

**ASEAN LAW ASSOCIATION
12TH GENERAL ASSEMBLY
Makati City, Metro Manila
26 - 28 February 2015**

**REPORT OF THE RAPPORTEUR GENERAL
(28 February 2015)**

1. The 12th General Assembly of the ASEAN Law Association (ALA) was held from 26 February to 28 February 2015 at the Shangri-La Makati Hotel in Makati City, Philippines. The General Assembly was well attended by delegates from Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. More than 353 delegates and accompanying persons registered for the event.

2. At the Opening Ceremony and Plenary Session on 26 February 2015, the General Assembly was addressed by the President of the ALA and Chief Justice of Indonesia, Hon. Dr. Hatta Ali, and by the ALA Secretary General, Hon. Swandy Halim. Introductory speeches and remarks of the Heads of Delegations followed.

3. ALA Past Presidents, Hon. Justice Sansern Kraichitti, Hon. TPB Menon and Hon. Justice Chao Hick Tin, along with the President of ALA Philippines and the Head of the Philippine Delegation, Atty. Avelino V. Cruz, gave out the "Heroes of ALA" Awards to those without whom ALA would not be where it is now, namely:

Indonesia

Chief Justice Purwoto S. Gandasubrata
Former ALA President

Dr. Teuku Mohammed Radhie
Former ALA Secretary General

Prof. Dr. Komar Kantaatmadja
Former ALA Secretary General

Malaysia

Lord President Tun Mohamed Suffian Mohd Hashim
Former ALA President

Justice Harun Mahmud Hashim
Former Chairman of ALA Malaysia

Philippines

Justice Felix Antonio
First Chairman of the Philippine National Committee

Chief Just Marcelo B. Fernan
Former ALA President

Atty. Isidro J. Perez
Former Chairman of the Philippine National Committee

Atty. Jose F.S. Bengzon, Jr.
ALA Governing Council member and Chief Organizer of the ALA
Business Law Committee

Singapore

Nathan Isaac
Founding Member, ALA Singapore

The awardees' respective families and relatives received the "Heroes of ALA" Award.

4. Following the awarding ceremony to the "Heroes of ALA", Philippine Chief Justice, Ma. Lourdes P.A. Sereno, gave her keynote address. In her address to the ALA General Assembly, Chief Justice Sereno emphasized the importance of ALA as the organizational framework of cooperation in a region with so much diversity. She mentioned that, in a borderless future, ALA must take the initiative to prevent discord through the setting of ground rules on how to achieve a peaceful integration in the political, economic and socio-cultural areas. Chief Justice Sereno stressed that the RULE OF LAW – the observance of rules, rather than the unwarranted exercise of discretion – is key to the creation of the single market that the ASEAN Economic Community Blueprint desires. And, the duty to enforce the RULE OF LAW falls on the shoulders of the various judiciaries of all the member countries, which must transform from a very domestic or localized mindset to an international one so as to have a mutual understanding of the various judicial systems. Towards this end, Chief Justice Sereno disclosed that the Chief Justices of the ASEAN have met and agreed to take certain steps – the use of an internet portal (for flow and exchange of information), the conduct of judicial education and training opportunities, the encouragement of the use of technology in case management and the conduct of a study on the means to improve efficiencies in the service of civil processes. Finally, noting that the role of ALA is to be a catalyst of change, Chief Justice Sereno concluded that the

Philippines is committed to the ASEAN and to ALA and that, with greater cooperation based on the RULE OF LAW, keeping in mind the constitutional role of the judiciary, we can increase the prosperity of each member state and of the entire ASEAN region.

5. Six (6) workshops were consecutively held on topics relevant to the General Assembly's theme, "Sharing Prosperity at the Crossroads of ASEAN Integration: Legal Challenges". Member-countries were represented by their respective paper writers and/or speakers in these workshops (*Please see attached ANNEX A for the list of chairpersons, paper writers & speakers*). Summaries of the matters discussed and debated in each of the workshops are indicated below:

a. **WORKSHOP 1 (LEGAL PROFESSION) dealt with the topic entitled, *"Cross-border practice of law in the ASEAN: Its effect on ASEAN Economic Integration; promoting synergy and increasing competitiveness of ASEAN"***

All speakers unanimously agreed that liberalization of the legal profession (so as to allow lawyers to practice across all members of the ASEAN) is not only inevitable in view of increasing globalization but, more importantly, desirable. The common view is that allowing cross-border practice or trans-national legal service, in one way or another, would not just benefit the clients and the lawyers but also the member States. It was observed, however, that there is great disparity across the members of the ASEAN insofar as the practice of foreign lawyers within their jurisdictions is concerned – some countries don't allow foreign lawyers in any capacity while others allow them to practice, albeit subject to some conditions. Challenges to the liberalization of the legal profession (and the allowance of cross-border practice) across the ASEAN were acknowledged – such the diversity in legal systems, the difficulty in regulation of trans-national legal service and the legal and/or constitutional impediments in certain countries. A comparison was made between the available models for liberalization in the ASEAN and the experience of the European Union (EU) on the matter. It was noted that the EU experience might be considered in determining the most appropriate manner to proceed with the liberalization of the legal profession across the ASEAN. Lastly, each member State explained the efforts that were being taken to allow trans-national legal service.

POINTS FOR CONSIDERATION BY THE STANDING COMMITTEES OR BY THE GOVERNING COUNCIL:

It was agreed that ALA, perhaps with the assistance of the member States' judiciatures, should take the lead in pushing for the liberalization of the legal profession. It was also suggested that the ALA Standing Committee on the "Legal Profession" have continuing dialogue on the manner by which liberalization should be done and that an "evidence-based" study be done on the impact of the said liberalization.

- b. **WORKSHOP 2 (ALTERNATIVE DISPUTE RESOLUTION) dealt with the topic entitled, *"Strengthening ADR mechanisms for ASEAN integration including transparency issues in ICSID disputes and comparative study/table of ADR in ASEAN countries; ALA guidelines on best practices for enforcement of arbitral awards within the ASEAN"***

The speakers of the ADR workshop discussed a wide range of matters. There was an effective consensus that ADR was a more efficient, and more effective, means of resolving disputes than court litigation. As such, individually, member States were exerting efforts in promoting various ADR modes in their respective jurisdictions particularly arbitration. However, certain panelists mentioned that modes of ADR other than arbitration are underdeveloped including mediation. In addition, certain speakers raised specific concerns on matters that impact the effectiveness of ADR including particularly (i) the inconsistent manner by which national courts interpret the provisions of the New York Convention (and the UNCITRAL Model Law) particularly those relating to the exceptions to the recognition and enforcement of arbitral awards; (ii) the handling of arbitrator's "secret knowledge" (*i.e.*, specialist and expert knowledge possessed by the arbitrator by reason of his/her professional experience, education, independent research and/or study) and its possible adverse impact on the recognition and enforcement of arbitral awards under the New York Convention; (iii) the ethical implications of (as well as confidentiality issues arising from) the practice of third-party funding of arbitrations; (iv) the need for a mechanism to enforce mediated settlement agreements; and (v) the propriety and effectiveness of confidential investment arbitration in resolving disputes under Bilateral Investment Treaties (BITs).

POINTS FOR CONSIDERATION BY THE STANDING COMMITTEES OR BY THE GOVERNING COUNCIL:

The various speakers brought up the following points for the consideration of the ADR Standing Committee (and/or the ALA Governing Council):

First, the preparation of a regional instrument for ADR that would assist or guide national courts in their approach to arbitration, particularly their interpretation of the “public policy” exception to the recognition and/or enforcement of a foreign arbitral award under the New York Convention (and UNCITRAL Model Law) so that there would be a uniform “ASEAN public policy” against which arbitral awards are measured;

Second, the codification of ASEAN general standards and practical recommendations relating to the use of an arbitrator’s “secret knowledge” in an arbitration proceeding to ensure that there will be uniformity and consistency in arbitrators’ approaches on the matter as well as a consequent avoidance of the possibility that such “secret knowledge” would be used to refuse recognition and enforcement to arbitral awards;

Third, the conduct of a study on the implications and issues relating to, and arising from, the use of “third-party funding” in arbitration proceedings including possibly its regulation through a code of ethical guidelines thereon;

Fourth, the creation of regional system under the ASEAN for the recognition and enforcement of mediated settlement agreements (perhaps as consent awards under the New York Convention and UNCITRAL Model Law); and

Fifth, the need for, and the adoption of, an UNCITRAL Rule on Transparency in Investment Arbitration to ensure that the stakeholders in such a process are kept fully informed.

- c. **WORKSHOP 3 (INTERNATIONAL LAW), dealt with the topic entitled, “Mechanisms for multi-lateral legal cooperation in the ASEAN community; removal of regional problems standing in the path of integration such as environmental issues and enforcement of criminal judgments”**

The speakers of the International Law workshop discussed a wide range of matters. There was an effective consensus on the fact that

ASEAN integration – in all its pillar communities (economic, political-security, and socio-cultural) – requires multilateral legal cooperation across the various member states through possible harmonization of laws. These cooperative efforts may be achieved in various areas including (i) cross-border and trans-national organized crimes; (ii) environmental concerns; (iii) free trade in services; (iv) navigation and communication at sea; (v) intellectual property and IP rights protection; and (vi) migrant workers. The speakers discussed various modes of multilateral cooperation (including entry into multilateral treaties, harmonization of laws, regional cooperation in enforcement of laws, joint capacity building as well as information sharing). The role of the judiciary, in providing well-reasoned and consistent decisions that would impact on actions of the legislative and executive branches of each government, was also discussed.

POINTS FOR CONSIDERATION BY THE STANDING COMMITTEES OR BY THE GOVERNING COUNCIL:

The various speakers brought up the following points for the consideration of the ADR International Law Committee (and/or the ALA Governing Council):

First, in addressing trans-national organized (and cross-border) crimes and in conjunction with the mutual legal assistance treaties, the adoption of a “joint investigative team” that would promote closer coordination and cooperation (as well as the sharing of knowledge and experience) among member States of the ASEAN;

Second, the need for harmonization of domestic laws especially in the areas of (a) environmental protection including the creation of specialized “environmental courts & tribunals” and the grant to such ECTs the power to issue interim measures of protection; and (b) protection of migrant workers particularly including mechanisms for their effective, efficient and expeditious access to justice; and

Third, in the harmonization of laws, the ALA should provide the ASEAN Secretariat with the requisite legal assistance.

In the course of the open forum, it was likewise suggested that, in relation to the ASEAN Agreement on Trans-Boundary Haze Pollution and each member State’s obligation to craft domestic legislation implementing the same, the ALA draft and formulate a MODEL LAW, which will serve as reference (or template) of the ASEAN countries in crating their own domestic legislation.

d. **WORKSHOP 4 (BUSINESS LAW), dealt with the topic entitled, “Harmonization of laws of ASEAN countries in commercial arbitration and free trade including ASEAN treaties on comprehensive investment protection”**

The speakers shared a common view that the ASEAN Comprehensive Investment Agreement (ACIA) provides the backbone for free trade and the increase in foreign investments in each of the member States and in the region. However, the speakers shared concerns on the investment protection mechanisms available within each State and the need for an assurance that investment disputes will be dealt with impartially. The investment protection tools under Bilateral Investment Treaties and International Investment Agreements (such as “MFN” clauses and anti-discrimination provisions) as well as the effectiveness of investment arbitration as the dispute resolution mechanism (when other modes such as mediation and negotiation are likewise available), were also raised. Issues on corporate governance, ease of doing business, transparency, corruption, and cross-border insolvency were also discussed. Some speakers expressed concern about certain circumstances that impede the effective implementation of the ACIA including the availability of reservations to the ACIA commitment (which reservations are primarily protectionist in nature) and the lack of a uniform approach to double taxation and transfer pricing issues.

POINTS FOR CONSIDERATION BY THE STANDING COMMITTEES OR BY THE GOVERNING COUNCIL:

The following points were raised for consideration.

First, the creation of a working group consisting of representatives from each member State to carefully study the requirement of investment (and investor) protection especially in the areas of corporate governance, cross-border insolvency and access to justice. It is suggested that the working group conduct extensive research into the member States’ legal systems particularly in the area of corporate governance to look at similarities and differences in compliance, governance and legal framework issues.

Second, the adoption of a common approach in the ASEAN on, and the possible harmonization of laws relating to, double taxation and transfer pricing concerns.

Third, the introduction of the UNCITRAL Model on Cross-Border Insolvency as a reference by each member State in the crafting of

national laws on the matter.

- e. **WORKSHOP 5 (TRADE & INVESTMENT), dealt with the topic entitled, “Inputs for an ASEAN common position on trade & investment dispute under the WTO rules and procedure”**

The speakers all agreed that an efficient and effective dispute resolution mechanism for investment disputes is essential for a successful integration of the ASEAN and for increased investments in the region. The speakers also discussed the various challenges raised by certain dispute resolution mechanisms – particularly investor-state arbitration – including: (i) lack of a formal system of precedents in international investment dispute resolution systems, which result in inconsistent and divergent awards; (ii) evolving interpretations on some common provisions, *i.e.* “fair and equitable treatment”; (iii) the calculated amount of compensation in an investor-State arbitration award can be staggering, particularly for a developing country; (iv) the concerns about transparency and legitimacy in the selection of arbitrators; and (v) the possibility for court intervention in the annulment or setting aside of arbitral awards.

POINTS FOR CONSIDERATION BY THE STANDING COMMITTEES OR BY THE GOVERNING COUNCIL:

The following points were raised for consideration.

First, it was suggested that, to render all lawyers familiar with the available dispute settlement mechanisms, ALA should link its website with the ASEAN Secretariat website to share information about ASEAN Community, ASEAN treaties, agreements and their implementing laws and regulations;

Second, in addition, ALA should work closely with ASEAN Secretary General and the Secretariat in organizing joint seminars or workshops to promote better understanding and build up capacity for its members to use investor-state dispute settlement mechanisms in the implementation of ASEAN economic agreements with technical support from UNCTAD, WTO and ITC;

Third, ALA should take an active role in promoting networking and cooperation among its members from the judiciaries, parliaments, governments, law firms and law faculties in sharing views and experiences on the enactment of related laws and regulations, and on the problems from the use of investor-state dispute settlement mechanisms.

Fourth, it was suggested that members of ALA emphasize (and educate themselves on modes of) dispute avoidance. It was recommended that emphasis should be made not on dispute settlement but on (i) cooperation, (ii) complementation and (iii) competition, which would reduce costs and thereby avoid disputes.

Fifth, it was suggested that BITs should be reviewed and there must be an improvement in the clarity and transparency in ASEAN investment laws, which ALA can assist in surveying, as well as a continual improvement of infrastructure, human development and rule of law.

- f. **WORKSHOP 6 (LEGAL EDUCATION)**, dealt with the topic entitled, *“Legal Education in ASEAN countries including conflicts of law issue courses relating to ASEAN integration in law school curriculum, exchange and research programs among legal experts”*

The speakers shared the common view that, in the root of ASEAN integration, is harmonized (and integrated) ASEAN legal education. The speakers shared their views on the manner by which this may be achieved such as (i) the use of enhanced e-books (i.e., electronic books with video and audio components); (ii) the identification of areas of shared values and principles such as environmental and commercial law, which may be the starting point for harmonized laws and consistent judicial interpretation thereof across the member States and, consequently, harmonized education; (iii) the requirement for a course on ASEAN Law or perhaps the establishment of an ASEAN Law University; and (iv) the use of technology in the delivery of an integrated ASEAN education (such as modular online courses). Challenges to an integrated ASEAN legal education were also identified.

POINTS FOR CONSIDERATION BY THE STANDING COMMITTEES OR BY THE GOVERNING COUNCIL:

The following points were raised for consideration.

First, the updating of the ALA website’s e-book content to allow easy access to ALA members to information;

Second, ALA should consider providing modular online courses on ASEAN legal systems or organizing 5-7 day academic programs on the matter (where speakers from the ALA countries are tapped);

Third, to address concerns about lack of resources, the creation of an ALA Professorial Chair.

6. In addition to the various workshops, the General Assembly was honored to have two (2) luncheon speakers (on 26 and 27 February 2015) – that is, Retired Chief Justice of the Supreme Court Artemio Panganiban (“Retired Chief Justice Panganiban”) and incumbent Senate President Hon. Franklin M. Drilon. (“Senate President Drilon”). Retired Chief Justice Panganiban spoke on unleashing the entrepreneurial ingenuity to achieve liberty and prosperity while Senate President Drilon discussed the Philippine legislative efforts at complying with its obligations towards ASEAN integration.

7. All workshops were enjoyed and actively participated by the delegates and other participants. The academic program of the General Assembly was closed at 6:00 p.m. of 27 February 2015.

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RAPPORTEUR GENERAL