RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS IN THE ASEAN REGION*

This paper argues for an Asean convention to streamline the enforcement and recognition of foreign judgments within the region. Presently, the countries within Asean have different rules relating to the enforcement and recognition of foreign judgments. To standardise these different procedures, the author suggests that an Asean convention, modelled generally after the 1968 Brussels Convention and the 1971 Hague Conventions, be established. On arbitral awards, the author believes that a convention would not be necessary if all the member states of Asean become signatories of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards.

I. INTRODUCTION

IN 1978 the Agreement on Judicial Cooperation was signed between Indonesia and Thailand.[1] The treaty's preamble states that the agreement is signed in order to implement the provisions of the Declaration of Asean Concord on Judicial Cooperation.[2] It has been many years since the declaration of the Asean Concord. It would be proper if we once again consider the necessity of closer judicial cooperation in civil and commercial matters within Asean. Thus, the topic for deliberation as Asean lawyers, *i.e.* the recognition and enforcement of foreign judgments and arbitral awards among Asean countries, is a well chosen one.

The above agreement on judicial cooperation between Indonesia and Thailand was intended to serve as a model, and a start for further and closer cooperation in the judicial field among Asean member states.[3] It was hoped by the promoters that the other Asean countries will follow suit. This simple cooperation includes serving judicial documents and

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1 For the text and commentary of this Agreement see S. Gautama *Indonesia and Konvensi2 Hukum Perdata Internasional* (Indonesia and Private International Law Conventions) Alumni Bandung, (2nd Printing 1983), pp 49, *et seq.* Bab I, *Persetujuan Hukum Perdata Internasional antara Republik Indonesia dan Kerajaan Thailand mengenai kerjasama dibidang Peradilan dalam ranka Asean.* (The Private International Treaty between the Republic of Indonesia and the Kingdom of Thailand on Judicial Cooperation in the framework of Asean).

2 Hereafter the Asean Concord.

3 Professor Dr. Mochtar Kusuma Atmadja, at that time Minister of Justice for the Republic of Indonesia has advised the members of his legal team to set up to prepare this bilateral treaty, that the other Asean member states showed no interest for such a judicial cooperation Agreement.

obtaining evidence in civil and commercial matters. Ideally it should also recognise and enforce court judgments on the basis of reciprocity within the Asean countries.

The judicial cooperation should not only be limited to procedural matters as in rendering assistance in serving judicial documents and taking of evidence, but also cover cooperation concerning more substantive matters as recognizing and enforcing court judgments and arbitral awards. By doing so, the ideals of judicial cooperation as set forth in the Asean Concord will become a living reality.

II. The Different Approaches Within Asean

There is thus, a clear need for a special Asean convention for the reciprocal recognition and enforcement of judicial decisions among its member states. To begin with, it would be proper to survey more closely the approaches of the different legal systems within Asean towards recognition and enforcement of foreign judgments and arbitral awards.

The different approaches have been clearly elaborated by Dr Bradford A Caffrey in a thorough study entitled, "International jurisdiction and the recognition and enforcement of foreign judgments in the LAWASIA Region: A Comparative study of the Laws of Eleven Asean countries inter-se and with the E.E.C. Countries".[4]

The approaches within Asean may be classified as: (1) the English method, (2) the appeal method, and (3) the evidentiary method. The following discussion on the different approaches will be based on the countries within Asean.

(1) *Indonesia*

Indonesia together with Thailand[5] operates on the evidentiary method.

It should be pointed out that Indonesia belongs to the group of countries which do not enforce foreign judgments automatically. All claims must be tried anew. The case should be brought again before the Indonesian courts. The only exception is with regard to foreign decisions concerning general average (*avery grosse*) in maritime transport matters. Foreign judgments concerning the amounts to be contributed by Indonesian parties in general average claims could be directly enforced in Indonesia by Indonesian courts. This is done at the request of the judgment creditor. However, all other foreign judgments would have to be tried anew unless there are concluded execution treaties between Indonesia and the other foreign states. To date however, Indonesia has not signed

[4] Caffrey, BA. *Enforcement of Foreign Judgment,* (1985) CCH Australia Ltd. A study for LAWASIA.
[5] *Ibid.,* p.9.

any treaty, bilateral or multilateral, in this field. The principle of non-enforcement is explicitly regulated under Section 436 of the Indonesia Code on Civil Procedure (Burgerlijke Rechtsvordering), which reads as follows:

> "Except for the cases regulated by article 724 of the Commercial Code and other legal provisions, foreign court decisions cannot be enforced within the territory of Indonesia. The proceedings should be instituted and decided anew before the courts in Indonesia."

In the above exception, the foreign judgment will only be enforced after obtaining an *exquatur (fiat executie)* from the Court of First Instance of the territory within which the decision is to be enforced. The application for an *exquator* is made on a form prescribed by the rules.

In the procedure of submitting a request for an issuance of a *fiat executie,* the matter will not be investigated anew.

It is obvious from the writings of legal scholars and case laws[6] that foreign judgments cannot automatically be enforced within the territory of Indonesia.

However, this does not mean that a foreign judgment has no value at all. As a new case before the Indonesian court, the foreign judgment could be used as evidence of the plaintiff's rights. The foreign decision could at least be used as *prima facie* evidence.[7] This has been illustrated in the famous Bontamantel arrest by the Dutch Supreme Court in 1924.[8] A Dutch firm in the Hague started proceedings against a Mrs H.M. Platt, a British widow. Mr. Platt had bought, but not paid, a pink coat for his mistress, Madame Victor, during his internment in the Netherlands. The sum which the firm sought to recover was N.f. 40.000.

The Dutch instituted the claim in England. The English court rejected the claim on the grounds that the basis for the claim was an "immoral" transaction. The Dutch firm once again started recovery proceedings before the Court of First Instance and the High Court in the Hague. The plaintiff, however, did not succeed in both courts. Their Lordships rejected the claim in the first, as well as in the second instance. The courts reasoned that although a foreign judgment has the effect of *res judicata,* it is not

[6] See S. Gautama *Hukum Perdata Internasional Indonesia* (Indonesian Private International Law), (second edition, 1987) Alumni-Bandung, pp. 807 *et seq.,* and literature mentioned on p. 277 n. 142.
Riezler, Internationales Zivilprozessrecht und prozessuales Fremdenrecht (1949), pp. 509 *et seq,* Sperl, H., La reconnaissance et l'execution des judgements etrangers, 36 Recueil des Cours de l'Academic de droit international, (The Hague) (abbreviated "Rec") 1931, II 385 *et seq,* Petroud, J. Decisions judiciarese'trangeres, 5 Rep. 351 *et seq.* Supplement Judgement Etrangers (1934) 175 *et seq,* Gutteridge, H.C., 44 Rec. 1933, II (1 1 1-198), Martha Weser, Les Conflits (111-198), Martha Weser, Les conflicts de jurisdiction dans le cadre du Marche Commun - Difficulties et remedies, 48 RCDIP (1959) 613-659 (1960), 21-41, 151-172; 313-333.

[7] Caffrey, BA, *op. cit., supra,* n. 4, p. 194; "Begin van bewijs" article 1902 C.C.

[8] H.R. 14 November 1924, N.J. 1931, 890 Schultsz Arresten over International Privaatrecht no. 15.

correct to say that a foreign decision is totally worthless. Their Lordships further stated that a Dutch court is free to consider and evaluate the value of a foreign court decision since there are no written regulations on it. In evaluating, consideration should be given in the process to good faith and equality of the parties. In this case it was obvious that the plaintiff had voluntarily filed the suit and started proceedings against the widower of the deceased in the United Kingdom. In losing the case, it would not be right for the plaintiff to pursue the defendant's heirs in the Netherlands.

It should be mentioned that the above decision concerns money judgments. In cases where foreign decisions relate to the status of persons, the situation is somewhat different. Decisions in the field of family law are treated differently under case law, and are not regarded as coming within the wordings of article 436 of the Indonesian Code on Civil Procedure. This is similar to the Dutch article 431 of the Code on Civil Procedure. The Dutch article is based on the principle of concordancy.[9]

Two decisions demonstrate the issue of enforcing foreign decisions in respect of family law matters. These are the Dutch Supreme Court decisions of the "first" and the "second" Swiss child cases, (Heteerste Zwitserse kind and het tweede Zwitserse kind). The "first" Swiss child case, decided in 1931, is concerned with the personal status of a Swiss child and the question of the payment of alimony of a child whose mother is Swiss, and father is German. Swiss law was applied in this case; *i.e.* the child should be regarded as a natural child born out of the wedlock. This status of the child is also recognized in the Netherlands. However, the second part of the Swiss decision concerning payment of alimony for the upbringing of the child could not be enforced within the territory of the Netherlands as it was a condemnatory money judgment. The first part of the Swiss decision is recognized since it relates to personal status. The Supreme Court applied article 431 of the Regulation on Civil Procedure. This article requires a party who has obtained judgment from a non Dutch court to, if he wanted to enforce the judgment in the country, institute *fresh* proceedings before a competent Dutch Court, and to request for its finalization without being obligated to base his claim on the judgment already handed down by a foreign court. Therefore, an automatic enforcement of the foreign decision for payment of alimony would be regarded as contrary to article 431 of the Code on Civil Procedure.

In the 1938 "second" Swiss child decision of the Dutch Supreme Court,[10] it was decided that Dutch law should be applied in the case of an alimony payment for the Swiss child of a Dutch father. This decision was based on Article 344a of the Dutch Civil Code.[11] This judgment was *not a status* decision. It was regarded as a money payment judgment. Therefore the Dutch Court did not consider itself bound by the Swiss decision. The Dutch Court treated the matter as new, and thus did not

9 On the "Principle of Concordancy", see Sudargo Gautama, *International Encyclopedia of Comparative Law: National Report: Indonesia* (Tuebingen, Hague, Paris, New York), pp. 1-34.

10 H.R. 1 April 1938, N.J. 1938, 989, Schultsz Arresten over International Privaatrecht, no. 16.

11 Not appearing in the Indonesian Civil Code.

have to consider any part of the Swiss decision. It would appear that the Supreme Court is of the view that the Dutch court was in fact not bound by the decision of a foreign court which is not within the scope of personal status. The Supreme Court reasons:

(a) That the Appeal Court, by considering itself legally obligated to recognise and enforce a foreign decision has, in so doing, acted contrary to what is stated in article 431 Code on Civil Procedure;

(b) That this article does not exclude the competence of the Dutch court to consider every foreign decision while observing Dutch public policy;

(c) That by legislation, but for the exception[12] which did not appear in this case, the enforcement of foreign judgments in this country is prohibited.

In consequence, foreign cases should be tried anew before the Dutch courts. It is prohibited for a Dutch court to take measures to enforce a foreign judgment. It is also not permitted for a Dutch Court to issue condemnatory payment orders simply because a foreign court has done so, or to use the facts as basis for its decision because a foreign court has accepted those facts as being true.

In conclusion it could be said that the Dutch, as well as the Indonesian courts, are not bound by foreign decisions when it comes to money payment judgments. The judge is free to evaluate, on a case by case basis, whether and how far the foreign judgment will be valued. There are no written legal regulations which prescribe and bind the judge in this respect. Article 436 of the Indonesian Regulation on Civil Procedure relates only to condemnatory money payment judgments. Declaratory personal status judgments in the field of family law are not included. This is only recognition, and not enforcement, of the foreign decision. If a party voluntarily chooses a foreign judicial forum, they have expressed their willingness to be bound by that country's judicial decision. In that case the Indonesian court could give full credit to the foreign judgment.

It may be said that the foreign judgment, as has been pointed out by Caffrey,[13] is regarded merely as evidence of the debt. The position in Indonesia is generally that foreign judgments are not enforceable. The problem of what effect should be given, in Indonesia, to a foreign judgment is made rather simple by the general rule that foreign judgments are not entitled to enforcement. The principle of territoriality is upheld rather strictly. To give direct effect to a foreign judgment would be thought of as a violation of the sovereignty principle.

The basis for this direct rejection of enforceability of foreign condemnatory money judgments, as mentioned above, may be found in article

[12] The *"avery grosse"* decision referred to in art. 436 of Code of Civil Procedure.
[13] Caffrey, B.A., *op. cit., supra,* n. 4, pp.190 *et seq.*

436 of the Indonesian Code on Civil Procedure. This article follows closely the Dutch article 431, and it is based on the principle of concordance. Persons belonging to the categories of "Europeans" and "Foreign Orientals-Chinese" were required by article 436 to turn to the Raden van Justitie, the Netherlands Indies Daily Court. For the Europeans and the Foreign Orientals-Chinese, the imported Civil Codes (originally imported from the Netherlands, but basically derived from the French Code Civil) applied to them.[14] These Courts have since been abolished with the Japanese occupation, and were replaced by a "one Court" system for all inhabitants; *i.e.* the State Courts of Pengadilan Negeri, serving as District Courts, or the Courts of First Instance, for the whole territory of Indonesia.[15] The procedural regulations of the Pengadilan Negeri is found in the "Herziene Indonesisch Reglement" (Reglemen Indonesia yang diperbaiki).[16]

However, the Indonesian Courts still use the Indonesian Code on Civil Procedure when the H.I.R. is silent on the question of regulation and enforcement of foreign judgments. This is allowed under Section II of the Transitory Regulation of the 1945 Constitution, which states that laws in effect prior to Indonesia's independence, which are not replaced by new laws, continue to remain valid. This includes the provision stated in article 436 of the Code on Civil Procedure.

Thus, it may be said that foreign judgments are not enforceable in Indonesia except for matters covered by article 724 of the Indonesian Commercial Code, *i.e.* decisions in general average matters.

It should further be noted that Indonesian courts do give recognition and effect to foreign judgments of a declaratory or constitutive nature. Examples of this would include decisions concerning the validity or nullity of marriage, divorce, ownership of goods, and nullification of a contract. In these cases there is no execution needed, but rather, the establishment of rights and duties between the parties. Thus, as a rule, the Indonesian courts will recognize them. However, the matter rests with the Indonesian judge to decide. It could also be said that if the parties had agreed to submit to the jurisdiction of a foreign court (choice of jurisdiction), the resulting judgment will be recognized in Indonesia as a matter of contractual obligation. There will be no further review. However, the foreign judgment should not be regarded as being contrary to Indonesian public policy.

(2) *Thailand*

In Thailand there is no statutory provision concerning enforcement or recognition of foreign judgments. However, a foreign judgment may well

[14] See, S. Gautama and Robert N. Hornick, *An Introduction to Indonesian Law,* (1983), Bandung, pp. 4 *et. seq.*

[15] See, S. Gautama, National Report on Indonesia, The Commercial Laws of Indonesia, "The Digest of Commercial Laws of the world" Oceana Publications Inc., (Dobbs Ferry, New York) pp 4 *et seq* and in *International Encyclopaedia of Comparative Law, National Reports: Indonesia* vol. 1, *op. cit.* pp 1-32.

[16] State Gazette 1848 no. 57, or known as HIR.

be a sufficient ground for the winning party to obtain a Thai judgment favourable to him. He could produce an authenticated copy of the foreign judgment in order to obtain a new Thai judgment with a similar effect. If the losing party in the original foreign proceedings disputes the foreign judgment, the Thai court will then examine the merits of the case in order to establish the dispute anew.

(3) *Singapore, Malaysia, Brunei*

It may be said that in these countries, where the Anglo Saxon legal system prevails, the English method is adhered to. The courts regard foreign judgments as conclusive, and preclude an examination of its merits. This includes the foreign court's finding of fact and law.

The English method may be divided into two separate methods. The common law method and the legislative method.

In the first method, the English common law rules of enforcement is followed. This is based now on the obligation theory. Formerly it was based on the doctrine of comity, reciprocity, or vested rights. The obligation theory is now generally accepted, growing out of the vested rights theory. The theory was a good response to the needs of the commercial sector. Foreign judgments are given effect by another country because of motivations of self interest and economic expediency. If the nations want to become a part of the international community, and wish to promote international trade and commerce, they must look upon these foreign judgments as obligations that they as enforcing forums should give effect to; provided that they are in conformity with certain internal conditions. There must be a fair degree of cooperation between the nations so that their economies may prosper and grow.

One important consideration is that the businessman should be able, without undue delay, to recover his debts from defaulting foreign debtors. It is easy to understand why foreign judgments are regarded as giving effect to legal obligations, and why they are, subject to certain conditions, enforceable. There is a legal obligation to pay the sum called for in a foreign judgment handed down by a competent court of another jurisdiction.

The principle of *res judicata* forms a part of the obligation theory. Almost all legal systems in the world support the view that litigation has to stop somewhere. There must be an end. With *res judicata,* it is easy for a court to adopt the obligation theory as the basis of enforcing foreign judgments. Courts generally are, subject to certain conditions, willing to enforce these obligations.

Economic necessity and the demands of justice go hand in hand in compelling the courts to give effect to, and cooperate in enforcing foreign judgments.

Under the common law, enforcement based on the obligation theory is to be realised via a new action between the winning and the losing

party. However, this is not a new trial *"de novo"*. It is more an action on the judgment in the form of an application for summary judgment. It is based on the premise that the losing party in the original foreign proceeding has no defence.[17] Judgment on this application is signed automatically if the judgment debtor does not defend after a short time period. The reasoning on the merits of the foreign judgment is not re-examined. Furthermore, there is also no appeal on the matter.

The second method, the legislative method, is limited to those countries where the two English Acts, the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933, are adopted. It involves the registration of the foreign judgment with the enforcing court.[18] Upon registration, the foreign judgment becomes a judgment of the enforcing court. Enforcement is then available within a short period, unless the loosing party successfully challenges registration. There are however only limited grounds available for such a challenge.[19]

The above is a short outline of the prevailing methods used in the Asean countries which fall within the Anglo-Saxon common law system.[20]

(4) *The Philippines*

The Philippines may be regarded as using the appeal method. In this system, the foreign judgment is in principle enforceable. The grounds for refusing judgment seems to be modelled after the rules of the United States.

However, by accepting that clear mistakes of fact or law could also form a ground for refusing to enforce a foreign judgment, it could be said that a winning party must in effect "appeal" from his foreign judgment in order to secure its enforcement in the Philippines. Therefore, this method could be classified more as a non-enforcing rather than as an enforcing one.

II. Other Conventions as Models for Asean

A discussion of the main features of the European Economic Community[21] sponsored Brussels Convention[22] and the Hague Convention follows the brief survey of the different methods, within Asean, of recognition and enforcement of foreign judgments. It is hoped that these conventions will serve as models for an Asean convention on the same subject-matter.

17 See the Rules of Supreme Court, Singapore, 1970, 0.14.
18 *Ibid.* 0.67.
19 *Ibid.* 0.67 r.1.
20 There is not much material availablem, for the writer on the present legal system in Brunei; it is however, assumed that the legal system in Brunei is similar to the Anglo Saxon legal system.
21 Hereafter the EEC.
22 Hereafter the Brussels Convention.

(1) *The Brussels Convention*

The EEC countries have since 1968, at the threshold of regional cooperation, felt and realized the need for reciprocally recognizing and enforcing judgments. As a consequence, and following the Treaty of Rome (EEC Treaty of 25 March 1957), the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (known as the Brussels Convention) was signed on 27 September 1968. This convention came into force within the EEC on 1 February 1973.[23]

The regional cooperation among the EEC Countries is now a living reality. The main issues and contents of the successful Brussels Convention on reciprocal enforcement could also be used as a basis for similarly establishing an Asean convention on judicial cooperation.

(a) *The Brussels Convention And Asean*

The 1968 Brussels Convention directly distributes jurisdiction amongst the courts of its member states. It has been said that this convention is successful primarily because the jurisdictional issue of the respective courts has been clearly dealt with.[24] Whenever a court lacks jurisdiction on the basis of the convention, it generally abstains from hearing the case. On the other hand, whenever a court has assumed jurisdiction and issued a decision, the other courts of the member states are not allowed to review the original court's jurisdiction. The court generally abstains from hearing the case anew. This is to avoid "limping" decisions.[25] This belongs to the *"traite' double",* as opposed to the *"traite simple"* type of conventions. The last mentioned type of conventions are formally convened with the view to recognition and enforcement only, and they do not, as in the the case of the Brussels Convention, stress on jurisdictional matters. The writer believes that this type *of traite simple* convention should be the immediate goal of a proposed Asean convention on the recognition and enforcement of foreign judgments. A list of conditions which have to be met in order to obtain a binding effect in the other Asean states may be enumerated. The most important condition is that the original court should have proper jurisdiction. This is to be defined in the convention. Conventions of this type do not completely avoid "limping" decisions.

The courts of the state of origin could have another interpretation on the jurisdictional issue.

23 For the text of this Convention, see Appendix I in R. van Rooy & M.V. Polak, *Private International Law in the Netherlands,* a publication in cooperation with the T.M.C. Asser Instituut, The Hague, Kluwer Puglishers. (Deventer, Antwerp, London, Frankfurt, Boston, New York 1986) pp. 247 *et seq.*

24 Caffrey, B.A., *op. cit., supra,* 4, pp. 289 *et seq.*

25 Compare this with the well known case of *de Ferrari* in Professor Kollewijn's Dies Speech, Jakarta Law School 1929: *Ontaarding van het natitmalite its beginsel in her moderne internationaal privaatrecht* (Deviation of the nationality principle in modern private international law). Also elaborated in S. Gautama, *Huku Perdata Internasional Indonesia* (Indonesian Private International Law), Book III, Bandung (1986), pp 220 *et seq.*

The Brussels Convention presupposes a great deal of mutual confidence among the member states. Mutual trust should also be the case if Asean is to have a convention aimed at the reciprocal recognition and enforcement of judgments among the member states of Asean.

The Brussels Convention, in addition, establishes a special Court of Justice to ensure that the convention is uniformly interpreted and adhered to by its member states.

However, such a special court for Asean will, in my opinion, not be feasible for the time being.

(b) *The Scope of the Brussels Convention*

It is important to note that the Brussels Convention is limited to the recognition and enforcement of judgments in civil and commercial matters.

A proposed Asean convention should, in the opinion of the present writer, also be limited to civil and commercial matters only.[26] It should not cover disputes between a public body or administrative organ and an individual person, and also not include matters concerning customs, taxes and administration. Furthermore, it should not extend to family matters, particularly in respect of property between spouses.[27] These issues, falling under the notion of *"personeel statuut"* (or simple family law), according to article 16 of the Indonesian General Provisions of Law (Algemene Bepalingen van Wetgeving, State Gazette 1847 no. 23, abbreviated "A.B.), are not regarded as monetary judgments of civil and/or commercial kind. Also the making of wills, or questions related to succession are not regarded as falling under the Brussels convention.

Equally decisions on maintenance obligation between spouses after divorce, or with regarded to the relationship between parents and children under the Hague Convention on private international law do not come under the Brussels Convention. These matters are treated under separate conventions as, for instance:

(a) The Convention of 15 April 1958 on the Recognition and Enforcement of Maintenance Obligations Between Parent and Child;[28]

26 The art. 1(1) EEC Convention reads as follows: "This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend in particular, to revenue, customs or administrative matters".

27 Art. 1(2) EEC Convention reads as follows: "The Convention shall not apply to: 1. The status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; 2. Bankruptcy proceedings relations to the winding up of insolvent companies or other legal persons, judicial arrangements composition and analogies proceedings; 3. Social security; 4. Arbitration;

28 Convention du 15 avail 1958 concernment la reconnaissance et l'execution des decisions en matiere d'oblications alimentaires envers les enfants, Recueil des Conventions (1951-1988) no. IX.

(b) The Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;[29]

(c) The Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations;[30]

(d) The Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages;[31]

Bankruptcy and winding up of companies also do not fall within the scope of the Brussels Convention. With regard to recognition and enforcement of decisions in bankruptcy matters, there are two known theories in private international law: (a) universality principal - unite, universalite, extraterritorialite de la faillite;[32] and (b) the territoriality principle - pluralite de faillites, territorialite de la faillite.[33]

For followers of the universality principle a bankruptcy in state X, will be recognised automatically and enforced in state Y. A person declared a bankrupt in a certain state is also a bankrupt elsewhere in the world. On the other hand, for those who subscribe to the territoriality principle, a person declared a bankrupt in state X has also to be declared a bankrupt again by the court of state Y by a separate proceeding. Otherwise, he is only regarded as bankrupt within the territory of state X and not in state Y.

Indonesia adheres to the territoriality principle.[34] However, during the pre-independence period, bankruptcy decisions in the Netherlands are regarded as being automatically valid for persons residing within the Netherlands Indies, and vice versa.[35]

(c) *The Civil and Commercial Criteria*

It should be noted that it is the subject matter which should decide whether a decision falls under civil or commercial matters. This is of

29 Recueil des Conventions (1951-1988) no. XVIII;
30 Recueil des Conventions (1951-1988) no. XXIII;
31 Recueil dex Conventions (1951-1988) no. XXVI;
32 This principle is based on the "personal status" doctrine. Bankruptcy is regarded as personal status. Writers following this principle are: Von Savigny, in *Germany.* Nussbaum, Raape, *France:* Weiss, Bartin; *England,* Dicey, Cheshire, Wolff, *Netherlands;* Asser, Jutta, Mulder, Kosters-Dubbink p. 866. Also in Institut de Droit International, International Law Association, International Chamber of Commerce.
33 Bankruptcy is regarded as a court attachment with *executionary* force. Writers following this principle are in the *Netherlands.* Molengraaff, Kleintjes, Polak, Suyling, Cleveringa, Dorhout Mees, in *France:* Fillet, Niboyet, *Germany:* Von Bar; *Austria:* Waker, *Swiss,* Schnitzer.
34 See S. Gautama, *Hukum Perdata International Indonesia,* Indonesian Private International Law, book 8, 2nd ed. (1987) n. 815.
35 See Rechtbank Amsterdam 26-2-1957, N.J. (*Nederlandse Jurisprudence.* Dutch case law) 1957, 553, Kollewijn, R.D. in WPNR (*Weekhlad Privatrecht. Notariaat en Registratie.* Magazine for Private Law, Notary and Registration) 4532,4642, also in "Tien jaren rechtspraak international Privaatrecht (10 year case law on Private International Law), pp 462 and 463 et seq.

importance as there are no separate commercial courts in many countires, including Indonesia. There is usually only a one court system, deciding on civil as well as commercial matters.

As indicated, Indonesia does not have commercial courts.[36] *The Pengadilan Negeri* (State Courts) sits on civil as well as commercial matters. Perhaps it is worthwhile to note that according to article 1 of Indonesian Commercial Code (Wetboek van Koophandel, Kitab Undang2 Hukum Dagang),[37] the provisions of the Civil Code (Burgelijk Wetboek, Kitab Undang[2] Hukum Perdata)[38] are also applicable to civil law matters. Commercial law is consequently to be regarded as a part of the civil law.

Disputes between an administrative organ and a private person does not fall under the term civil and commercial matters.

Therefore administrative court decisions of the recently enacted Indonesian Pengadilan Tata Usaha Negara[39] will not be applicable within the meaning of civil and commercial matters.

(d) *No re-examination*

An important reature of the Brussels Convention is the important rule that the recognition and enforcement of the member state's judgment on civil and commercial matters is to be carried out without a re-examination of the jurisdiction or the merits of the case. (arts. 23 and 31). According to these provisions, judgments rendered in a member state shall be recognised and respectively enforced in the territory of the other member states. The court, where recognition or enforcement is asked, should not re-examine the case. The court rendering the original judgment has already done the examination.[40]

Should a similar convention be adopted, it is required, for Indonesia at least, that a special law be enacted in order to give full effect to the automatic enforcement provisions. As mentioned above, Indonesia belongs to the countries (as inherited from the Dutch system) where foreign judgments, other than *avery grosse* decisions, are not directly enforceable but should be tried anew. The special statute for Indonesia, if enacted, should depart from the normal rules found in the Code on Civil Procedure and provide for a simple *"fiat executie"* or *"exequatur"* procedure for member countries within Asean.

36 See S. Gautama, *"The Commercial Laws of Indonesia", op. cit., supra* n. 14.

37 State Gazette 1847 no. 23 for text of the Indonesian Codes, see *Himpunan Peraturan Per-Undanglan Republik Indonesia, disusun menurut sistim Engelbrecht* (Collection of the laws of the Republic of Indonesia, editedx according to Engelbrecht's system), (1989) Jakarta 2 volumes.

38 State Gazette 1847 no. 23.

39 Law 1986 no. 5L.N. 1986 no. 77, L.N. = Abbreviation for Lembaran Negara, State Gazette.

40 Art. 34 of the EEC Convention. The Court applied shall give its decisions without delay: the party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions in the application.

(e) *Exceptions to recognition and enforcement*

However, there are still some exceptions in the Brussels Convention which allow, on a limited scope, re-examination of the other member state's judgments. Some of these exceptions should also be taken into consideration while preparing for the proposed Asean convention.

First, the courts requested to enforce should be free to determine whether the subject matter of the original action really falls within the scope of the convention, *i.e.* whether the matter belongs to civil and commercial matters. This however, does not amount to a re-examination of the merits.

Secondly, there is a general rule, derived from private internal law, that will always form an exception to the application of foreign law; this is the public policy (or in Indonesian, ketertiban umum) provision.[41] If the foreign judgment is regarded as being contrary to the public policy of the state requested to enforce, this foreign judgment will not be recognised. The public policy escape clause should be used very cautiously, keeping it within only as a shield, and not as a sword;[42] to use the terminology of the Hague Convention. Only when it is manifestly incompatible,[43] will the foreign judgment be set aside by the court.

There are other grounds which are usually considered in conventions in deciding the question of recognition and enforcement. These are:

(1) The court of origin on the matter based on convention;

(2) The original decision which has reached the stage of enforceability, (in kracht van gewijsde, berkekuatan pasti, res judicata) and is no longer subject to ordinary review in its state of origin;

(3) The decision is not manifestly incompatible with the public policy of the state addressed;

(4) The original decision was not obtained by fraud or corruption.

(5) There are no proceedings between the same parties which have the same purpose pending (lis pendens, litis pendentie) before the courts of the state addressed or another state; the latter decision being enforceable in the state addressed;

(6) If the decision was rendered by default, notice would have to be served in accordance with the law of the state of origin, and sufficient time be given to the defendant in order to enable him to defend the proceedings.[44]

[41] See S. Gautama, *Pengantar Hukum Perdata International Indonesia* (Introduction to Indonesian Private International Law), Jakarta-Bandung, publication of the Institute of Legal Development, *Badan Pembinaan Hukum Nasional,* (1977), subsequently reprinted, chapter VI.

[42] S. Gautama, *op. cit., supra,* n. 36.

[43] *E.g.* art. 2 sub 5 *Alimentation Convention Toards children* (1958), art. 16, *Protection of Minors Convention* (1961).

[44] Compare Art. 27 EEC Convention.

It is obvious that the well-known principle of audi alteram partem, equality of treatment of the parties in the proceedings, is to be observed.

(2) *The 1971 Hague Convention on the Recognition And Enforcement of Foreign Judgments in Civil and Commercial Matters*

(a) *The Hague Convention as a model*

In this connection another convention, the 1905 Hague Convention on Civil Procedure, could also be taken into consideration. This 1905 convention is now being thoroughly revised and amended by other more recent and modern conventions. One example is the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters. This convention, concluded on 15 November 1965, served as a model for the 1978 Indonesian-Thai agreement on judicial cooperation. Another Hague convention which is also closely followed, is the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[45]

The 1971 convention, concluded in the frame of the Hague private international law conventions, should also be taken into consideration when drafting the Asean convention. This convention also relates to decisions in civil and commercial matters. Article 1 of the 1971 Hague Convention does have approximately the same contents as article 1 of the Brussels Convention.

Article 1 defines the scope of the convention. The cases which fall outside the scope of the convention relate to:

(1) Status or capacity of person, or questions of family law. All matters belonging to the so called "personal status" of persons, regulated under article 16 of the Indonesian General Provisions on Legislation (Algemene Bepalingen van Wetgeving) are excluded. This also extends to personal or financial rights and obligations between parents and children, or between spouses. These cases just mentioned are covered under different conventions within the framework of the Hague cooperation. In this connection, mention should be made of the Convention of 15 April, 1958 on the Recognition and Enforcement of Alimony Obligations Towards Children;[46]

[45] For the text of this Convention, See *Recueil des Conventions Conference de la Haye de droit international Prive* (Collection of Conventions Hague Conference on Private International law (1951-1988), edited by Permanent Bureau of the Conference).

[46] *Convention of 15 Maret 1958 concernment la reconnaissance et I'execution des decisions en matiere d'obligations alimentaires envers les enfants,* until March 27, 1989, signed and ratified by Austria, Belgia, Cechoslovakia (accession), Denmark, Finland, France, Federal Republic of Germany, Greece (signed), Hungary (accession), Italy, Luxemburgbourgh (signed), Netherlands, Portugal, Spain, Suriname (accession), Sweden, Switzerland, Turkey, Liechtenstein (accession as non-member State).

(2) Legal persons or the powers of their officers;

(3) Other maintenance obligations, not included in (1) above;

(4) Questions of succession;

(5) Bankruptcy matters, compositions or analogous proceedings,

(6) Social security questions

(7) Damage or injury in nuclear matters.

(8) Payment of customs duty, tax or penalty.

As with the Brussels Convention, the most important feature of the Hague Convention is the entitlement to recognition and enforcement of a judgment in a contracting state, in another contracting state (Article 4). However, the respective decision must be given by a court considered to have jurisdiction, and is no longer subject to ordinary review in the state of origin. It should also be enforceable in the state of origin before it could be enforced in the state addressed.

Again, as with the Brussels Convention, recognition and enforcement could be refused if:

(1) The respective decision is manifestly incompatible with the public policy of the state addressed;

(2) The decision resulted from proceedings incompatible with the due process of law or either party has no adequate opportunity to fairly present his case;

(3) The decision was obtained by fraud;

(4) There is *litispendentie* in the sense that proceedings between the same parties, based on the same facts and having the same purpose are pending before a court of the state addressed, and those proceedings were the first to be instituted or have been decided by a court of the state addressed, or of another state entitled to recognition and enforcement according to the laws of the state addressed.[47]

(b) *Error in Private International Law (applicable law)*

A noteworthy provision is the stipulation that recognition or enforcement may not be refused if according to the law of the state addressed, another law should have been used by the state of origin.[48] If in arriving at a

[47] Article 5.
[48] Article 7.

decision, the court of origin had to decide the question relating to personal status or capacity in family matters (which are excluded form the convention), and had reached a result different from that which would have followed from the application of the rules of private international law of the state concerned, then it is possible to refuse recognition or enforcement. In all cases other than those mentioned above, there is no review of the merits of the court of origin's decision. In principle, the convention is aimed at full recognition and enforcement of the member states' court decisions.

(c) *Basis of jurisdiction*

Of importance are the conditions which indicate the state of origin as having jurisdiction for the decisions rendered.[49] The following facts are regarded as conclusive:

(1) If defendant has his habitual residence in the state of origin at the time proceedings were instituted against him. For legal persons, the seat, or place of incorporation, or the principal place of business are taken as decisive. We see here that all the three principles used to determine the status of a legal entity have been observed. The principles of legal seat, incorporation or central management[50] are all taken into account;

(2) If it has commercial, industrial or other business establishment or a branch office. The defendant's legal corporation could also rightfully be sued in the state of origin. The object of the proceedings should have arisen from business transacted by such establishments or branch offices. Here again, the basis of presence is of vital importance.

(3) If the proceedings are related to immovables situated in the state of origin. The *isle rei sitae* as is also known in article 17 of the Indonesian General Provisions on Legislation, is regarded as conclusive.

(4) In case of tort actions, injuries to persons or damage to property occurred in the territory of the state of origin, if the person responsible for the injury or the damage was present there when those facts occurred.

Here the *lex locus delicti commissi,* a decisive connecting factor in tort cases, is important according to classic private international law theory.[51]

[49] Article 10.

[50] See S. Gautama *Hukum Perdata International Indonesia* (Indonesia Private International Law), book VII, chapter XXII, *op. cit, supra,* n. 6.

[51] See S. Gautama, *Hukum Perdata International Indonesia* (Indonesian Private International Law), book VII, chapter XXVIII, *op. cit, supra* 15.6, pp 768, *et seq.* Cp. this old theory with its more modern exceptions of *"surrounding circumstances of the case, milieu social"* etc. *Nahcock v. Jackson, Dym v. Gordon, Macey v. Rozbicki* (1966), *Kelt v. Hernderson* (1966), *Boys* v. *Chaplin* (1967), see S. Gautama *"Hukum Perdata Internasional Indonesia* (Indonesian Private International Law), Book VII, *op. cit., supra,* n. 6, pp 776. *et seq.*

(5) If there is a choice of jurisdiction by the parties, unless the law of the state addressed could not permit such a choice because of the subject matter of the dispute;

(6) If defendant has argued the merits of the case without challenging the jurisdiction of the court.

(7) If the person against whom recognition or enforcement is sought was the plaintiff in the original proceedings, and was unsuccessful in those proceedings.

(d) Exclusive jurisdiction

On the other hand, the jurisdiction of the original court need not to be recognized by the authority addressed:

(1) If the courts of the state addressed have exclusive jurisdiction according to their own law, over the subject matter;

(2) If the law of the state addressed recognises a different exclusive jurisdiction;

(3) If the authority addressed considered itself bound to recognise exclusive jurisdiction to be conferred upon arbitrators.

(e) Procedure

The procedure for the recognition or enforcement of foreign judgments is governed by the law of the state addressed. This is normal as the courts of the state where the action is brought always use its own procedural law.

This means that in Indonesia the request for enforcement should be channeled via the District Court (Pengadilan Negeri) of the debtor's domicile. The H.I.R. will also be used as the procedural law for the Courts of First Instance or District Court in Indonesia.[52]

The above is a short outline of the Hague Convention, which could be taken into consideration when drafting the Asean convention on reciprocal recognition and enforcement of foreign judgments.

IV. ARBITRATION

With regard to the recognition and enforcement of foreign arbitral awards, it would not be necessary to make a separate convention among the Asean

[52] See, S. Gautama, 52National Report in Digest for Commercial Laws of the World", *International Encyclopedia of Comparative Law op. cit.. supra,* n. 9.

states. It is sufficient if all the Asean states adhere to the 1958 United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Indonesia joined this convention in 1981. This convention came into operation for Indonesia on 5 January 1982. The other Asean states are also members of of this convention; the Philippines on 4 October 1967,[53] Malaysia on 3 February 1986, Singapore on 19 November 1986 and Thailand on 20 March 1960. Brunei has yet to join. The 1958 New York Convention will become fully operative within Asean when Brunei joins the convention. In that event, arbitral awards handed down in any one of the Asean states, will be automatically recognized and enforced in the other Asean states, making, in my view, a separate convention on this subject unnecessary.

V. CONCLUSION

In conclusion, I would like to summarise my above outline as follows:

1. There is a need for Asean countries to have closer cooperation in the judicial field.

2. As a first step, the other Asean states should join a similar convention as, for instance, has been bilaterally adopted between the Indonesia and Thailand in 1978.

3. To begin with, the Asean states should create a regional convention on the reciprocal recognition and enforcement of court decisions in each of the member states.

4. The drafters of such a convention should take into consideration the contents of the 1968 Brussels Convention and the 1973 Hague Convention on the same subject matter, as models to be followed.

5. It is not necessary to conclude a separate Asean Convention on the recognition and enforcement of foreign arbitral awards. It will be sufficient for the smooth cooperation and harmonization in this field, if all the member states adhere to the United Nations sponsored 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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[53] See NIPR *(Nederlands International Privaatrech), Repertorium op Verdragenrethts. Wetgeving, Rechtspraak en Literature* (Netherlands Private International Law, Legislation, case law and letterature), vol 6 (1988) part 1, Nr 57.

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