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# BOOK REVIEW

*Asian Principles for the Recognition and Enforcement of Foreign Judgments* BY ADELINE **CHONG**, ed. [Singapore: Asian Business Law Institute, 2020. liii + 187 pp. eBook: SGD87.50]

On 3 September 2020, the *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (*hereinafter*, "*Asian Principles*") adopted under the auspices of the Asian Business Law Institute was officially released, a date that may be considered a turning point in the history of legal developments in the field of recognition and enforcement of foreign judgments in Asia. This is because to date, there is no single regional framework that ensures the smooth circulation of judgments between neighbouring states despite strong economic ties that bind the various Asian jurisdictions. Many of these states (such as Indonesia, Japan, the Philippines, South Korea, Thailand *etc*.) have not even showed eagerness to establish their own networks of bilateral cooperation to that effect (for an earlier unfruitful attempt, see Asian-African Legal Consultative Committee, *Report of the Seventh Session Baghdad 1965* (1966)). This status quo might intrigue outsiders' curiosity. Indeed, unlike Europe, Latin America, or intergovernmental organisations such as the Commonwealth of Independent States ("CIS"), the League of Arab States ("LAS") or the Gulf Cooperation Council ("GCC"), where regional schemes on judgments recognition and enforcement have already been in place, the lack of interest displayed in some parts of Asia, at least at an official or diplomatic level, is hardly comprehensible. This is more so knowing that the field of international arbitration has a completely different picture although the need to foster economic growth and to guarantee legal certainty and predictability is indifferent to which method of dispute resolution is adopted.

The success of economic integration in Europe based on the establishment of an efficient framework for free movement of judgments has ignited the enthusiasm of some leading Asian scholars who have been calling for the harmonisation of judgments recognition practices across borders (C Y C Ong, *Cross-Border Litigation within ASEAN* (1997); S Gautama, "Recognition and Enforcement of Foreign Judgments and Arbitral Awards in the ASEAN Region" (1990) at p 172; P M C Koh, "Foreign Judgments in ASEAN—A Proposal" (1996) at p 847). Further research on dispute resolution in Asia has provided practical information about the diversity of—and somewhat contradicting—approaches among the various Asian jurisdictions (M Pryles, *Dispute Resolution in Asia* (2006)). The awareness of the necessity to rationalise cross-border dispute settlement in general, and judgments recognition in particular, across Asia has increased particularly in recent years as reflected by the

growing number of academic publications in this field (A C Leyda, *Asian Conflict of laws—East and South East Asia* (2015); A Reyes, *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (2019)).

In the absence of effective official initiative, scholars and experts have decided to take things in hand and come up with detailed rules that could subsequently serve as a starting point for any official undertaking, otherwise as a useful resource for domestic reform and/or persuasive authority for national courts and practitioners. The work of the Study Group on Asian Principles of Private International Law, which also covers the recognition and enforcement of foreign judgments, is one such example (on this initiative and its background, see N Takasugi & B Elbalti, Asian Principles of Private International Law", in D Girsberger *et al.*, *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (2021) at p 399). However, that initiative is yet to release its output. It is within this broad context that the release of the *Asian Principles* is highly appreciated. This is more so if one takes into account global and regional developments of this area of law, such as the release of the *Restatement (Fourth) on Foreign Relations* (2018), the entry into force of the *2005 Hague Convention on Choice of Court Agreements* in 2015 and the successful adoption of the *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* on 2 July 2019, or the domestic developments towards liberalisation of foreign judgments recognition and enforcement in various Asian jurisdictions, notably China and Vietnam. Against this general background, the "timely" (at p xviii) release of the *Asian Principles* provides researchers, academics and practitioners with invaluable comparative materials that demonstrate different trends in this area of law.

In the words of Associate Professor Chong, the *Asian Principles* "is the output of the second phase of an ambitious project by the Asian Business Law Institute (ABLI) to promote the harmonisation of foreign judgments rules in the region" (at p xi). Although the title seems to suggest that the *Asian Principles* is limited to "Asian" jurisdictions, it is intended to provide core and "overarching principles that underpin the recognition and enforcement of foreign judgments in the *Asia Pacific*" (Asian Business Law Institute, *ABLI releases Asian Principles for the Recognition and Enforcement of Foreign Judgments* (2020) [emphasis added]). Indeed, the project covers all ten ASEAN Member States, three Northeast Asian countries (China, Japan, South Korea); one South Asian country (India) and one Oceanian country (Australia) (fifteen in total). In the project's first phase, information about the said states was put together in the form of a compendium of country reports (A Chong, *Recognition and Enforcement of Foreign Judgments in Asia* (2017)). This phase can be regarded as an essential first step towards the second phase, *ie*, drafting the Asian Principles, especially considering that information about the law and practice of some of the involved jurisdictions is not always available to non-local scholars and practitioners.

The *Asian Principles*, translated into ten different regional languages, consists of 13 principles of what would constitute core common principles among the Asian jurisdictions. The book is divided into independent chapters and begins with an Introduction. The Introduction concisely describes the background of the project, places the *Asian Principles* in its general (global, regional and domestic) context, and highlights some of its key features and objectives.

The adopted Principles themselves are not unfamiliar to specialists and can possibly be grouped into three categories. The first category concerns the general principles that underpin any judgments recognition system, including (a) the principle that foreign judgments in commercial matters are entitled to recognition and enforcement (Principle 1); (b) prohibition of the review of merits and examination of mistakes of law and/or fact (Principle 4); and (c) the principle of severability or partial recognition and enforcement (Principle 13). The second category deals with the eligibility to or pre-requisites for recognition and enforcement, including (d) types of judgments entitled to recognition and enforcement (Principles 1, 6 and 12); (e) the jurisdiction of the foreign court or indirect jurisdiction (Principle 2); (f) finality (Principles 3 and 7) and (g) reciprocity (Principle 5). The third category comprises the grounds for refusal of or defences against the recognition and enforcement of foreign judgments, including (h) fraud (Principle 8); (i) public policy (Principle 9); (j) due process (Principle 10) and (k) inconsistent judgments and *lis pendens* (Principle 11). Each principle is accompanied by a detailed commentary which is intended to highlight its substantive content as well as the commonalities and differences of approaches that exist among the states studied with respect to that particular principle. More importantly, the commentaries also suggest, where appropriate, possible ways forward for the issues covered in the principle in question.

One example suffices to highlight this feature of the *Asian Principles*. Principle 5 states that "a foreign judgment is eligible for recognition and enforcement if there is reciprocity between the country of the court addressed and the country of the court of origin" (at p 57). One might feel surprised to see the inclusion of the reciprocity requirement in the *Asian Principles*. In fact, the commentary concedes that "a cogent case could be made for the abolition of reciprocity as a pre-condition to the recognition and enforcement of foreign judgments" before confidently suggesting that "[i]deally, however, countries will move towards abandoning reciprocity […] altogether" (at p 76). However, although the commentary clearly shows the keen awareness of the drafters of the debate about the undesirability of reciprocity and the recent trends towards the liberalisation of this requirement across the globe in general and some of the involved states in particular, it might seem unrealistic to simply exclude the reciprocity requirement given that it is largely retained among the concerned states and the region in general. After scrutinising the various forms of and approaches to reciprocity as found in the involved states with detailed references to applicable rules and cases where available, the drafters seem to have favoured a more realistic approach taking into account the regional status quo while expressing their vows towards a more optimal future.

On the other hand, like any other human undertaking, there is room to address some critics to the *Asian Principles* despite its enormous qualities. First, with respect to the very issue of reciprocity, it is regrettable that the neutrality of the wording of the principle might induce hasty readers into misunderstanding the true intention of the drafters. Although the realistic approach taken by the drafters is fully understandable, they could have used a formulation that shows the undesirability of reciprocity in the recognition and enforcement of foreign judgments. This can be the case if, for example, a presumption in favour of the existence of reciprocity is introduced in a way that shifts the burden of proof of lack of reciprocity on the party challenging the reception of the foreign judgment or if reciprocity is adopted as a discretionary rather

than mandatory pre-requisite for judgments recognition. Moreover, looked through civilian eyes, some principles might appear more as a reflection of a common law conception of judgments recognition rather than a compromise between different systems. For example, the list of "*typical* grounds" (Principle 2, para 2 at p 18) based on which the rendering court will be considered as having international jurisdiction contains the questionable and exorbitant ground based on the mere presence of the defendant. In this respect, although this jurisdictional ground continues to be largely admitted in various common law jurisdictions, it is unfortunate that the drafters did not choose to follow the international trends as reflected in the various works of the Hague Conference on Private International Law. This is more so because it is hardly conceivable that a judgment rendered by an Asian court assuming jurisdiction based on mere presence would to be eligible for recognition in countries such as Japan and South Korea. In addition, the listed acceptable grounds for indirect jurisdiction overlooked the inclusion of the "typical" ground of special jurisdiction based on connection between the forum and the dispute (for example, in contractual matters, tort matters *etc*.) nor did it include any that would be considered as exclusive jurisdictional grounds.

Despite the criticism that may be addressed to the *Asian Principles*, one should not overlook the formidable task and challenges that the drafters had to overcome. On the one hand, the herculean task to take by the horns the Asian bull of diversity of legal traditions and levels of institutional development (at p xviii) warrants in itself admiration. On the other hand, there was a concern to show that the *Asian Principles* did not content itself with simply reproducing major international codifications. Rather, it was to come up with principles that faithfully represent the Asian context. In any case, one should not lose sight that "the *Asian Principles* do not purport to set out a model law or a comprehensive code. Nevertheless, by analysing how the countries in Asia approach specific issues and teasing out the similarities and differences between the various laws, it is hoped that they will be a useful resource for judges, practitioners, legislators and policymakers in Asia" (at p xix). The reading of the *Asian Principles* and the commentaries shows without any grain of doubt that this objective is very much likely to be achieved.

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