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HARMONIZATION OF LAWS ON ELECTRONIC CONTRACTS BASED ON MODEL LAWS FOR THE ASEAN ECONOMIC COMMUNITY

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Abstract

Technological advancement has created new business practices such as utilizing electronic contracts. Utilization of electronic contracts, especially in international transactions, has pushed countries around the world to impose new regulations defining the legalities of electronic instruments. Challenges arise considering the global and borderless nature of electronic transactions faced with regulations of different countries that are not in sync with each other. This is especially apparent in Member States of the ASEAN Economic Community. This paper attempts to discover the ideal legal framework for electronic contracts in the ASEAN Economic Community. Based on the research and analysis, it has been found that there is a need for a harmonized legal framework regarding electronic commerce that can be adopted unaltered by Member States of the ASEAN Economic Community, which could be drafted by the ASEAN as an inter-governmental organization.

Keywords: *legal harmonization, ASEAN Economic Community, electronic contracts*

1. INTRODUCTION

The revolution of communication and information technology starting in the 20th century has resulted in a number of new regulations in various countries around the world, including Indonesia. The development of information technology created the internet and consequently a digital era that transformed people's life patterns. The various aspects of the human life that was previously conducted offline, now can be done online through the internet. In business, there are now electronic business practices such as the application of communication and information technology to support the business activities of a person, group of people, or a business entity. Electronic commerce creates the exchange of products and services between traders, individuals, groups of people, and business entities.¹ Thus, the way in which people contract and their attitude towards contracts made through electronic media also differs from ordinary contracts made through traditional channels.

Short for interconnection networking, the internet is a collection of open global communication networks that connects computer networks of different systems and of all sorts, using the communication types such as the telephone, satellite, and so on.² The internet is classified as one of the parameters of technological progress that has carried the world economy into a new era, known as the "digital age", in which information and communication technology has occupied a very strategic role and position as it presents a new world order of no limits,

¹ Louis Gerstner. *Who Says Elephants Can't Dance*. 2002. p. 172. See also Beynon-Davies P. *E-Business*. Palgrave. Basingstoke. 2004.

² Alfian Hidayat Kamal. "Sistem Pendukung Keputusan Penentuan Harga Pemasangan Internet di CV. Lontas Smart Media Dengan Pendekatan Logika Fuzzy Inference System Madani". Undergraduate thesis: Fakultas Teknik Universitas Muria Kudus. 2018.

distance, space, and time. It has an impact on increasing productivity and efficiency in trades of goods and services.³

The internet has created opportunities and challenges of the 21st century with its cultivation. Opportunities sprout in the form of democratization of culture, business, equality and electronic commerce. Trade is no longer limited to face-to-face interactions between sellers and buyers. With the development of technology, trade can be done through the cyberspace where humans perform various activities without the need to directly face each other and be obstructed by the boundaries of space, time and geographical areas. Users conduct trading activities or business transactions without having to know one another, nor buyer, seller, and the product being traded ever being in the presence of one another. With the internet, society has a wider range of space in choosing products in the form of goods and services desired.⁴

Along with the abovementioned opportunities, challenges also arise for the international legal system and the legal system of each country. Electronic transactions are “global, borderless, virtual, and anonymous”, which affects tax law, contract law, and the application of cross-border intellectual property laws. The contract between the buyer and seller is done by electronic media; the parties are not physically present. Given the unlimited nature of the internet, transactions in electronic commerce are independent of regional and national boundaries.⁵ The internet forms a “global village” which according to Mark Federman is the culture of a place, where the place is defined as “nowhere” and “everywhere”. Federman states that presence of the internet is a matter of debate caused by its nature of not being easily seen, felt, or touched.⁶ The internet’s borderless nature presents itself a challenge as the legal system that we have known for the better part of the century is based on the state, territorial boundaries, and physical presence (legal jurisdiction).⁷ Thus the emergence of electronic transactions, which easily break down national boundaries, is a call for lawmakers in each country of the world to come up with a solution to regulate the cyberspace and its citizens’ dealings on the internet.

As a response to the changing dynamics, opportunities, and challenges cropping up due to advances in technology, a number of countries in Southeast Asia, such as Singapore, Malaysia, and the Philippines, have made changes to their legislation, regulations, and have made specific policies regarding the internet and electronic transactions. A couple of examples namely are Singapore issuing the Electronic Transactions Act 1998 and the Electronic Commerce Act of the Philippines.

The need to regulate not only the offline world, but also the cyberspace as a guideline for the legal subjects involved. Its aim is to provide certainty for said legal subjects that exchange information across national boundaries, which can no longer be determined by the

³ Siswanto Sunarso. *Hukum Informasi dan Transaksi Elektronik (Studi Kasus: Prita Mulyasari)*. Rineka Cipta. Jakarta. 2009. p. 39.

⁴ Arsyad Sanusi. “Efektivitas UU ITE Dalam Pengaturan Perdagangan Elektronik (E-Commerce)”. *Jurnal Hukum Bisnis*. Vol. 29 No. 1. 2010. p. 6.

⁵ Sukarini *Cyberlaw: Kontrak Elektronik dalam Bayang-Bayang Pelaku Usaha*. Bandung: Pustaka Sutra. 2008. p. 10.

⁶ Mark Federman. *The Cultural Paradox of the Global Village*. California: The Creative Commons Attribution-Noncommercial-ShareAlike License. p. 1.

⁷ Richard Doernberg *et al.*, *Electronic Commerce and Multijurisdictional Taxation*, 2001; Dale Pinto, *E-Commerce and Source Based Income Taxation* (2002); Bjorn Westerberg, *Cross Border Taxation of E-Commerce* 2002; Richard Westin, *International Taxation of Electronic Commerce*, 2002.

legal rules of a country, and instead leads to international regulations. As transactions are done between legal subjects of different nationalities and geographical areas, there need to be legal certainty provided by a legal framework that accommodates the unique nature of these online transactions. This is especially needed for countries that are part of a particular regional organization such as the ASEAN economic community established in 2015 which has the goal of constructing a highly integrated and cohesive economic society by the year 2025.⁸ It is also to be noted that ASEAN as a region consists of a mixture of civil law and common law systems. Considering that and the fast-paced development of technology, it is imperative to work on harmonizing the laws between the ASEAN nations. Based on the matters discussed above, the main problem statement of this study is as follows: What is the ideal legal framework for electronic contracts in the ASEAN Economic Community?

This study employs the legal system theory by Lawrence M. Friedman. It is a theory, which divides the legal system into three components, namely the legal structure, legal substance, and legal culture.

System is mostly seen as a conception of all aspects and elements arranged as an integrated whole. In saying that, it means that the legal system is evidently an overall aspect and element that is arranged as an integrated whole pertaining to the law. Lawrence M. Friedman explained in his book several type groups of definitions of law as a preface to understanding the legal system. According to Friedman, the definition of law can be divided into a group that defines law in an institutional way, a group which equates the law with regulations, a group which defines the law based on its function, and a group which sees the law as a special type of process or sequence.⁹

Despite the above groups of definitions of law, there is yet a definitive understanding of law reduced to a sentence or a paragraph that all legal scholars can agree on. There is no legal definition that is the most “correct”, as definitions flow from the purpose or function of the person giving such definition.¹⁰ However for the purpose of defining the legal system, in this case, we can take the definition of law as a set of rules in the form of regulations governing human behavior in a social, national and state setting which is naturally coercive and binding, containing prohibitions and/or orders that must be obeyed with strict sanctions for violators as to ensure security, order, and justice.¹¹ The law itself is a system.¹² Thus it may be concluded that the legal system is a legal order consisting of several legal subsystems possessing different functions but are interrelated with one another, in order to achieve a common goal, namely creating security, order, and justice in society.¹³

As previously mentioned, the subsystems of the legal system according to Friedman are the legal structure, legal substance, and legal culture. Friedman believes that the heart of the legal system is how the system converts inputs into outputs. How legal events turn into

⁸ ASEAN. <https://asean.org/asean-economic-community/>. Accessed on July 13, 2020.

⁹ Lawrence M. Friedman. *The Legal System: A Social Science Perspective*. Russel Sage Foundation. 1975.

¹⁰ Philip Selznick. *Law, Society and Industrial Justice*. 1969. p. 7. See also Muhammad Sadi Is. *Pengantar Ilmu Hukum*. Kencana: Jakarta. 2015. p. 125-126.

¹¹ Handri Raharjo. *Sistem Hukum Indonesia: Ketentuan-ketentuan Hukum Indonesia dan Hubungannya dengan Hukum Internasional*. Media Pressindo: Yogyakarta. 2018. p. 25.

¹² Muhammad Sadi Is. *Op. Cit.*, p. 129.

¹³ Handri Raharjo. *Loc. Cit.*

court rulings. He believes that those three elements are what determine how input is changed into output in the legal system.¹⁴

The legal structure is the program that runs the legal system, such as organizational rules, jurisdiction, and court procedures. It means structure likened to the number of judges in court, the jurisdiction of the court, how there are courts that are higher or lower in competency, and the roles of the people bound by courts.¹⁵

The legal substance is the output that functions to shape future outputs. Legal substance in the rules and provisions, including substantive rules and rules on how an institution should behave. H. L. A. Hart asserts that the characteristic of the legal system is this set of double rules, where there are primary and secondary rules. Primary rules being the norms of behavior itself, whereas secondary rules are norms about norms of behavior itself. Meaning secondary rules include how to decide whether the norms of behavior imposed on society are valid, and also how to enforce them. Both sets of rules are the output of the legal system that describes its behavior.¹⁶

Lastly, the legal culture. It is a complement to the legal system. Friedman believes that what makes the legal system come alive is the social life. The legal system depends on external input. Thus, social impulses, namely human needs and demands, are things that influence the course of the legal process.¹⁷

2. RESEARCH METHODS

The type of legal research method used in this study is the normative legal research method. It examines the law from an internal perspective. The research object is legal norms, and it uses materials obtained in literature such as the opinions of legal scholars in law books. Normative legal research functions to provide juridical argumentation where there is a vacuum, obscurity, and conflict of norms. Therefore, the theoretical basis used here is one found at the level of normative/contemplative legal theory.¹⁸ This study uses the normative legal research method in order to find legal certainty by linking the problems occurring in practice with the existing legal norms, both documented and declared.

This research employs a Statute Approach, which is normally used in normative legal research, as it analyzes the rule of law in normal and general circumstances. One such way of employing the Statute Approach in this research is by examining the consistency of the provisions of the Constitution of 1945 with the Law and the laws and regulations under it. Another way is to examine the consistency of the provisions of some of the electronic contract laws in Southeast Asian nations to the provisions of an international instrument, namely a Model Law.

This research makes use of secondary data obtained from library research. This study is a research using available data. The legal materials consist of primary, secondary, and tertiary legal materials. Primary legal materials are authoritative and generally include statutory regulations and official courts decisions. Secondary legal materials consist of law books or

¹⁴ Friedman. *Op. Cit.*, p. 12.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p. 14.

¹⁷ *Ibid.*, p. 15.

¹⁸ Mestika Zed. *Metode Penelitian Kepustakaan*. Yayasan Obor Indonesia: Jakarta. 2004. p. 1.

journals containing research material in the form of legal principles and doctrines of legal scholars relating to the research object. Lastly, tertiary legal materials and non-legal materials include legal dictionaries such as the Black's Law Dictionary and census data, as well as general encyclopedias.

3. ANALYSIS AND DISCUSSION

3.1. Overview of the ASEAN Economic Community's Goals and Impacts

Established on 8 August 1967, The Association of Southeast Asian Nations (ASEAN) is a concert of Southeast Asian nations originally consisting of the Founding Fathers, Indonesia, Malaysia, Philippines, Singapore and Thailand. Over the years since its establishment, other countries have joined including Brunei Darussalam in 1984, Vietnam in 1995, Lao PDR and Myanmar in 1997, and Cambodia in 1999. It sets out to promote peace and collaboration between member states and accelerate economic growth through close and beneficial cooperation.¹⁹

Furthering such cooperation between member states, the ASEAN Economic Community (AEC) established in 2015 is a step towards regional economic integration. The AEC was established in order to reduce obstacles in regional trade of goods and services between Southeast Asian countries. It also helps to promote foreign investment. Essentially, the AEC aims to create a free market in Southeast Asia, which translates to improved competitiveness among ASEAN member states.²⁰

The AEC Blueprint 2025 consists of a number of characteristics and elements, one of them being a highly integrated and cohesive economy. This is achieved through seamless movement of goods, services, investment, capital and skilled labor throughout ASEAN, which in turn enhances trade and production network.²¹ Another characteristic is the increased competitiveness and productivity of the ASEAN region as a whole through a number of different key elements, such as²²:

- a. Effective competition policy to ensure a level playing for all firms
- b. Fostering the creation and protection of knowledge
- c. Deepening ASEAN participation in Global Value Chains
- d. Strengthening related regulatory frameworks and overall regulatory practice and coherence and the regional level

Seamless trade and increased productivity is a near impossible task without enhanced connectivity and sectoral cooperation, which is another characteristic of the AEC Blueprint 2025. It involves various sectors, including transport; information and communications technology; e-commerce; energy; food, agriculture and forestry; tourism; healthcare; minerals; and science and technology.²³ The AEC Blueprint 2025 also includes the characteristic of a resilient, inclusive, people-oriented and people-centered ASEAN.²⁴ And lastly, the AEC points

¹⁹ ASEAN. <https://asean.org/asean/about-asean/#>. Accessed on 14 July 2020.

²⁰ Ariawan Gunadi, "ASEAN Economic Community Impact for Indonesia". *Jurnal Opinio Juris*. Vol. 19. 2016. p. 9.

²¹ ASEAN Secretariat. "ASEAN Economic Community Blueprint 2025". Jakarta. 2015. https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf. p. 3.

²² *Ibid.*, p. 12.

²³ *Ibid.*, p. 21.

²⁴ *Ibid.*, p. 30.

to a global ASEAN integrating into the global economy through Free Trade Agreements and Comprehensive Economic Partnership Agreements with other nations outside of Southeast Asia.²⁵

As a key driver in the economic and social transformation of ASEAN, Information and Communications Technology (ICT) promotes trade, investment, and entrepreneurship in the region.²⁶ A strong ICT infrastructure facilitates the growth of electronic commerce (e-commerce) that plays a significant role in cross-border trade. E-commerce lowers barriers to entry and operating costs for businesses and in turn highly benefits small and medium enterprises.²⁷ The AEC involves reducing tariffs, which then eases the flow of goods, which along with improved ICT infrastructure, accelerates the growth of e-commerce and digital economy. Southeast Asia is bound to see an exponential growth of up to an estimated \$200 billion internet economy by 2025.²⁸ That is one potential impact of the establishment of the AEC.

Along with the beneficial impacts, the AEC also carries the consequence of member states having to cooperate with each other concerning matters that affect other countries in the region. One of which is enacting national laws and having legal frameworks that support the regional and economic integration in ASEAN. The AEC member states must enact laws that align with the AEC goals and Blueprint.

3.2. The Various Legal Systems in the ASEAN Economic Community

ASEAN consists of a diverse bunch of Member States with different economies, cultures, and political and legal systems. Some ASEAN nations adopt the civil law system²⁹, some adopt the common law system³⁰, while some others adopt a mixture of both³¹. Each country has their own set of rules relating to the use of electronic contracts. The law has to cater to and be accepted by the people in order to truly work, thus why each ASEAN Economic Community member with their own unique qualities and legal system has their own way of regulating electronic contracts.

Legal behavior is not to be understood without context, including cultural context. A legal system in actuality is a complex organism in which the structure, substance, and culture interact with each other.³² Thus the workings of and any changes to a certain component affect the other two components and vice versa. For example, the different views on contracts where some countries rigorously negotiate the terms of a contract and strictly adhere to it, while some countries work out the contract in a collaborative fashion after the contract has been signed. The difference between those two policies and philosophies, as part of the overall national legal

²⁵ *Ibid.*, p. 35.

²⁶ *Ibid.*, p. 23.

²⁷ *Ibid.*, p. 24.

²⁸ Rajan Anandan, *et. al.*, "e-conomy SEA: Unlocking the \$200B Digital Opportunity". 2016. <https://www.thinkwithgoogle.com/intl/en-apac/trends-and-insights/e-conomy-sea-unlocking-200b-digital-opportunity/>. Accessed on 14 July 2020.

²⁹ Namely Indonesia and Vietnam.

³⁰ Namely Singapore, Malaysia, Myanmar, and Brunei Darussalam.

³¹ Namely the Philippines.

³² Friedman, *Op. Cit.*, p. 16.

culture, may be reflected in the country's laws, that is the legal substance.³³ Lawmakers that are sensitive to the legal culture of its people would form and enact its laws according to the mold of the legal culture, thus serving national interests while adhering to local customs. Such enacted laws are the legal substance component in a legal system, according to Friedman's theory. The legal substance component in this case is the enacted e-commerce laws in ASEAN. There exist some differences in regard to the content of such e-commerce laws, considering the various legal cultures of each Member State, which in turn affects the legal substance.

While there are differences, there are also some common features in the legal culture of ASEAN Member States. ASEAN countries value consensus and social harmony. In Asia in general, there is a larger social or religious order which contains law as a subordinate part of it. Most of the culture is mainly concerned with laws that have to do with such social or religious order, thus laws that have little to do with them (in this case such as electronic contract laws) attracts a mere handful of people of the general population. Many ASEAN Member States also operate with more than one legal system coexisting. Legal pluralism is rampant due to the continuation of colonial legal order, modern state law, traditional law, and religious law.³⁴

The difference in legal cultures affect how each ASEAN Member State govern electronic contracts and e-commerce laws. One such difference is in the implementing bodies of the rules and regulations. Some countries have dedicated e-commerce offices and agencies that issue trustmarks ensuring the security of a website, while some others don't. Some countries have difficulties in enforcing existing regulations while some others have adopted forward-looking regulations addressing e-commerce.³⁵ These differences have led to difficulties in cross-border e-commerce in that some ASEAN countries are more ready than others to take on cross-border e-commerce and encourage its people to make cross-border e-commerce transactions and facilitating the electronic contracts resulting from those transactions.

Most e-commerce laws in ASEAN essentially acknowledge the validity of electronic contracts, however some of them phrase their acknowledgments differently. In most Member States, in general the acknowledgment of electronic contracts is stated along the lines of "contracts made through electronic means should not be denied legality and validity solely on the grounds that it was made through electronic means."³⁶ Such statement is in the same vein as the postulate: "what is valid in the real world, is also valid in cyberspace". This means there is no one certain definition of what constitutes an electronic contract, only that contracts not made through traditional means are subject to the same legality requirements as their traditional counterparts and cannot be denied validity just because of its electronic nature. Indonesia takes a different approach to this, as its e-commerce law specifically lists the requirements to be fulfilled in order for an electronic contract to be considered legal and

³³ Law Kee Yang & Philip Zerrillo. "Negotiating the Legal Systems in ASEAN". *A Walk Through Asia*. Vol. 5 Issue 1. Singapore, 2018.

³⁴ Christopher Heath (ed.), *Intellectual Property Law in Asia*, London: Kluwer Law International, 2003, p. 13-35.

³⁵ Singapore Economic Development Board (EDB). "E-Commerce in ASEAN: Seizing Opportunities and Navigating Challenges". 2018. <https://www.edb.gov.sg/en/news-and-events/insights/innovation/e-commerce-in-asean-seizing-opportunities-and-navigating-challenges.html>. Accessed on 22 July 2020.

³⁶ See Article 6 of Singapore's Electronic Transactions Act and Article 6 of Brunei Darussalam's Electronic Transactions Order among others.

binding.³⁷ Therefore, there is a narrower definition of a legal and binding electronic contract in Indonesia, as opposed to the broader understanding of what constitutes an electronic contract in the other ASEAN countries.

Another difference is related to when an electronic contract is formed. Electronic contracts consist of an offer and acceptance, all done through electronic media, with different electronic systems between the contracting parties, and different time zones. It comes into question of when exactly the moment is when the contract is officially formed. For example, in Indonesia it is stated that an agreement is formed and legally binding when an electronic acceptance is in line with the technical mechanism and substantial terms and conditions in the electronic offer³⁸, but then requires another electronic confirmation to be sent afterwards by the business.³⁹ On the other hand, in Singapore the moment of contract formation conclusion is not specifically determined, only the time and place of dispatch and receipt of electronic communications are regulated.⁴⁰ Therefore when it comes to international electronic contracts, it may cause disputes, regarding when a contract is concluded and whether or not one has been concluded. In such case, it must be decided upon which country's law prevails, that will then dictate the when and where of the contract formation.

3.3. Regional Electronic Contract Laws in the ASEAN Economic Community

The upsurge of online transactions in the ASEAN region translates to more electronic contracts being drawn up. An electronic contract can be defined as the online simulation of the traditional contracts.⁴¹ This means that an electronic contract is essentially the same as a paper based commercial contract, except made through an electronic medium. The legislation of electronic contracts should be in the scope of traditional laws seeing as it is derived from the traditional contracts system. Putting electronic contracts legislation in a different scope of law would expose the whole business to prosecution by traditional laws.⁴² However applying traditional contract laws on electronic contract practices is not a viable course of action, as it would not accommodate the different nature and quirks of electronic contracts. The online marketplace needs a set of rules and regulations that govern a number of factors contributing to protecting the market dynamics and ensuring fair competition.⁴³ Online stores face a number of challenges in cross-border e-commerce including legal and tax conditions.⁴⁴ It is imperative to eliminate such issues to maintain dynamic growth of online shopping abroad and cross-border e-commerce more competitive.⁴⁵

³⁷ Indonesia Government Regulation Number 80 of 2019 concerning Trade via Electronic System, Article 52.

³⁸ *Ibid.*, Article 44.

³⁹ *Ibid.*, Article 46.

⁴⁰ Singapore Electronic Transactions Act, Article 13.

⁴¹ Shiremyth. *e-Contracts: Legal Challenges*. Ohanes Baljian. 2012. p. 2.

⁴² *Ibid.*

⁴³ Lurong Chen. *Improving Digital Connectivity for E-Commerce: A Policy Framework and Empirical Note*, E-Commerce Connectivity in ASEAN. Economic Research Institute for ASEAN and East Asia (ERIA). Jakarta. 2020. p. 26.

⁴⁴ Arkadiusz Kawa. *Network Cooperation in Cross-border E-commerce: A Conceptual Model of a Logistics Platform*. *Ibid.*, p. 199. See also Kawa, A. and W. Zdrenka, *Conception of Integrator in Cross-border E-commerce*, LogForum, Vol. 12 No. 1, p. 63-73.

⁴⁵ *Ibid.*, p. 201.

Recognizing the role of electronic commerce in driving economic growth and social development in the ASEAN region, the ASEAN members entered into the ASEAN Agreement on Electronic Commerce signed on 12 November 2018. As a platform for Southeast Asian countries to integrate efforts and efficiency in terms of economic cooperation, ASEAN is the first region in the world to have an e-commerce agreement.⁴⁶ The objectives of the e-commerce agreement are to⁴⁷:

- a. Facilitate cross-border e-commerce transactions in the ASEAN region;
- b. Contribute to creating an environment of trust and confidence in the use of e-commerce in the ASEAN region; and
- c. Deepen cooperation among Member States to further develop and intensify the use of e-commerce to drive inclusive growth and narrow development gaps.

The agreement contains a few key provisions regarding⁴⁸:

1. **Paperless trade:** The agreement encourages Member States to use paperless trading administration by facilitating electronic documents through the use of information and communications technology (ICT)
2. **Electronic authentication and electronic signatures:** The agreement encourages Member States to acknowledge electronic signatures and encourage the use of interoperable electronic authentication
3. **Cross-border transfer of information by electronic means:** The agreement encourages Member States to facilitate cross-border e-commerce by allowing information to flow across borders through electronic means

The agreement comes as a part of the 2017-2025 ASEAN Work Programme on Electronic Commerce. Another part of the program includes updating the e-commerce legal framework and transparent national laws and regulations on e-commerce. In 2001, the ASEAN Secretariat published the e-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure, which serves as a guide for Member States to enact national e-commerce laws in their respective jurisdictions with common basic concepts and general principles shared by the region. As of 2020, all of the ASEAN Member States have enacted their own national e-commerce laws, with the latest being Cambodia's Law on Electronic Commerce in November 2019.

The e-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure provides general principles to have in an e-commerce law, such as⁴⁹:

- a. They should conform to international standards such as UNCITRAL's Model Law on Electronic Commerce and Draft Model Law on Electronic Signatures⁵⁰ so as to be interoperable with similar laws of other countries;
- b. They should be transparent and predictable so that there is no legal ambiguity between transacting parties in an electronic transaction;

⁴⁶ Robbaita Zahra. "ASEAN Agreement on E-Commerce: What It Tries To Tackle". ASEAN Studies Center Faculty of Social & Political Sciences Universitas Gadjah Mada. 2019. <https://asc.fisipol.ugm.ac.id/2019/09/17/asean-agreement-on-e-commerce-what-it-tries-to-tackle/>. Accessed on 21 July 2020.

⁴⁷ ASEAN Agreement on Electronic Commerce. 2018. Article 2.

⁴⁸ *Ibid.*, Article 7.

⁴⁹ e-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure. 2001. p. 5.

⁵⁰ Now published since July 2001.

- c. They should be technology neutral, meaning there should be no discrimination between the different types of technology used in e-commerce practices; and
- d. They should be media neutral, meaning both paper-based commerce and electronic commerce are to be treated equally by the law.

The above principles are in line with the principles stated in the ASEAN Agreement on Electronic Commerce such as: 1) the legal and regulatory frameworks in each Member State to support e-commerce shall take into account internationally adopted model laws, conventions, principles or guidelines; and 2) Member States shall endeavor to recognize the importance of the principle of technology neutrality and recognize the need for alignment in policy and regulatory approaches among Member States to facilitate cross border e-commerce. Most of the laws abide by the principles set out in the reference framework and the e-commerce agreement. However as a result of the different cultures, circumstances, and needs of each country, disparities are difficult to completely avoid. The regional legal system developed through these measures respects cultural sensitivities and national sovereignty.⁵¹ Thus despite having the agreement and the reference framework, there are still discrepancies between the national e-commerce laws in ASEAN.

Aside from the agreement and the reference framework, the ASEAN likes to use Mutual Recognition Arrangements/Agreements (MRA) to work towards legal harmonization in the region. An MRA could be defined as:

“Principle of international law whereby states party to mutual recognition agreements recognize and uphold legal decisions taken by competent authorities in another Member State. Mutual recognition is a process which allows conformity assessments (of qualifications, product...) carried out in one country to be recognized in another country.”⁵²

The use of MRAs is beneficial to the countries involved as they reduce costs in international cooperation by eliminating the costs of double testing and certification.⁵³ There is also a greater certainty of market access with manufacturer or traders meeting the technical requirement of importing countries without testing.⁵⁴ ASEAN employs MRAs to provide ease of cross-border trades, resulting in goods and services moving across borders freely. The only ASEAN MRA related to electronics is the ASEAN Sectoral Mutual Recognition Arrangement for Electrical and Electronic Equipment, which facilitates cross-border trade of electronics.

3.4. Model Law as a Tool of Legal Harmonization

In an ideal world, having every country in a region to adopt the exact same laws would be a straightforward practice. In the real world, lawmakers must take into measure the varied

⁵¹ Phet Sengpunya, “ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review”. *Lentera Hukum*. Vol. 6 No. 3. 2019. p. 379. See also Joanne Wong, *On Legal Harmonization Within ASEAN*, Juris, Vol. 5, 2013/14, Singapore Law Review, 2013, p. 1-2.

⁵² OECD, “Mutual recognition agreements (MRAs)”, <https://www.oecd.org/gov/regulatory-policy/irc6.htm>. Accessed on 7 February 2021.

⁵³ de Brito, *et.al*, “The contribution of mutual recognition to international regulatory co-operation”. OECD Regulatory Policy Working Papers No. 2. p. 53, https://www.oecd.org/regreform/WP2_Contribution-of-mutual-recognition-to-IRC.pdf. Accessed on 7 February 2021.

⁵⁴ ASEAN. “How MRAs Help Industry in the Region”. p. 2. https://asean.org/storage/images/archive/pdf/accsq_2.pdf. Accessed on 7 February 2021.

levels of development and priorities each country has in creating laws that are interoperable and do not hinder any cross-border affairs. Especially with ASEAN as an inter-governmental organization, grouping by sovereign states of the Southeast Asia region, it cannot be a party to an international agreement. ASEAN's legal personality as an inter-governmental organization affects its competence to conclude treaties under international law and its capacity to enter into relations with other States or organizations. Since ASEAN is neither a sovereign organization nor a supranational organization like the European Union, ASEAN does not have a formal structure that can issue legal instruments binding for every Member State. Its legal framework is largely based on a regime of the international legal framework.⁵⁵ ASEAN has developed a legal framework that harmonizes the Member States' national laws into a regional legal system in which it provides a legal template in the form of a reference framework that serves as a guide for ASEAN Member States in enacting their domestic laws and regulations in their respective jurisdictions.⁵⁶

When talking about legal harmonization, we are referring to the coming together of legal systems. The most important element to be aware of in regard to legal harmonization is that it is created by willing participants.⁵⁷ Thus in the case of ASEAN, the efforts of harmonizing its various national e-commerce laws must be done willingly and through the consent of all Member States. Member States that agree to a harmonized norm also agrees to the supremacy of said norm to domestic law, thus setting up a harmonized norm as a superior form of norm. Despite the threats of shortsighted political calculations, ultimately, legal harmonization must present political, economic, as well as legal utility, practicality, and benefits.⁵⁸

There are two kinds of law in international law: hard law and soft law. Shaffer and Pollack claims that the two should not be viewed as binary categories, but as two ends of a spectrum.⁵⁹ Legal instruments falling more towards the hard law end of the spectrum have more compliance pull with more costly outcomes of incompliance than those falling more towards the soft law end.⁶⁰ On the other hand, soft law instruments facilitate compromise better and encourage mutually beneficial cooperation.⁶¹ Soft law instrument are often easier to adopt because one or more of its elements may be loosened or changed to accommodate the interests of a participating country.⁶²

Soft law instruments come in different forms such as a set of principles for reference, decisions adopted by international organizations, or model laws. A model law is as its name suggests a model instrument. An international organization or a group of countries design a

⁵⁵ Phet Sengpunya. *ASEAN E-Commerce Legal Framework – Towards the Development and Prospects*. 2019. p. 99.

⁵⁶ *Ibid.*, p. 106.

⁵⁷ Antonios E. Platsas. *The Harmonisation of National Legal Systems: Strategis Models and Factors*. Edward Elgar Publishing, 2017. p. 1.

⁵⁸ *Ibid.*, p. 2.

⁵⁹ Gregory C. Shaffer and Mark A. Pollack. "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance". *Minnesota Law Review*. Vol. 94 No. 706. p. 716.

⁶⁰ Andrew T. Guzman and Timothy L. Meyer. "International Soft Law". *Journal of Legal Analysis*. Vol. 2 No. 1. Berkeley Law. 2010. p. 177.

⁶¹ Kenneth W. Abbott and Duncan Snidal. "Hard and Soft Law International Governance". *International Organization*. Vol. 54 No. 3. Cambridge University Press. Cambridge. p. 421.

⁶² *Ibid.*, 423.

model instrument pertaining a certain issue to be adopted by countries either unaltered or with changes as required.⁶³ Unlike a convention, a model law allows any number of changes when adopted to suit the adopting country's requirements. Although complete textual uniformity is unlikely to be achieved through adopting a model law, it may accomplish its harmonization objective if we consider successful harmonization as harmonization that enhances economic efficiency and substantiates reasonable expectations of the parties to transactions.⁶⁴

An example of a model law in the field of electronic commerce is the UNCITRAL Model Law on Electronic Commerce (1996) with Additional article 5 bis as adopted in 1998. It contains articles and provisions establishing rules for the formation and validity of electronic contracts, attribution of data messages, acknowledgment of receipt and determining the time and place of dispatch and receipt of such data messages.⁶⁵ For example, Article 11 of the model law states:

“In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.”⁶⁶

A contract itself is a document, that contains information and consists of data. In the process of making a contract, before the conclusion, it is also often done through the exchange of information and data through electronic means. The UNCITRAL e-commerce model law acknowledges electronic versions of such documents, records, and information. Its provisions have influenced the e-commerce laws of ASEAN countries, including how it governs the use of electronic contracts.

The e-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure while useful is not a model law. As opposed to the UNCITRAL Model Law on E-Commerce, the reference framework only contains instructions such as that an e-commerce law should have a certain scope and legal effects as set out in the reference framework. The same goes for the ASEAN Agreement on Electronic Commerce, which is a hard law. While Member States are legally bound to abide by the provisions of the agreement, it contains mostly broad principles regarding paperless trading and electronic authentication. Each Member State still has to adopt further national laws and regulations governing electronic transactions.⁶⁷

One could argue that the cross-border use of electronic contracts could be governed by an MRA, seeing as MRAs have presently been implemented in ASEAN in a few sectors. When implemented to electronic contracts, MRAs could be used to encourage Member States to recognize each other's systems and methods of digital signatures and digital authentication. However, MRAs are only recognizing each other's qualifications, which means the scope of what is determined by MRAs is quite limited. Furthermore, one concern to be had regarding

⁶³ Dean Lewis. *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration*. Kluwer Law International B. V. 2016. p. 6.

⁶⁴ *Ibid.*, p. 7.

⁶⁵ UNCITRAL Model Law on Electronic Commerce (1996) with Additional article 5 bis as adopted in 1998. https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce. Accessed on 22 July 2020.

⁶⁶ *Ibid.*, Article 11.

⁶⁷ ASEAN Agreement on Electronic Commerce, Article 12.

MRAs in the regulatory specificity and a possible lack of flexibility. Deeply entrenched regulations in the countries involved may significantly complicate the implementation of MRAs.⁶⁸ Thus even with MRAs, there may still be a need to revise the laws and regulations.

Model laws on the other hand would contain the specific provisions in a formulated article which a country or a Member State could adopt unaltered into its national e-commerce laws should it desire to do so. Apart from the aforementioned point, the reference framework also needs updating as it was first adopted in 2001. The 2017-2025 ASEAN Work Programme on Electronic Commerce does include the agenda of creating an updated e-commerce legal framework as an element. Such update may be done instead through the making of an e-commerce model law.

In creating a model law based on recent updates on the development of electronic contract usage around ASEAN, lawmakers should consider not only the electronic contract itself, but the ICT required to accommodate electronic contracts. As Friedman states, all components of the legal system interact and influence one another. ICT and certain regulatory bodies created for electronic contracts are part of the legal structure, while the laws and regulations are the substance. The model law may not only contain provisions on the electronic contract itself, but also the ICT and special authorities governing the use of electronic contracts, paperless trading, as well as digital signatures and authentications, even a special court tasked with settling disputes relating to or arising from electronic contracts and its paraphernalia. All elements of the legal structure (substance, structure, and culture) must be utilized to maximize legal certainty in electronic contracting. Considering how the legal culture in ASEAN has the general population more concerned with laws related to social and religious orders, the implementation of laws for electronic contracts might not be given particular attention in relation to its legal structure (authorities' efforts in implementation, communication between regulating bodies, and clear control and monitoring procedures). Thus the model law should not only acknowledge the use of electronic contracts, but pay great attention to how it's going to be implemented.

4. CONCLUSION

Based on the above discussion and analysis, it can be concluded that the establishment of the ASEAN Economic Community calls for an integrated economic system within the Southeast Asian region. The AEC'S aim to yield seamless trade and increased productivity in ASEAN demands enhanced connectivity as well as sectoral cooperation. Such cooperation involves all sorts of aspects, not excluding the legal framework. A set of national laws that mesh and coordinate with each other is especially relevant when it comes to electronic commerce, which transcends time and borders. Contracts concluded through electronic mediums as a result of e-commerce transactions need legal norms regulating the making and implementation thus providing legal certainty to those contracting electronically. The assurance of legal certainty in electronic contracting is one way of reducing the obstacles in regional trade of goods and services between Southeast Asian countries and consequently improves the regions' competitiveness against the rest of the globe. One such way of securing legal certainty is by creating a model law on electronic commerce which provides legal harmonization for

⁶⁸ de Brito, et.al, *Op. Cit.*, p. 55.

facilitating cross-border e-commerce in ASEAN. While the e-ASEAN Reference Framework for Electronic Commerce Legal Infrastructure instructions such as that an e-commerce law should have a certain scope and legal effects as set out in the reference framework, a model law would generate greater benefits as it presents clear and specific provisions in a formulated article which a country or a Member State could adopt unaltered into its national e-commerce laws should it desire to do so.

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