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*Ms Grace Xavier*

*Faculty of Law*

*University of Malaya*

*Kuala Lumpur*



**Asia-Europe Institute**  
University of Malaya



INTRODUCTION

ASEAN, the Association of South East Asian Nations, comprising Indonesia, Thailand, the Philippines, Malaysia, Brunei, Singapore, Vietnam, Laos and Cambodia, is rapidly advancing, there is a need for legal reforms that are designed to attract investment flows, and business, as well as the religious and cultural practices, which are factors that play an important role in the economic development of countries.

**INTEGRATION OF ASEAN CONTRACT LAWS - A FOCUS ON THE CONSTRUCTION INDUSTRY**

by

Grace Xavier  
Lecturer  
Faculty of Law  
University of Malaya

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## INTRODUCTION

ASEAN, the Association of Southeast Asian Nations comprising Singapore, Indonesia, Thailand, the Philippines, Malaysia, Brunei, Vietnam, Myanmar, Laos and Cambodia, is rapidly developing and making an impact in the economic world. To ensure that this development is enhanced, there is an urgent need to focus on the variety of the legal systems governing the nations, as well as the religious and cultural heritages, as these are factors that play an important part in the economic development of countries.

The area that needs immediate attention is legal reforms - there is almost an immediate need to appraise legal reforms that are designed to enhance cross-border investment flows, and particularly in the area of construction contracts, to encourage transparency in cross-border procurement and award of construction contracts. Transparency in the regulation of business by the government would serve to enhance investor confidence, and donor agencies such as the World Bank and the Asian Development Bank as well as the International Monetary Fund have required reforms as a factor for investor confidence. It cannot be denied that certainty on the legal aspects governing cross-border transactions is one of the main catalysts of trade. Having certainty and transparency, a nation can look forward to increased investor confidence, resulting in diverse business groups entering into trade in the ASEAN region. At the same time, another reason for the proposed legal reforms is to provide for dispute resolution methods which would clothe foreign investors with easier methods of dispute settlement in case of conflict and disputes.

This paper focusses on the need for uniform laws to govern construction contracts. There is no doubt that this area deserves special attention. Development of infrastructures and public utilities is an important and urgent issue for developing countries - and the ASEAN nations fall into this category. However, in order to finance development, investment capital is necessary and nations with low GDP would find it difficult to achieve satisfactory economic growth when they do not have the resources to finance development projects.



The last decade has seen a tremendous influx of international parties as players in the construction industry. In Malaysia, Germany, Japan and Korea, the construction and consultancy companies have been involved in the building of some of the major buildings and infrastructure projects<sup>1</sup>. Despite the economic slowdown in 1997, the construction industry has done very well, and its pick-up has been amazing. Priority is being given to projects that enhance the development of the country, and this scenario now prevails in Southeast Asia. Illustrations of how much infrastructure projects are being given priority can be seen by the construction of a triple-decker road project in south Jakarta, Indonesia; the Chongqing highway project in China; the Truong Son Expressway project in Vietnam; the Bakun Hydro-Electric Dam Project in Malaysia; and the proposed New Downtown of the 21<sup>st</sup> century in Singapore.<sup>2</sup>

The trend is moving towards making use of the rich potential of the Far East in order to provide for the modernisation of local industry and to boost economic development by promoting interactions with the countries of the Asia Pacific Region. In this regard, not only the Southeast Asian states are involved. Countries like Russia and Australia have also begun looking towards Southeast Asian countries as partners in the building and construction projects. For example, Russia has implemented large-scale and long-term co-operation projects in partnership with players in the Far East i.e. the development of oil and gas on the Sakhalin shelf, the exploitation of gas layers in Yakutia and in the province of Irkutsk, as well as the construction of a pipeline to supply gas to China and Korea. These are some of the projects undertaken under the concept of partnering between parties in Russia and the Far East. In the near future, it is possible that Russia's partners will constitute countries like China, the Republic of Korea and Japan. Australia's Queensland Rail (QR) has won a US\$534 million contract to design and build the 175-kilometre double electric rail link between Rawang and Ipoh.<sup>3</sup>

<sup>1</sup> Infrastructure development is a critical factor in enhancing the country to meet the competitiveness on a global scale. Therefore projects such as ports, highways, airports, power stations and factories cannot be shelved if the country is to press ahead in its economic growth.

<sup>2</sup> Address by Mr. Lim Hng Kiang, Minister for National Development, on "Opportunities in the Construction Industry: The Korea-Singapore Partnership". Sourced from website [http://www.mnd.gov.sg/speeches\\_nd1997\\_dated\\_131097.html](http://www.mnd.gov.sg/speeches_nd1997_dated_131097.html). Site accessed on 1 March 2001.

<sup>3</sup> Anderton, Tony, "Rail archives: A new golden age of rail", in Connections. Sourced from website <http://www.ausconnect.com/rail.html>. Site accessed on 1 March 2001 and was last modified on 7 December 2000. Anderton says that if the plan proceeds, the projects would begin in 2005 and end around 2010. The project would also involve Mitsui & Co. Ltd., from Japan. Mitsui would deliver the system works. According to Anderton, QR has also strong links with Singapore and Taiwan. It is projected that the Rawang-Ipoh project is the forerunner of



## EMERGENCE OF BUILD-OPERATE-TRANSFER PROJECTS (BOT PROJECTS)

Simultaneously, over the last decade, private investment in public projects has become popular and these projects are not restricted to single nations.<sup>4</sup> Referred to as PFI (Private Financing Initiatives) in the UK, private institutions have been invited to fund public projects. Although these projects have become popular, the amount of capital involved is large, and the process of recovery of loans is slow. In Malaysia, such projects are known as BOT projects or Build-Operate-Transfer projects.

The Build-Operate-Transfer (BOT) approach has played an important role in the growth of implementing of industrial and infrastructure projects in developing countries. The fundamental basis of BOT projects is the introduction of private sector investment into public sector projects. A private company is given a concession to finance, build and operate a facility that would normally be built and operated by the government. At the end of the concession period, the private company will return the ownership of the project to the government. The concession period is determined by the length of the time needed for the facility's revenue stream to pay off the company's debt and provide a reasonable rate of returns for the capital investment, effort expended and risk borne.

## THE FINANCIERS' CONCERNS

Banks and financial institutions are the major players in a construction project. Being the fund providers, they are naturally sensitive to events or circumstances that may have adverse effects in two aspects of any construction project: the timely completion of the project, or the future income stream of the project. Land laws play an important part as the bank or financing institution would want to know:

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the government's plan to prepare the trans-Asia rail network, which would link Singapore to Kunming in China via Seremban, Kuala Lumpur, Bangkok and Ho Chi Minh City.

<sup>4</sup> From 1993 till present, Vietnam has granted two investment licences to Malaysian Emac & Sadec and French Lyonnais des Eaux in water supply industry: Nguyean Thu Hiean "Project Financing a Solution to Private Infrastructures": sourced from <http://www.hcmueco.edu.vn/teptkt/english/2001/thang03/w7.htm>. Site accessed on 26 August 2001.



- What rights did the project company have over the land in which the project is proposed to be situated - possessory rights - proprietary rights?
- What are the conditions on the land - and how are those conditions enforced by the law of the land in which the project is situated?
- What was the law of the land in relation to interest payable on the loan?
- Were major provisions of the law governing financial institutions in the project country the same or at least largely similar to those of the funding country?

These are some of the concerns of financing institutions and need to be addressed quickly considering that BOT projects are necessary for assisting in the economic development. However, in 1995, the Asian Development Bank, recognising that most governments and public utilities in the Bank's developing member countries could not adequately meet present and future demand for infrastructure services through their own resources, agreed to assist member countries governments in formulating and negotiating BOT projects.<sup>5</sup>

### INADEQUACY OF LOCAL LAWS

It is now time to consider the sufficiency or inadequacy of local laws. It is probable that local or national contract laws, especially in relation to construction contracts may not be flexible to attract foreign investors and partners as participants in projects geared towards economic development, as the popularity of BOT projects grow. Aspects of cross-border transactions, especially concerning finance and service providers and those relating to the movement of trade and labour force across borders need to be harmonised.<sup>6</sup> Considering that the national laws are by their very nature limited in operation, and also that countries may or may not be governed by international uniform instruments, there is a growing need for harmonisation of laws – in

<sup>5</sup> "ADB Supports BOT Projects for Infrastructure Development", News Release No. 069/95, 27 July 1995: Sourced from <http://www.adb.org/Documents/News/1995/nr1995069.asp>. Site accessed on 26 August 2001.

<sup>6</sup> Uncertainty and fragmented pieces of contract legislation governing the various member states of the EU led Ole Lando in 1976 to the conclusion that Europe had to move beyond harmonisation in private international law. He founded the Commission on European Contract Law. The Commission's ultimate goal was to work out common principles of contract law for the member countries of the EU. And the goal was achieved in 1999 with the publication of the book on "Principles of European Contract Law" by Lando & Beale (eds).



particular, contract laws. A uniform contract code or rules would definitely serve to facilitate and encourage cross-boundary projects concerning economic development.

## OBJECTIVES OF HARMONISATION

- Establishment of uniformity and clarity - It is useful for the contracting parties to know the law that they are operating under. To know where they stand. Construction players would be much more comfortable if they knew whether the law was consistent and readily comprehensible.
- Assertion of political values - A clear and unified statement of the law will make a symbolic statement to the various nations involved, i.e. if the countries of ASEAN were to formulate a set of rules, this would be an important political symbol for ASEAN.
- Improvement in the quality of laws - Unifying the laws of member countries may be the only practical way of achieving a desirable change in the separate laws that govern each country.<sup>7</sup>
- Bridge the fundamental gap between the civil law and the common law of contracts for use within countries with the two legal systems - In Europe, for instance, there is a dire need for a conciliation of a number of different European legal assumptions and practices regarding contracts entered into by the countries under the different legal systems. The legal systems of most EU countries are civil law systems. However the United Kingdom, i.e. England, Wales, and Northern Ireland operate under the common law system. Scotland operates on its own legal system, which is a mixture of common, civil, and indigenous legal principles. Denmark, Sweden, and Finland operate under a separate legal system referred to as the "Scandinavian Legal System". Harmonisation would set the scene for a uniform set of laws

<sup>7</sup> Brunei, Malaysia and Singapore, for instance, are governed by common law principles derived from the UK common law. Cambodia, on the other hand, is governed by communist practices and principles derived from the French civil law system. Similarly, Vietnam is governed by civil law "Doi Moi", based on the French civil law system and communist legal theories. Myanmar is a melange of customary personal family law practices, English common law and shards of socialist legislation. Thailand operates under a civil law system based on the European Union civil law principles, while the Philippines operates on a combination of Continental civil law and Anglo-American common law system.

to be formulated, rather than to have uncertainty in the law while waiting for each case to be decided according to the laws of a particular state or nation.<sup>8</sup>

- Dangers of having different contract laws leading to distortions of competition due to the divergent rules that are found in such laws - Such distortions would deter businessmen from entering into cross-border transactions and thus would prevent transnational construction projects from being carried out. Sharing of existing technology and dissemination of new technologies would thus be stultified.

### THE WAY TOWARDS HARMONISATION OF ASEAN LAWS

ASEAN countries should move towards harmonising the ASEAN countries' laws or legal frameworks, beginning with the areas where there was already a common agenda, i.e. in the areas of trade and economic cooperation. Legal cooperation had to be formulated in these two areas as these were the main focus of developing countries. It is hoped that the prevailing concerns and inadequacies of individual legal systems in cross-border transactions would be the catalyst for setting the machinery in motion for a set of uniform contract laws or codified rules governing the ASEAN countries. The proposal is not by any means, a new one. It has been discussed from as early as 1984. It was further discussed in 1999 at the 4th ASEAN Law Ministers' Meeting (ALMM) under the theme "Towards Mutual Understanding of ASEAN Legal Systems" where the ALMM recognised a dire need to close the differences in the legal systems of ASEAN countries and to provide a framework that would assist and enhance regional cooperation. The call was made by the Singapore Prime Minister that the main platform to bond ASEAN was regional economic cooperation and this could be adequately achieved only by a cohesion of the legal systems and the legal fraternity who could and should collectively facilitate the broader efforts of ASEAN cooperation, without attempting to contrive a convergence of ASEAN legal systems.

<sup>8</sup> Referring to the footnote above, it can be seen that the variety of legal systems may result in confused and uncertain decisions if such were to be the case.



In addressing the subject of harmonisation in relation to laws, especially that of contract law, it is essential to recognise that it is not an easy task to promulgate a successful contract law that is acceptable to all nations in a particular defined geographical location. An attempt by any single nation to regulate or control the activities of people who are not residents or citizens will be viewed with great mistrust and suspicion. When dealing with the subject of global harmonisation of contract law, cultural heritage and religious considerations require attention.

ASEAN harmonisation, of the law and legal systems, may be a slow, time-consuming and laborious exercise but there will be an ultimate achievement. In this regard, the example of the European Union (EU) can be cited. The EU finally, on 1 January 1999, achieved its long struggle to introduce a common currency to replace the national currencies of member states in the European Union. A single currency, the Euro, was introduced in most member states of the EU. The impetus of the introduction is great. Any company that trades with a company in a member state will now trade using the new currency. A single monetary policy now operates across the EU zone. It is therefore not an impossibility. As a starting point, and as encouragement to drive us towards the goal of harmonisation, it is proposed that the European efforts in formulating uniform and common principles of law i.e. the UNIDROIT principles and the Principles of European Law governing commercial contracts may be used as role models for the ASEAN nations venture.

### **THE PRINCIPLES OF EUROPEAN CONTRACT LAW (PECL)**

The Lando-Commission<sup>9</sup> has painstakingly worked its way towards harmonisation of contract law in Europe by formulating the Principles of European Contract Law (PECL).<sup>10</sup> The force behind the Lando-Commission's efforts to come up with a uniform contract code was the dire need to formulate a set of mutually agreed legal principles applicable to international contracts, especially those in relation to sale and purchase of goods and services and in relation to the construction industry. There are numerous contracts executed involving performance by parties

<sup>9</sup> The Lando-Commission takes its name from the Chairman, Professor Lando from Copenhagen Business School. The official name of the Lando-Commission is "Commission on European Contract Law" (CECL).

<sup>10</sup> Lando, O, & Beale, H, (eds), *The Principles of European Contract Law, Part 1. Performance, Non-Performance and Remedies*, Nijhoff, Dordrecht 1995.



from more than one country and these are increasing in number. However, at the moment, the national laws of each country involved in the project govern legal issues. But when international parties are involved, there will be issues that will be outside the scope and extent of national laws and this is where special contractual law governing international contracts becomes necessary. National laws would not be adequate to address complex issues outside the realm of the jurisdictional boundaries.

Uniform contract legislation cannot be based on any one national law but ought to consider the various provisions governing contractual transactions in various jurisdictions or at least the laws prevailing in the particular jurisdictions that are being considered for harmonisation. For example, if an Asian Uniform Contract Code is being proposed, then the contract laws of all the countries that make up Asia must be examined. Similarly if an ASEAN legislation is being considered. Not only must the said law which is applicable to international contracts be universally applicable, it must also be uniformly interpreted and applied to ensure that the real meaning and efficacy of such a law does not vary from jurisdiction to jurisdiction. Several efforts have been made to formulate uniform legal rules for international contracts in the name of harmonisation of law.

One such effort was to formally enact rules and make them legally binding on signatory sovereign states with regards to contracts covered under a multilateral convention. This was done pursuant to the United Nations Convention on Contracts for the International Sale of Goods ("CISG") and the related United Nations Convention on the Limitation Period in the International Sale of Goods and Its 1980 Protocol.

The second effort was to informally formulate rules called virtual "Restatements of the Law" as have developed in the United States. There is no legal obligation on the part of any party or institution to adopt or implement such rules or to accept them in toto. Such rules would be adopted where appropriate. Currently there are two major sets of these forms of rules: the



UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles") and the Principles of European Contract Law (PECL).<sup>11</sup>

The purposes of the PECL<sup>12</sup> were to serve as:

- the basis for the later formulation of a Common European Code of Private Law;
- a legal guide for the EU, EU organs, and EU member states in the drafting of their legislation and regulations and in regulating their own conduct;
- the basis for the formulation of EU member states and implicitly as well that of those prospective EU member states future codification or recodification of contract law;
- the law applied by tribunals to EU contracts; and
- the law voluntarily chosen as the applicable law for contracts by and between European parties.

Part I of the PECL was concluded in 1995 and this part dealt with the issue of performance and non-performance of contractual obligations and remedies and was made up of 4 chapters. In 1998, another 5 chapters were added, and the completed PECL covered virtually all aspects of contract law. Briefly, the PECL covers the following:

- Chapter 1 contains the general provisions, the application of the Principles, the exclusion or modification of the Principles, usages and practices, interpretation and supplementation, meaning of terms, good faith and fair dealing, duty to co-operate, reasonableness, imputed knowledge and intention and notice.

<sup>11</sup> Professor Ole Lando first proposed the PECL in 1976. He proposed the drafting of a European Uniform Commercial Code or a European Restatement of Contract Law. To carry out this proposal, the Commission on European Contract Law - also known as the "Lando Commission" - was established in 1982 with funding from the European Union ("EU") Commission. The Lando Commission was composed of academics and legal practitioners, all of whom were acting in their personal capacity and not as delegates from European national governments. Membership was restricted to lawyers from member states of the EU but drew on legal sources (such as the American Restatements of the Law and the CISG) from outside Europe in formulating the European Principles: "European Principles of Contract Law", International Contract Advisor, Vol. 4, No. 1 1998. Sourced from website [http://www.ljx.com/practice/internat/euro\\_k.html](http://www.ljx.com/practice/internat/euro_k.html). Site accessed on 2 March 2001.

<sup>12</sup> The PECL would govern domestic European contracts as well as trans-EU international contracts and all "European" contracts, including merchant consumer contracts as well as contracts between commercial parties.



- Chapter 2 covers terms and performance of the contract, determination of price or other contractual terms, unilateral determination by a party, determination by a third party, reference to a non-existent factor, quality, place and time performance, early performance, contract for an indefinite period, form and currency of payment, appropriation of performance, property not accepted, money not accepted, stipulation in favour of a third party, performance by a third person, and change of circumstances.
- Chapter 3 addresses the issues of non-performance and remedies in general, remedies that are available, cumulation of remedies, fundamental non-performance cure by non-performing party, assurance of performance, notice fixing additional period for performance, performance entrusted to another, excuse due to an impediment and clause limiting or excluding liability.
- Chapter 4 deals with particular remedies for non-performance, right to performance, monetary and non-monetary obligations, non-monetary damages, damages not precluded, right to withhold performance, termination of the contract, where contract is to be performed in parts, notice of termination, anticipatory non-performance effects of termination in general, property reduced in value, recovery of money paid, recovery of property, recovery for performance that cannot be returned, price reduction, damages and interest, foreseeability, delay in payment of money, agreed payment for non-performance and currency by which damages are to be measured.
- CHAPTER 5 considers matters relating to interpretation, general rules of interpretation, relevant circumstances, contra proferentem rule, preference to negotiated terms, reference to contract as a whole, terms to be given (full) effect, linguistic discrepancies.
- CHAPTER 6 deals with contents and effects of terms in a contract; statements giving rise to contractual obligation, implied obligations, simulation, determination of price, unilateral determination by a party, determination by a third person, reference to a non-existent factor, quality of performance, contract for an indefinite period, stipulation in favour of a third party, change of circumstances.
- CHAPTER 7 focusses on performance and place of performance of contracts, time of performance, early performance, order of performance, alternative performance,



performance by a third person, form of payment, currency of payment, appropriation of performance, property not accepted, money not accepted, costs of performance.

- CHAPTER 8 however, discusses matters in relation to non-performance and remedies in general: remedies available, cumulation of remedies, fundamental non-performance, cure by non-performing party, assurance of performance, notice fixing additional period for performance, performance entrusted to another, excuse due to an impediment, clause limiting or excluding remedies.
- CHAPTER 9 lays down the particular remedies for non-performance. Section 1 - right to performance, monetary obligations, non-monetary obligations, damages not precluded. Section 2 - right to withhold performance, right to withhold performance. Section 3 - termination of the contract, right to terminate the contract, contract to be performed in parts, notice of termination, anticipatory non-performance, effects of termination in general, property reduced in value, recovery of money paid, recovery of property, recovery for performance that cannot be returned. Section 4 - price reduction, right to reduce price. Section 5 - damages and interest, right to damages, general measure of damages, foreseeability, loss attributable to aggrieved party, reduction of loss, substitute transaction, current price, delay in payment of money, agreed payment for non-performance, currency by which damages to be measured.

## SCOPE OF THE PECL

- The PECL are substantially broader in scope than the UNIDROIT Principles, for example, the PECL apply to both domestic contracts and merchant-consumer contracts.
- The PECL are designed to operate within a single economic market, i.e. member states of the EU.
- The EU's single currency market blurs any distinction between intra-EU "international" contracts and domestic contracts and provides a high degree of harmonisation of the EU legal regimes for consumer and other commercial contract transactions.

## HOW DO WE GO ABOUT IT?

### (a) Statutory Instruments

The Treaty of Rome 1957, Merger Treaty of 1967, The European Communities Act 1972, Treaty on European Union (Maastricht) 1993 and the Treaty of Amsterdam 1997 were all formulated with one objective in mind, to achieve uniformity of legislation for the member states of the European Union. The objective was fulfilled under the following methods. The provisions of the founding treaties were implemented upon by the national courts of the member states by way of instruments such as Regulations, Directives or Orders (Rules). They were applicable to cases involving all parties, including individuals against other individuals, without the need for the member state to have taken any steps to make those Rules part of national law.<sup>13</sup> The strength of the European Communities Act 1972 can be seen in that it must take priority over national law in case of conflict.

### (b) Working Committees

The PECL were drawn up by an independent body of experts from each member state of the EU. The project was supported by the European Commission and many other organisations. Drafting groups formulated the PECL rules using the "black-letter" rules. However, principles of good faith and mutual trust and co-operation formed the fundamental guidelines for drawing up the principles.

## CONCLUSION

The road to harmonisation of laws, in particular contract laws, does not promise to be one of plain sailing. Contract law is a private law and governs private obligations of individual parties, corporations and state entities. Whatever the law is governing the contract, the prevailing issue

<sup>13</sup> "Directly enforceable Community rights are part of the legal heritage of every citizen of a member state of the EEC. They arise from the Treaty itself and not from any judgment of the ECJ declaring their existence. Such rights are automatically available and must be given unrestricted retroactive effect. The persons entitled to the enjoyment of such rights are entitled to direct and immediate protection against possible infringement of them. The duty to provide such protection rests with the national court...Community law overrides English law and either empowers



is that both parties have entered into the contract based on mutual trust and co-operation. However, parties may need certain information or guidelines. The proposed harmonisation of ASEAN laws may provide reference material for parties entering into cross-border contracts. To maintain the confidence of the contracting parties, the proposed harmonised contractual laws must be formulated on the basis of mutual trust and in such a way so as not to be in favour of any one party or one nation. The laws must be such that they can be applied uniformly and be acceptable in all the jurisdictions they are meant to cover. One way is to ensure that morality is inbuilt into the provisions that are proposed. Law and morality are inseparable although not all persons would agree. But the fact of good faith, being recognised almost universally, and being present in almost all jurisdictions either in an express clause or as an implied term, supports the principle that law and morality exist hand-in-glove. The duty of good faith is a very important tool in establishing a uniform body of international contract law. It is a tool that demands respect and adherence. As stated by Honnold:

*The general concept that the draft Convention should contain provisions to good faith and fair dealing was supported by a majority of the representatives. It was pointed out that such principles are expressly stated in many national laws and codes and it was thus appropriate that similar provisions be found in international conventions. It was also pointed out that such provisions on good faith and fair dealing contained in national laws had in some legal systems become useful regulators of commercial conduct.<sup>14</sup>*

Grace Xavier  
3 September 2001  
Kuala Lumpur

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or obliges and English court to make an interim order protecting the putative rights...: as per Lord Bridge of Harwich in *Factortame Ltd and Others v Secretary of State for Transport* [1989] 2 WLR 99.  
<sup>14</sup> Honnold, John O, *Documentary History of the Uniform Law for International Sales* (1989), at 298. Sourced from website <http://www.cisg.law.pace.edu/cisg/biblio/powers.html>. Site accessed on 3 March 2001.

