardless of nationality subjected to “detrimental interest of Indonesia” (Article 2). It is worth noting that the extraterritorial nature of the law has posed a challenge both for the judiciary and the enforcement agencies to put this into practice (Balfas, 2009). Under *LEIT*, all dealings should be done clearly and on good faith (Balfas, 2009). Certificate procedure must be dealt with in written form. If need be, emphasis should be given on the performance of such dealings at the time of sending or receiving electronic records or information. Business actors should provide “full and true information”, which may be termed as “friendly disclosure” as mentioned in Civil Procedure Rules. Business actors may ask for certification for their conducts from authorized certification bodies. Electronic Certification Service Providers (ECSP) should comply with their ethics and laws (i.e. complying with reliability, secure manner, proper operation, etc.). ECSP may include both national and international providers. Electronic transactions may be carried out within a public or private scope. Parties should adopt “Agreed on” electronic system. Domain names, intellectual property rights and protection of privacy rights should be based on good faith and proper rules of justice. Parties should avoid performing prohibited acts while dealing with electronic transaction, which is a part of customary rules (i.e. good practice of trade). Under *LEIT*, all disputes should be settled according to dispute settlement procedure. In this respect, electronic information is admissible for the purpose of the evidence law, which is a huge departure from the pre-*LEIT* evidence law and hence an important development in Indonesian legal landscape (Balfas, 2009).

2.4. The Lao People’s Democratic Republic

The Law on Electronic Transaction No. 20/NA (LET) (<http://www.laotradeportal.gov.la/>) passed by the National Assembly in December, 2012 is generally harmonious with the *MLEC*. *LET* consists of 58 Articles. Its main purpose is to make electronic transaction more reliable among the concerned persons regardless of jurisdiction. Electronic transaction includes Automatic Teller Machine (ATM) or payment over the internet. Principles of electronic transaction are based on equality, independence and integrity subjected to good faith. Subjected to exceptions, this law is applicable to individuals, legal entities, national and international organizations etc. International

co-operation is an important part of this law. Automated messages are part of electronic data interchange. Determination of source, date, time, location of sending and receiving electronic data message is the vital aspect of this law. Electronic documents may be treated as original documents subject to satisfying requirements under this law (Article 15(1)(a)-(c) of *LET*). Basic electronic signature, basic digital signature and secure digital signature are considered to be electronic documents and shall have similar evidential value and their validity is subjected to authentication. Secure digital signatures must comply with requirements and certificate procedure. Under *LET*, any dispute shall be settled through dispute resolution procedure. Ministry of Science and Technology shall have jurisdiction for inspection and management of electronic transactions. Any kind of *ultra vires* activities may be sanctioned with necessary measures (<http://www.laotradeportal.gov.la/>).

2.5. *Malaysia*

Based on the *UN Convention on the Use of Electronic Communications in International Contracts 2005* (UN Electronic Communications Convention), Malaysian *Electronic Commerce Act 2006 (ECA)* (http://www.commonlii.org/my/legis/consol_act/eca2006182/) is the main legislation related to electronic commerce regulation in the private sector area while the public sector is governed by the *Electronic Government Activities Act 2007*. The former contains provisions broadly concerning legal recognition of electronic message, fulfillment of legal requirements by electronic means, and communication of electronic messages. It does not apply to the following transactions or documents: Power of attorney; the creation of wills, codicils and trusts; and negotiable instruments. Earlier, Malaysia passed the *Digital Signature Act 1997*.

2.6. *Myanmar*

Myanmar has *Electronic Transactions Law (ETL) 2004* (The Union of Myanmar, 2004) in place, which recognizes the legal validity of electronic records, messages and signatures. It consists of 52 Articles. The main purpose of this Act is to promote electronic transaction technology within national jurisdiction. This Act is applicable to both commercial and non-commercial transaction within national or international jurisdictions. The central body has duties and functions for smooth and sustainable running of electronic transaction. And the certificate authority deals with certificate procedure. Under this Act, electronic record, electronic data message and electronic signature shall have similar evidential value under existing and relevant laws and regulations. Administrative actions may be taken as sanctions subjected to application for revision and appeal. Computer crimes are punishable up to 15 years of imprisonment.

2.7. *Philippines*

Enacted in 2000, the *Electronic Commerce Act (ECA)* (Arellano Law Foundation, 2000) grants authenticity and reliability of electronic data messages and electronic documents. It also recognizes the validity of electronic signature. In the similar way, electronic contracts are legally valid to the same degree as paper contracts. It is presumed that electronic evidence is admissible in the law court. There are special provisions relating to contracts of carriage of goods. The *ECA* provides for punishment of computer crimes. It is based on the *MLEC*.

2.8. Singapore

Closely matched with the UN Electronic Communications Convention, which is an update of *MLEC*, Singapore adopted the *Electronic Transactions Act (ETA) 2010* (<http://statutes.agc.gov.sg/aol/home.w3p>). It recognizes both electronic and digital signatures. It grants validity to electronic information in the following words: “For the avoidance of doubt, it is declared that information shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record.” (ETA, Section 6). Therefore, subjected to exception, this Act may be applied to all electronic transactions with respect to authentication. The normal rules of formation of contract and communication shall apply to electronic documents and electronic transactions subjected to fulfillment of requirements.

2.9. Thailand

The *Electronic Transactions Act 2001(ETA)* mainly follows the *MLEC*. Of course, its provisions concerning electronic signature are based on the *UN Model Law on Electronic Signatures*. It covers both civil and commercial transactions electronically made. It declares the validity of both electronic information and electronic documents in that they cannot be denied only because they are electronically made. Of course, their admissibility is at the discretion of the law court (Nakorn, n.d.). It recognizes all e-signatures, but digital signature is preferred. It prescribes punishment for certain computer crimes. However, it has given rise to significant uncertainty with respect to electronic contracting (Nakorn, n.d.)

2.10. Vietnam

Founded on the *MLEC*, in 2005 Vietnam adopted the *Law on E-transactions*. (<http://mic.gov.vn/lawfiles/1355073.doc>). It contains provisions both relating to electronic commerce and electronic signatures. It “regulates electronic transactions in the civil, business, commercial and other sectors” (Linh, 2006). Under this Law, data messages should not be questioned because of their electronic nature. Normal rules of formation of contract and communication will prevail in respect of such transactions. Receiving and sending data message are important parts under this Law. E-signature needs to fulfill the requirements to be legally valid. E-transactions may be subjected to security, safety, protection, and confidentiality provisions. Any dispute may be settled through dispute settlement procedure. However, it is not a complete law, which is in need of amendment to include matters like recognition of electronically signed documents such as wills.

3. DISCREPANCY IN THE APPLICATION OF LAW

Section 2 gives a broad view of legislative harmonization initiatives by ASEAN Member States. But mere harmonization is not all. Its main success lies in enforcement (UNCTAD, 2013). This Section, therefore, looks into three cases- each from Malaysia, Philippines and Singapore-to see if the judicial interpretations converge, or diverge from each other.

3.1. *Malaysia*

In *Yam Kong Seng & Anor v. Yee Weng Kai*, [2014] 6 CLJ 285, upon completion of a construction work in 1999, the defendants (respondents) promised to refund outstanding sum to the plaintiffs (appellants). As the amount remained unpaid, the respondents, upon demand, acknowledged the indebtedness by an SMS on 5 September 2006 sent to the plaintiffs. Still the refund was not made. Following this, the plaintiffs brought a writ in the High Court against the defendants in 2008. The latter argued that the cause of action arose in 1999, but the action was brought in 2008. As such, it was time barred. The High Court held that the time for litigation should, under the law of limitation, start afresh from the date of acknowledgement of the debt by the SMS. The defendants preferred an appeal. The Court of Appeal reversed the decision of the High Court arguing that for the purpose of limitation law the acknowledgement should be in writing and signed, which was not satisfied by the SMS as it was an electronic short message. Following this, the Federal Court (the Highest Court in Malaysia) confirmed the High Court's decision. For the requirement of writing, the Court relied on section 8 of the *Electronic Commerce Act 2006*, which provides that 'Where any law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in an electronic message that is accessible and intelligible so as to be usable for subsequent reference.' Then it held that 'An electronic message such as an SMS, with all the attributes of s. 8 being present, is as good as in writing. Herein, the intention of the respondent in the SMS was clear in that there was an acknowledgement of a debt which fell within the meaning of s. 27(1) of the (Limitation) Act (of 1953). The SMS, though short, reflected the intention of the parties clearly and unambiguously.' (paras 19, 21, 27 & 29). Respecting the requirement of signature, the Federal Court laid down that

Signatures need not be written. Suffice if there be any mark, written or not, which identifies the act of the party, perhaps in the form of mark or by some distinguishing feature peculiar only to that person, then the acknowledgement had been signed. The conventional paper is substituted by the mobile phone, which holds a feature that can preserve information or transmissions in the like of the SMS, with the telephone number representing the caller or the sender of some message. It is the norm nowadays to substitute the number of an identified person with his name to assist instant recognition. The fact that the respondent admitted sending the SMS sealed his liability. (para 38)

In connection with the above interpretation of "writing," it should be mentioned that the Federal Court also relied on the broader definition of the term under Section 3 of the *Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989)*, which reads as follows: "writing" or "written" includes type writing, printing, lithography photography, *electronic storage or transmission or any other method of recording information or fixing information in a form capable of being preserved.* (emphasis added)

3.2. *Philippines*

In *MCC Industrial Sales Corp. v. Ssangyong Corporation* (2007), the Seller (a Korean corporation) and the buyer (a Philippines corporation) entered into a contract for the sale of hot rolled stainless steel by pro forma invoices.¹ According to the invoices, the payment was required to be made through an irrevocable letter of credit (L/C) and goods were to be delivered after the L/C account had been opened. The seller faxed pro forma invoices to the buyer repeatedly, but the buyer failed to open the account. Then, the seller filed a suit against the buyer in a local court, the Regional

Trial Court (RTC), and sought damages for the breach of the contract. The buyer alleged that the seller did not present the original pro forma invoices. The RTC held the pro forma invoices admissible. The Court of Appeal affirmed the RTC ruling and declared that the photocopies of the facsimile invoices were original documents under the (Philippines) *Electronic Commerce Act (ECA), 2000* (R.A. No. 8792)

The Supreme Court reversed the ruling of the Court of Appeal on the ground that *ECA* recognizes only “electronic data message”, which excludes anything that is not generated by computer, such as telex and faxes. This is so because the Philippines Congress introduced the concept of “electronic data message” in the *ECA* by deleting the following words- “but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy”- from the definition of “data message” used in its underlying international model law- the *MLEC*. It defines “electronic data message” as the “information generated, sent, received or stored by electronic, optical or similar means” (Section 5). Thus, even though the “electronic data messages” or “electronic documents” are functional equivalents of written documents for evidentiary purposes, they do not apply to fax transmission as they are not electronically made and so are not “written” for the purpose of *ECA*.

3.3. Singapore

In *Integrated Transware Pte Ltd. v. Schenker Singapore (Pte) Ltd.* (30 March 2005), the plaintiff and defendant, through e-mail and telecommunication (and without any correspondence in the form of letter), came to an understanding to enter into a lease agreement. The plaintiff drafted the lease agreement and sent it by e-mail attachment to the defendant who agreed to it by an e-mail reply. Later, the defendant declined to carry out the contract. The plaintiff sued the defendant and sought compensation for the breach of the contract. The defendant argued that the agreement was not valid as it was not done according to the *Civil Law Act (Cap. 43) (“CLA”)*, which requires land lease agreement to be in the form of some written memorandum or note evidencing the terms of the agreement of the parties and the signatures of the parties against whom the agreement is to be enforced. The Court argued that through e-mail communication all three requirements- memorandum, in writing and signature- were fulfilled. The plaintiff sent the draft agreement to the defendant by e-mail attachment and the latter accepted the same by e-mail reply. This amounted to a memorandum. When the attached draft agreement was opened and it appeared on the computer monitor and was printed, it amounted to a written document. The Court took a broad view of “in writing”. It relied on the definition given in the *Interpretation Act*, according to which “in writing” included, apart from printing, lithography, typewriting and photography, also any “other modes of representing or reproducing words or figures in visible form.” The Court accepted the argument of the plaintiff that “although e-mails are files of binary information when transmitted or stored, they are in visible form when displayed on the screen of a computer monitor. The screen display would then satisfy the requirement of “writing” within the meaning of the Article 6(1) of *MLEC*. Third, for the signature requirement, the Court took the common approach, which considers signature in an inclusive sense. A signature, under common law, is not necessarily to be in hand writing. It can be typewritten or printed. The Court held the view that a signature typed into an e-mail satisfied the requirement. It went further even to say that the signature needed not to be typed into the e-mail. If the e-mail showed the name of the sender in the “From” line, that would fulfill the requirement “as long as the sender knew that his name appeared at the head of every message next

to his e-mail address so clearly that there could be no doubt that he was intended to be identified as the sender of the message.”

3.4. *Comment*

As noticed above, the electronic commerce law of Malaysia (*ECA*) is based on the UN Electronic Communications Convention while the laws of both Philippines (*ECA*) and Singapore (*ETA*) have their roots in *MLEC*. *ECA* (Malaysia), *ECA* (Philippines) and *ETA* (Singapore) accord written document status to (a) electronic messages, (b) electronic data messages and electronic documents, and (c) electronic records respectively. In this context, what is “written” is interpreted by the respective judiciary. According to the Supreme Court of Philippines, only computer generated messages and electronic documents can be treated as written for evidentiary purposes. On the other hand, the Federal Court of Malaysia holds that the written document can be created electronically or by any other means so long that data can be preserved for future reference (Hassan *et al.*, 2016). Thus, it considers that SMS serves that purpose. In the same line of argument, the Singaporean Court takes the view that the written document can be created by any means provided it could be visible. Thus, it holds that a document sent by e-mail attachment fulfills that condition when it is displayed on the computer monitor.

It should be noted that Malaysian interpretation requires the document or data to be preserved in order to be considered as “written” (Hassan & Bagheri, 2016). And Singaporean view is that the document must be visible. In essence, these two approaches are same in that when a document is preserved, it should be tangible and visible for use. And to be visible it has to be preserved. As such, the expressions, “preserved” and “visible” correspond to each other.

Thus, Philippines takes a strict and literal approach while Malaysia and Singapore a broader approach. The former considers only electronically created document/data as “written”, and the latter (Malaysia and Singapore) accept that it may be created by any means provided it is preserved/visible for the purpose of use.

4. RELEVANCE OF E-REPOSITORY

The cases, discussed above, represent the fact that ASEAN countries should have a coordination of the interpretation and application of the legal rules so that one single uniform approach is developed throughout the region. Otherwise, conflicting interpretation of law may hinder the integration program. To this end, the establishment of an ASEAN e-repository of case laws is essential. This may be done by replicating the case law repository system of the United Nations Commission on Trade Law (UNCITRAL)- CLOUT, which is described as

“a system for collecting and disseminating information on court decisions and arbitral awards relating to the Conventions and Model Laws that have emanated from the work of the Commission . . . to promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of those texts. (http://www.uncitral.org/uncitral/en/case_law.html)

In a similar fashion of CLOUT (United Nations, 2010), the following framework is being proposed for the ASEAN e-Repository:

- (1) There should be a network of correspondents from all Member States. Each Member should appoint one or more correspondents for one particular area of law. The correspondents, who may be individual lawyers/scholars or law firms, shall forward the details of case laws to the ASEAN Secretariat. The Member States should renew their appointment every five years and may also extend their term. The renewed list should be available to the public upon request. If a position falls vacant because of illness or death or any other reason, the concerned Member State should fill it with a new appointment within a shortest possible time so that the flow of case reporting is not disturbed.
- (2) The correspondents should prepare the abstract of case law in 1500 to 2000 words in clear and easily understandable English with a highlight of the subject matter and relevant section numbers of the statute(s) in question. If the case has made any remarkable changes in the jurisprudence, they should make a special **bold** note in this regard at the top of the abstract. They should underline the reasons and principles upon which the interpretation of the case is based. If the basis is a previously decided case, nationally or internationally, they should mention that too.
- (3) The correspondents should report only the final judicial decisions or arbitral awards, as the case may be ?.
- (4) After the Secretariat has received the cases, it should allocate each case an identification number indicating its country of origin and the area of law. The data should be entered in the following order:
 - country name
 - legislation
 - case name
 - case number
 - key words
 - section numbers
 - date of decision
 - name of the court/tribunal.
- (5) The Secretariat should edit and then index the abstracts and full texts of the reported cases in e-Repository with an acknowledgement of the contributions of the correspondents.
- (6) The published materials should be openly accessible to practicing lawyers, judges, academics, in-house lawyers, traders, student, researchers and others, which will update them of the regular application of the laws and their interpretation. This will, in turn, help to develop a uniform system of ASEAN jurisprudence.
- (7) If the decision/award is an “original” one, the report should mark it so. If it is copied from any source, it should indicate the source. Even though the report should be in English, the correspondent should pass the decision/award in the forum’s original language. The Secretariat may make the data so received available to the public or interested person/group subjected to Intellectual Property Rights.
- (8) The users should be warned that they are subjected to the copyright law of the country concerned.
- (9) The repository may be named as ACL e-REP (ASEAN Case Law e-Repository).

- (10) The repository website should provide the visitors a search engine to find their desired data. The following is the search engine for the CLOUT case search, which ASEAN may follow to develop one for itself: <http://www.uncitral.org/clout/showSearchDocument.do?lf=89&lng=en->

However, a preliminary format for ACL e-Rep is being proposed as follows:

Search ACL eREP

Welcome to the ACL eREP search engine.

You may search by reference to any key identifying features of an abstract, including country, legislative text, ACL eREP case number, ACL eREP number, decision date or a combination of any of these.

Legislative Text:

Section:

Court/Arbitration Tribunal:

Court Reference:

Parties:

Country:

Case Number:

ACL eREP Number:

5. CONCLUSION

ASEAN aims at a single market where goods, services, capital, labor and investment will move across the border. This requires removal of legal barriers, which, in turns, necessitates harmonization of law. ASEAN leadership has rightly appreciated this truth and has assigned different Working Groups to harmonize laws in various areas. It has made an important progress in this respect in the area of electronic commercial law. Most of the Member States have adopted laws mainly modeled on the *UNCITRAL Model law on Electronic Commerce (1996)* and the *United Nations Convention on the Use of Electronic Communications in International Contracts (2005)*. However, the legal harmonization requires a uniform judicial interpretation of the legal rules, which is absent in ASEAN at this moment. This is evidenced by three case laws from Malaysia, Philippines and Singapore discussed above. To help the national judiciaries make uniform interpretation, it is essential that there should be a case law e-repository maintained by the ASEAN Secretariat so that the judges, arbitrators, lawyers and academics may remain updated of the judicial decisions/arbitral awards in other jurisdictions. In this respect, the modality suggested above in this paper may be implemented. If this is done, an ASEAN approach of legal interpretation will emerge over the time. This may be called the ASEAN jurisconsultorium, a smaller version of “global jurisconsultorium,” which is defined as a ‘process of consultation that takes place across borders and legal systems with the aim of producing autonomous uniform interpretations and application of uniform law.’ (DiMatteo, 2014; Andersen, 2009).

In this regard, one thing should be added. Even if the proposed e-repository system is established, there still may be a need of central and uniform guidelines for the interpretation of ASEAN laws in line with the ASEAN’s basic laws, such as the ASEAN Charter. To cater for this need, there should be an ASEAN Court with Advisory Jurisdiction in the similar fashion of the European Court

of Justice. The ASEAN Court may give its advisory opinions on the meaning and interpretation of ASEAN laws, in particular commercial law as relevant in the present context, when there is a need of alignment of the legal interpretation with the ASEAN goals and objectives. In this way, it will be able to guide the national courts towards a uniform system of interpretation and application of law.

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REFERENCES

- Andersen, C. (2009). The Global Jurisconsultorium of the CISG Revisited. Retrieved from <http://www.cisg.law.pace.edu/cisg/biblio/andersen7.html> (accessed on 13 May 2015).
- Arellano Law Foundation. (2000). The Lawphil Project: Republican Act No 8792. Retrieved from http://www.lawphil.net/statutes/repacts/ra2000/ra_8792_2000.html (accessed on 24 September 2016)
- Association of South East Asian Nations. (2008). *The ASEAN Charter*. Jakarta: ASEAN Secretariat.
- ASEAN (2008). *ASEAN Economic Community Blueprint*. Jakarta: ASEAN Secretariat.
- ASEAN (2015). *ASEAN ICT Masterplan 2015 Completion Report: We are Stronger When We Are Connected*. Jakarta: ASEAN Secretariat.
- Balfas, H. M. (2009). The Indonesian Law on Electronic Information and Transactions. *Digital Evidence and Electronic Signature Law Review*, 6, 202-206.
- Chong, S. (2013). Keynote Address at Workshop on Harmonization of Trade Laws of ASEAN Member States (Arbitration and International Sale of Goods), *4th ASEAN Government Legal Officers Programme (AGLOP)*. Singapore: Attorney General's Chamber. Retrieved from https://www.agc.gov.sg/DATA/0/Docs/NewsFiles/AG_4th%20ASEAN%20Government%20Legal%20Officers%20Programme.pdf
- Danvivathana, P. (2010). Role of ALA in the Current Legal Issues under the ASEAN Charter. *Thailand Law Journal*, 13(1). Retrieved from <http://www.thailawforum.com/articles/Role-of-ALA-2.html>.
- DiMatteo, L. (2014). *International Sales Law: A Global Challenge*. Cambridge: Cambridge University Press.
- Hassan, K. H., & Bagheri, P. (2016). Data Privacy in electronic commerce: Analysing legal provisions in Iran. *Journal of Internet Banking and Commerce*, 21(1), 1-14.
- Hassan, K. H., Yusof, S. S. A., Mokhtar, M. F. M., & Khalid, K. A. T. (2016). The use of technology in the transformation of business dispute resolution, *European Journal of Law and Economics*, 42, 369-381
- Laws of Brunei. (2008). Electronic Transactions Act (ETA). Retrieved from [http://www.agc.gov.bn/AGC%20Images/LOB/pdf/Electronic%20Transactions%20\(chp.196\).pdf](http://www.agc.gov.bn/AGC%20Images/LOB/pdf/Electronic%20Transactions%20(chp.196).pdf)

- Linh, N. D. (2006). The Electronic Signature Law in Vietnam: A Note. *Digital Evidence and Electronic Signature Law Review*. Retrieved from <http://sas-space.sas.ac.uk/5487/1/1780-2425-1-SM.pdf>.
- Nakorn, P. N. Electronic transactions law in Thailand. *Thammasat Review*, 7(1), 52-85.
- The Union of Myanmar. (2004). The Electronic Transactions Law. The State Peace and Development Council Law No. 5/2004. Retrieved from <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan041197.pdf> on 12 November 2016.
- UNCITRAL. (1996). UNCITRAL Model Law on Electronic Commerce. Retrieved from http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html
- United Nations Conference on Trade and Development- UNCTAD. (2013). *Review of E-Commerce Legislation Harmonization in Association of Southeast Asian Nations*. New York and Geneva: United Nations.
- Wong, J. (2013). On Legal Harmonisation within ASEAN. *Singapore Law Review*. Retrieved from <http://www.singaporelawreview.org/2013/10/on-legal-harmonisation-within-asean/>.

Case Laws:

- Integrated TranswarePte Ltd. v. Schenker Singapore (Pte) Ltd.* (30 March 2005), CLOUT Case 661. Retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V06/567/83/PDF/V0656783.pdf?> (11 January 2015)
- MCC Industrial Sales Corp. v. Ssangyong Corporation* (2007), CLOUT Case 818. Retrieved from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V08/579/62/PDF/V0857962.pdf?>(11 January 2015)
- Yam Kong Seng & Anor v. Yee Weng Kai*, [2014] 6 CLJ 285

URL:

- <http://www.laotradeportal.gov.la/>
http://www.commonlii.org/my/legis/consol_act/eca2006182/

Endnotes:

ⁱ Most of the traders use “Pro-Forma Invoice.” It is a kind of one page contract. It is a readily made and fit-for- -all-purpose type of contract. However, it is not an alternative to a well drafted contract/standard contract. The limited expression of terms and conditions may give rise to disputes between the parties. For example, if the governing law is absent in the proforma invoice, the law court or the arbitrator will have to apply the conflict of law principles to determine it, which may or may not be favourable for either of the parties. For this reason, it is advisable for the traders to avoid “Pro-Forma Invoice” contract and to prepare a standard contract with reasonably detailed terms and conditions. International Chamber of Commerce (ICC) has drafted sample contracts for various international commercial contracts. Parties may use them and customise them to your own needs. This will save them money, time and energy. For the sample contracts, see Fabio Bortolotti (2008). *Drafting and Negotiating International Commercial Contracts: A Practical Guide*. Paris: International Chamber of Commerce. pp. 207-358.