CHAPTER 13

THE CURIOUS CASE OF INTERNATIONAL COMMERCIAL CONTRACTS IN ASIA

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I INTRODUCTION

International commercial contracts carry tremendous risks, and are pregnant with controversies – arising from negotiation, documentation, interpretation and performance, and effect of language and socio-cultural differences - all of which may give rise to serious issues, problems and challenges. These problems and issues are further aggravated in Asia given its outstanding diversity and complexity. This paper probes into the peculiar risks and controversies that characterise international commercial contracts in Asia.

The first section identifies the unique characteristics of doing business in Asia. It looks into how Asia drives global economic growth, and shapes the composition of global economy, flow and volume of international trade and investments, nature of corporate transactions, type of business ventures and strategies, and even the direction of technological developments and innovation. The next section then discusses the various international commercial contracts involved, including their contents and drafting style. This section confirms that the increase in international trade and investments in Asia results in the increased usage of international commercial contracts which come in various forms, with each form determined by the business goals, environment, and depth of business relationship, among others. Furthermore, because innovation is a key characteristic of the developments in

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Asia, innovative contractual arrangements are expected. Nonetheless, while there may be a great variety and forms of international commercial contracts, they are still often written on the basis of rather standardised models that are mainly drafted in English, and employ a common law drafting style. Thus, as to form, this section argues that much of the contents and documentation style of international commercial contracts reflects the demands and uncertainties of international trade and investments in Asia.

The third section looks into the controversies associated with international commercial contracts in Asia – their negotiation, documentation, interpretation and performance, and effect of language and socio-cultural differences- all of which may give rise to serious issues, problems and challenges in their interpretation, performance and judicial enforcement. Incorporating Richard Fentiman's analysis of risks involved in cross-border activities, the section looks into how problems in negotiations and documentation of international commercial contracts in Asia later on translate into problems during the interpretation and performance stage. The manner the negotiations are conducted, the fact that contracts are usually products of compromise, the integral linguistic and cultural differences, the uniquely Asian attitude towards contracts, and the possession of imperfect information all translate into higher levels of risk that the parties' expectations may not be realised. This higher level of risks associated with Asian transactions may be reflected in the more qualified legal opinions usually issued to support cross-border transactions in Asia, and the lower ratings to Asian companies given by credit rating agencies. Furthermore, other factors (eg, effects of the laws of the place of performance) complicating the performance stage are examined as well in this section.

The paper ends by examining how the Choice-of-Forum clause addresses these risk concerns. For the parties, this is usually in the form of reduction of risks, gains in efficiency, and acquisition of certainty and predictability. For the state, this is usually the attraction of investments and trade. For the international community, the advancement of international commerce and trade through enhanced judicial cooperation is the primary motivation.

II LIVING IN THE ASIAN CENTURY

The 21st Century is claimed as the Asian Century.[1] This means that Asia drives global economic growth, and shapes the composition of global economy, flow and volume of international trade and investments, nature of corporate transactions, type of business ventures and strategies, and even direction of technological

1 See Roman Tomasic and Leon Wolff (eds) *Commercial Law in East Asia* (Ashgate Publishing Limited, Aldershot, 2014) at xiii.

developments and innovation. What is fascinating with the Asian Century is the major role played by emerging countries,[2] majority of which are in Asia, in rapidly changing the structure of the global economy.[3] According to the International Monetary Fund (IMF), China is already the world's biggest economy in purchasing power parity (PPP) terms in 2015 while eight other Asian countries – India (3rd), Japan (4th), Indonesia (8th), South Korea (13th), Saudi Arabia (14th), Turkey (17th), Iran (18th) and Taiwan (20th) – rank among the world's twenty largest economies.[4] *The Economist*, on the other hand, claims that this rapid growth of emerging countries over the past decades represents the biggest economic transformation in modern history.[5]

Significantly, the Asian Century is marked by Asia's leadership in international trade. In less than a decade from the beginning of this century, China has replaced the United States as the top trading nation of the world.[6] Further, intra-Asia trade is growing, and much of this is business-to-business trade,[7] accounted for by multinational companies' supply chains transferring parts, components, and semifinished products from factories in one country to those in other countries.[8] Although many of the end products are still bound to developed countries,[9] substantial increases in business-to-consumer trade within Asia are expected in the coming years because of improving standards of living especially among the middle class, stronger currencies and relatively easy credit.[10]

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2 William Scheela *Venture Capital in Asia: Investing in Emerging Countries* (Business Expert Press, 2014) at 17.

3 Anil Gupta and Haiyan Wang "Building the Next-Generation Global Enterprise" in Anil Gupta, Toshiro Wakayama and U Srinivasa Rangan (eds) *Global Strategies for Emerging Asia* (Jossey-Bass, 2012) 3 at 3.

4 International Monetary Fund "World Economic Outlook Database 2015" (April 2015) <www.imf.org/external/pubs/ft/weo/2015/01/weodata/index.aspx>.

5 The Economist "When giants slow down" The Economist (online ed, 27 July 2013) <www.economist.com/news/briefing/21582257-most-dramatic-and-disruptive-period-emerging-market-growth-world-has-ever-seen>.

6 Niraj Dawar and Charan Bagga "Is Your Business Model Ready to Drill into the Core of the Diamond" in Gupta, Toshiro Wakayama, and U Srinivasa Rangan (eds) *Global Strategies for Emerging Asia* (Jossey-Bass, 2012) 29 at 35.

7 At 36.

8 At 36.

9 At 36.

10 At 36.

Beyond the statistics, however, is the changing nature of international trade in Asia. Foremost, changes in trade of goods and services are brought about by atomization of the value chain,[11] which means that an end product produced in an Asian country is the product of individual components and services from different countries, even beyond Asia. Moreover, greater product customisation, rather than standardisation, is expected brought about by heterogeneity within and across countries and developments in information, communications, and manufacturing technologies.[12] Asia is a diverse region and even within countries, there is an outstanding diversity of buying power, cultural norms, habits, language, geographic climate, body shape and size; thus, to satisfy the markets and thrive in Asia, the products being traded have to be customised to the varying preferences. Furthermore, innovation is expected to pervade all activities at all levels of the organisation, especially innovation that economises on raw materials and energy use, minimises environmental impact, yields products and services at ultra-low cost, and requires inter-firm collaboration in the development of new products, processes and solutions.[13]

Similarly, Asia will continue to draw huge volumes of global investments. According to the UN Conference on Trade and Development (UNCTAD), Developing Asia remains the number one global investment destination in 2013.[14] As regards private equity investments, projections indicate that by 2030, as much as 30% of the global aggregate investment activity will reside in China, and Developing Asia will collectively hold capital stocks exceeding 55% of the entire developed world.[15] This rapid catch up, that begun during the 1990s, resulted from the integration of developing countries into the global market, their structural transformations and improvements in their institutions.[16]

Interestingly, Asia also accounts for increasing outbound foreign direct investments. For instance, companies from Developing Asia, primarily from China and India, are increasingly engaged in global mergers and acquisitions (M&A) transactions, and provide formidable challenges to businesses of well-known

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11 Gupta, above n 3 at 8.

12 At 10.

13 At 12.

14 United Nations Conference on Trade and Development *World Investment Report 2014- Investing in the SDGs: An Action Plan* (2014) at xiii.

15 The World Bank *Capital for the Future: Saving and Investment in an Interdependent World* (2013) at 17.

16 At 17.

transnational companies (TNCs) from the Developed World. The World Bank already attributes the sharp rise in developing countries' share of global investments to China and, to a lesser extent, India.[17] Five Developing Asian countries – China, Hong Kong, Korea, Singapore and Taiwan – already rank among the twenty largest investors in the world in 2013.[18] Furthermore, UNCTAD observes that increasingly, TNCs from developing countries are acquiring foreign affiliates of developed-country TNCs in the developing world.[19] The rise in outbound investments is said to be motivated by the following factors: becoming a global company, saving transportation costs for products that have low labour content, creating research and development alliances to take advantage of areas in which technology is superior, establishing better distribution of Asian-made products, improving market access to Asian immigrants, and obtaining residency which will permit the owner of the business, and his family access to the services of the Developed country.[20]

An important note in the Asian Century is the role of multilateral, regional and bilateral trade and investment agreements, especially the World Trade Organization (WTO) Agreements. These agreements shape the regulatory and policy environment,[21] influence the enactment of local laws,[22] motivate countries to adhere to principles like transparency, rule of law and other liberalist values,[23] encourage industries where and how to do business, and even align their practices with global standards.[24] For example, in the Philippines, a powerful factor for the enactment of its Competition Law (Republic Act No 10667) is the taking effect of the Association of Southeast Asian Nations (ASEAN) Economic Community in

17 At 20.

18 United Nations Conference on Trade and Development, above n 14 at xv.

19 At xiv.

20 See Frederick Lipman and Larry Dongxiao Qiu *International Strategic Alliances Joint Ventures between Asian and US Companies* (2nd ed, World Scientific, 2014) at 141-142.

21 See Pramuk Perera "Influence of International Trade Agreements on International Trade" (2015) 21 J East-West Bus 205 at 219.

22 See at 223; Julia Ya Qin "Trade, Investment and beyond: The Impact of WTO Accession on China's Legal System" (2007) 191 The China Quarterly 720 at 724-740.

23 Qin, above n 22 at 734-740.

24 See United Nations Industrial Development Organization *ISO 9001-Its Relevance and Impact in Asian Developing Economies* (2012) 9 at 36.

2015.[25] Likewise, the Technical Barriers to Trade (TBT)[26] and Sanitary and Phytosanitary (SPS)[27] Measures Agreements of the WTO encourage member states to adopt international standards whenever feasible and this includes the International Organization for Standardization (ISO) standards.[28] One consequence is that businesses can include certification/registration under ISO standards as a term or condition of trade with a foreign business.[29]

III PARALLEL DEVELOPMENTS IN INTERNATIONAL COMMERCIAL CONTRACTS

Contracts are drafted to reflect the unique commercial circumstances of the parties. Hence, in Asia, the developments in trade and investments are mirrored in the contracts entered into by the parties engaged in it. The most common forms of these contracts are international licensing and distributorship agreements, international joint ventures, exclusive manufacturing agreements, export and import agreements, buyer-seller partnership, franchise agreements, built-operate-transfer, international management contract, counter-trade, marketing and production agreements, cooperative research, code-sharing, minority equity alliance, equity contribution, and contracts associated with mergers and acquisitions.[30] Likewise, parties enter into preliminary agreements like a Memorandum of Agreement or Understanding, and Terms of Reference. Various financing-related contracts are also entered into along with the main transaction such as financing loan, corporate bonds, and security agreements (*e.g.*, surety and guarantee agreements). Related to export and import contracts are contracts entered into with freight forwarders and shipping companies, insurance and customs

25 Philippines, *Journal*, Senate of the Republic of the Philippines, 30 July 2014, 45 (Paolo Benigno Aquino IV).

26 Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 3 (opened for signature 15 April 1994,entered into force 1 January 1995) annex 1A ("Agreement on Technical Barriers to Trade"), art 2.4 (*"*TBT Agreement").

27 Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 3 (opened for signature 15 April 1994, entered into force 1 January 1995) annex 1A ("Agreement on Sanitary and Phytosanitary Measures"), art 3.1 *(*"SPS Agreement*"*).

28 TBT Agreement, Annex 1.2, explanatory note.

29 Dave Bennett "ISO and the WTO: A Report to the International Confederation of Free Trade Unions (ICFTU) Working Party on Health, Safety and Environment" (July 2000) <www.ecologia.org/ems/iso14000/resources/opinions/bennet00.html>.

30 See Sonia El Kahal, *Business in the Asia Pacific* (Oxford University Press, 2001) at 227; Lipman and Qiu, above n 20 at 75-78, 98-101; Toshiro Wakayama and et.al. "Coevolving Local Adaptain and Global Integration" in Anil Gupta, Toshiro Wakayama and U Srinivasa Rangan (eds) *Global Strategies for Emerging Asia* (Jossey-Bass, 2012) 61 at 76.

agents. A wide range of international commercial contracts, therefore, are involved in international trade and investments in Asia.

Likewise, innovation in contracts has also become a key feature. For instance, until the 1998 Asian Financial Crisis, licensing, joint ventures and long-term contractual agreements were common and considered more important for Asian governments than any other type of international business operations.[31] After the Asian Financial Crisis, however, exporting to Asia Pacific, establishment of wholly foreign-owned enterprises, franchising, Build-Operate-Transfer, international management contract and counter-trade were the more common modes of entry.[32] In later years, there were even newer means of forging strategic alliances like research and development (R&D) joint ventures and exclusive technology licensing.[33]

Nonetheless, while there may be a great variety and forms of international commercial contracts, they are still often written on the basis of rather standardised models that are mainly drafted in English and, therefore, employ a common law drafting style.[34] They are oftentimes 'drafted in a style that aims to create an exhaustive, and as precise as possible, regulation of underlying contractual relationship, thus attempting to render redundant any interference from external elements such as interpreter's discretion or the rules and principles of the governing law.'[35] No wonder then that a joint venture agreement in China is typically exhaustive.[36]

Much of the contents and documentation style of international commercial contracts reflect the demands and uncertainties of international trade and investments. The language commonly used, for instance, reflects the fact that English is the international language of business transactions. Likewise, the very detailed documentation style reflects the huge participation of lawyers educated in the common law tradition who are accustomed to drafting contracts that meet the

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31 El Kahal, above n 30 at 227.

32 At 237.

33 Wakayama, above n 30 at 75-76.

34 Giuditta Cordero-Moss *International Commercial Contracts: Applicable Sources and Enforceability* (Cambridge University Press, 2014) at 8.

35 At 8.

36 See Lipman and Qiu, above n 20 at 99-101, 103-105.

requirements for contracts under common law.[37] Furthermore, the use of English-language contracts written in common law style also reflects the push provided by the Anglo-American companies in the previous century.[38] Consequently, most of the internationally distributed publications offering model contract collections reproduce common law style contracts.[39] Hence, law firms and corporate lawyers in a variety of jurisdictions learn to draft international contracts on the basis of these models.[40] In addition, international financial institutions impose the use of US or English style contracts for the transactions that they are financing, irrespective of whether the financed entities or the investors involved come from common law states or not, or whether most of the related contracts are governed by English law, or another system of common law or not.[41]

The common law drafting style follows the same approach that inspired common law models – *caveat emptor*.[42] Under the common law system, parties are expected to be able to assess the relevant risks and to make provisions for them, and the final text of the contract is deemed to reflect this.[43] As such, contracts should contain all elements according to which they will be interpreted and interpretation must be made objectively and on the basis of the contract's wording.[44] Furthermore, in the common law tradition, the common law judge sees it as his or her function to enforce the bargain agreed upon between the parties.[45] A literal and thus predictable application of the contract is perceived as the only fair application of contracts. Contrast this with the contract drafting style of the civil law system.[46] While civil law also respects and enforce the parties' will without evaluating the stipulations based on an extra-legal criterion, contracts are nonetheless evaluated based on a developed system of regulations applicable to the type which a particular contract may be categorised.[47] These categorisations which

37 Cordero-Moss, above n 34 at 10.

38 Maria Celeste Vettese "Multinational Companies and National Contracts" in Giuditta Cordero-Moss (ed) *Boilerplate, Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press, 2011) 20 at 20.

39 Cordero-Moss, above n 34 at 10.

40 At 10.

41 At 10.

42 At 11.

43 At 11.

44 At 11.

45 At 11.

46 At 12.

47 At 85.

developed out of natural doctrines had now been transformed into positive law.[48] Thus, in the civil law tradition, civilian judges and lawyers are expected to read the contracts in the light of the numerous default provisions provided in the governing law for that type of contract.[49] Therefore, extensive provisions are not required in the contract.[50] Hence, a common-law style contract may not sit well in a legal tradition which operates with a different framework of interpretation and analysis. With legal systems ranging from civil law to common law to Islamic and socialist, and a lot of in-between and hybrids, Asia, therefore provides a formidable challenge to interpretation, performance and judicial enforcement of international commercial contracts.

IV THE CURIOUS CASE OF INTERNATIONAL COMMERCIAL CONTRACTS IN ASIA

The common-law drafting style of international commercial contracts, however, is just the tip of the iceberg. International commercial contracts are pregnant with controversies – from its negotiation, documentation, interpretation and performance, and effect of language and socio-cultural differences- all of which may give rise to serious issues, problems and challenges in their interpretation, performance and judicial enforcement. These issues, problems and challenges are heightened in Asia given its outstanding diversity and complexity.

To better appreciate these issues in Asian cross-border transactions, Fentiman's analysis of risks involved in cross-border activities is helpful. According to him, multistate transactions involve two principal species of risks – transactions risk which is the risk that the parties' expectations will be defeated by the application of a law which does not give effect to the object of the transaction, and litigation risk which is the risk to a claimant that it must sue to enforce its rights, and the risk to a defendant that it must defend proceedings.[51] In cross-border disputes, litigation risk is also a venue risk, meaning, that there is a risk to each party that any dispute will not be resolved in the preferred forum.[52] Litigation risk is the primary threat to a transaction because it is only in the course of litigation that the risks to which

48 At 85.

49 At 11, 85.

50 At 11.

51 Richard Fentiman *International Commercial Litigation* (Oxford University Press, 2010) at 4.

52 At 4.

transactions are prone will materialise.[53] In the course of litigation, transactions are potentially exposed to five types of risks – (1) negotiation risk or the risk that a party may have incurred liabilities in the course of negotiation which may directly or indirectly erode the effectiveness of the transaction; (2) formation risks or the risk that a valid contract was not concluded because of want of form or consent; (3) counterparty risk or the risk that a counterparty lacked the capacity or authority to contract; (4) performance risk is the risk that a counterparty can excuse its default; (5) re-characterisation risk which is the risk that the legal nature of the transaction will be characterised in the course of litigation so as to deprive it of its intended effect. Such risks may be direct or indirect.[54] They may be direct in so far as a transaction is rendered ineffective, and indirect in so far as a counterparty may have an arguable case for challenging the transaction by defaulting, or by litigating.[55] Litigation risk is also an enforcement risk or the risk that a judgment-debtor with world-wide assets will disperse or conceal those assets, and the risk that a judgment obtained in one court will not be enforceable elsewhere.[56]

Many problems with international commercial contracts can be traced to the negotiations and documentation stage. For one, these contracts are products of compromises during contract negotiation. Strategic international contracts usually begin with the exchange of respective parties' standard terms of reference.[57] After the initial exchange, the buyer will generally be in the position to insist on the usage of its contractual template subject to the rules of supply and demand.[58] In a market, however, where the seller dominates, such as where it has the monopoly of supply, the seller may possess a particularly strong position. This is generally true in consumer contracts, and in sectors like computer software, information technology and telephony providers who commonly able to insist on the use of their respective terms of sale even outside of their home markets.[59] Nonetheless, the usual practice is for the seller to accept the buyer's terms as the starting point and thereafter reply with a number of counterproposals modifying the buyer's

53 At 5.

54 At 5-6.

55 At 6.

56 At 7.

57 David Echenberg "Negotiating international contracts: does the process invite a review of standard contracts from the point of view of national legal requirements?" in Giuditta Cordero-Moss (ed) *Boilerplate, Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press, 2011) 11 at 12.

58 At 12.

59 At 12.

original contractual language.[60] What follows, however, would depend on the relative bargaining position and resources available to the negotiating parties. Large companies like TNCs normally have legal counsels and the quantity and type of counterproposals would reflect this fact.[61] Smaller companies, on the other hand, may not have access to such resources and would provide fewer counterproposals.[62] Usually, the reviewer for smaller companies possesses commercial rather than legal background, and thus, his comments would emphasise the commercial rather than the legal contractual provisions.[63] Nonetheless, the negotiations process, especially in the case of international contracts involving the sale and purchase of goods and services, usually focus on select few legal issues – warranty, limitation of liability, termination, dispute resolution and the governing law provisions of the contract.[64] 'The extent to which individual contractual provisions are reviewed from the point of view of national legal requirements will depend on the importance of the individual provision to one or the other party.'[65] Hence, most provisions are negotiable while others are deal breakers.[66] Whether a contractual provision is a deal breaker will depend on the risk tolerance of the party, including the risk of non-enforceability of the contract itself.[67] Therefore, a party may insist inclusion of certain provisions mitigating risks. To ensure inclusions of desired provisions, a common negotiation strategy involves granting concessions on issues of minor importance.[68] Nonetheless, the negotiation process is an active and dynamic process, and there are many moving parts as the parties go through it.[69] Parties may change their mind as to their risk assessments and may therefore change their negotiation strategy. Furthermore, the company's representatives would still require the approval of the senior management, and the

60 At 12.

61 At 12.

62 At 12.

63 At 12.

64 At 12.

65 At 12.

66 At 13.

67 At 13.

68 At 14.

69 At 14.

latter may have a different opinion.[70] Therefore, the contract agreed upon is necessarily a product of compromise.

Since these contracts are products of compromise, there is a high likelihood that some provisions may be incoherent with the rest. In cross-border transactions where parties may come from different legal traditions, the provisions included into the contract may contain a mixture of principles drawn from respective legal systems of the parties[71] or even from somewhere else. This may not provide complications in the parties' interpretation and performance of the contract but the same may have serious consequences in the event of a dispute before a court.[72] Furthermore, the final agreement may not incorporate all of the relevant national legal requirements.[73]

Notably, especially when large TNCs are involved and the other party is unable to bargain for other terms because of inadequate resources, the standard international contract proposed may be adopted *in toto*. The use of standard international contracts is largely due to the globalisation of business.[74] Anglo-American companies strongly pushed for their use in their business transactions in the last century, and the continuous use of these contracts creates standard documentation for day-to-day business.[75] In addition, companies engaged in international trade and investments also have a strong need for internal standardisation, which in turn enhances the use of standard documentation.[76] Standardisation means a reduction of internal costs because the complexity in the exchange of information is a very costly activity.[77] Moreover, standard contracts contain clauses which may reflect practices that have been proven to best manage risks and uncertainties in high risk international business transactions. 'Contractual clauses are drafted in a specific manner in order to allocate risks related to specific transactions and normally should come both from experience (a sort of distillation of best practices) and from the interpretation of the law.'[78] Boilerplate clauses, for

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70 At 14.

71 At 18.

72 At 18.

73 At 18.

74 At 20.

75 Vettese, above n 38 at 20.

76 At 20.

77 At 20-21.

78 At 30.

instance, are specifically the result of best practices developed with respect to the allocation of typical risk polices present in international contracts.[79] Furthermore, national legislation may promote use of certain standards, like the International Financing Reporting Standards, thus pushing further of standard contracts,[80] and use of a particular language, and set of principles. Hence, examples of standard contracts permeate the various functions of a company – information technology, engineering, production, procurement, finance and legal matters.[81]

In addition, the limitation of language precludes contracting parties from achieving absolute agreement. In documenting the subjective preferences of the contracting parties, there is an inherent problem of transforming promises into words, oral or written because words are largely indeterminate, meaning they have no meaning by themselves but are infused with meaning based upon the particular experiences of the user of the words.[82] This problem is compounded in cross-border transactions where there are integral linguistic and cultural differences between parties, thus the existence of necessary differences in articulating and understanding the mutual promises of parties. Hence, because of differences in language, culture and legal systems, the intentions of parties in an international transaction cannot be easily discerned from their contract.[83]

A further complication, however, exists in Asia where contracts are said to play a different role and thus, viewed differently. While the Western approach is to be as detailed as possible because parties expect that if a matter is not addressed in the contract, there is no obligation and entitlement, the Asian approach is said to view contracts as a way to anticipate rather than define the ensuing relationship.[84] 'The contract memorializes not the "conclusion" of a business deal, as we are wont to describe a contract signing in the West, but the business relationship's beginning.'[85] '[T]he written contract is tentative rather than final, unfolding rather than static, a

79 At 23.

80 At 21.

81 At 21.

82 Larry A DiMatteo *International Contracting: Law and Practice* (Kluwer Law International, 2013) at 17.

83 At 15.

84 Philip McConnaughay "Rethinking the Role of Law and Contracts in East-West Commercial Relationships" (2001) 41 Va J Intl L 427 at 446.

85 At 446.

source of guidance rather than determinative, and subordinate to other values – such as preserving the relationship, avoiding disputes, and reciprocating accommodations – that may control far more than the written contract itself how a commercial relationship adjusts to future contingencies."[86] Hence, terms are often assigned a much lower value by Asian parties, and are commonly viewed not carrying a determinative weight.[87] Because the contract does not define the parties' performance but is an instrument to nourish the parties' relationship, mutual adjustment and accommodation is expected.[88] 'The process of adjustment and accommodation … is much more than "some ill-defined promise of good faith." Instead, it reflects reciprocal self-interest: "The great art is to give way (jang) on certain points, and thus accumulate …[a] fund of merit whereby one can later obtain advantages in other directions."'[89] Hence, when differences or disputes arise during the course of the contractual relationship, the parties will discuss and resolve the matter amicably.[90]

Given the possible differences in the parties' attitude towards contracts, the written agreement may not reflect the true intent of parties. In certain situations, there may even be a failure to draft a complete agreement[91] or parties may not even bother to go beyond preliminary agreements such as a letter of intent or memorandum of understanding.[92] In practice, most parties to a joint venture in China do not sign a document called a 'joint venture agreement'; instead, the letter of intent or memorandum of understanding takes the place of the joint venture.[93] In addition, the differences in attitude may also translate into formation and counterparty risks. The Asian party, for instance, may end up not fully complying with the formal requirements necessary to give legal effect to the contract (*e.g.*, registration requirements) or may not acquire the necessary authorities to represent his principal company.

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86 At 449.

87 At 447.

88 At 448.

89 At 448.

90 At 448.

91 Lipman, above n 20 at 48.

92 Andrew Godwin "Obligations to Negotiate in Good Faith in Cross-Border Deals" (2013) 3 Harv Bus L Rev Online 92 at 96.

93 At 96.

Another major source of problem in international commercial contracts is the fact that parties generally negotiate them based on imperfect information.[94] While the conduct of due diligence may provide information, the possessed information remains imperfect because of linguistic barriers, lack of knowledge of relevant laws and rules which may affect the transaction, or simply lack of time and resources to exhaustively gather material information.[95] In Asia where there is wide variance of legal systems, standards, sophistication of relevant rules, deficiency and uncertainty in the legal system, unavailability of documents coupled with cultural and linguistic barriers, acquiring a good understanding of the relevant facts is very challenging.[96] Hence, the understanding of the risks involved and provisions of the contract may not totally align with the actual state of material facts. This problem of imperfect information may translate into problems during the performance stage.

These discussions of the problems, issues and challenges happening during the negotiations and documentation stage translate into a higher level of risk that the expectations of the parties may not be realised, the so-called transactions risk. Fentiman points out that while transaction risks directly affect contracting parties when the stipulated performance is varied or prevented, he also stresses that transaction risks also have indirect effects, like when the risks limit the extent to which legal opinions can be given without qualification, and when rating agencies rate down transactions because the transaction is litigated in a country where the contractual law is readily overridden by other laws.[97] No wonder then that the legal opinions issued to support the cross-border transactions in Asia may be generally more qualified. In Indonesia, for instance, aside from usual qualifications, legal opinions may often be qualified by a statement that there is no reliable central source of obtaining comprehensive sets of relevant laws and regulations.[98] Likewise, Thai legal opinions for project financing transactions are qualified by the silence of Thai law on the admissibility in evidence and enforceability of non-

94 Echenberg, above n 57 at 15.

95 At 15.

96 See Baker & McKenzie "Asia Pacific Guide to Mergers & Acquisitions" (2013) <www.bakermckenzie.com/files/Uploads/Documents/MA_Guide_.pdf> at 94-95, 182-183, 270, 358, 363-364, 665.

97 Fentiman, above n 51 at 6-7.

98 Allens, Linklaters, Widyawan & Partners "Legal Guide to Investment in Indonesia" (July 2014) <www.allens.com.au/pubs/pdf/Investing-in-Indonesia.pdf> at 3.

exclusive jurisdiction of foreign courts, waivers of objections to venue, and judgment currency indemnities.[99] It appears that the qualifications in legal opinions reflect the deficiency and uncertainty in the legal infrastructure of Asian countries brought about by lack of laws and jurisprudence on specific legal issues.

Similarly, credit rating agencies may rate Asian companies involved in cross-border transactions lower than their Western counterparts. The ratings of emerging market firms, which most firms in Asia qualify, are usually capped by the sovereign rating of the country where they are based because they are seen to be suffering directly from macroeconomic shocks of their host country, irrespective of the capabilities of their management and operations.[100] In addition, accounting standards of emerging market firms are also seen to be of generally low quality, and thus are seen to be riskier, and thus, receive lower credit ratings.[101]

Western governments also recognise Asia's particular sensitivity to transaction risk. Australia's Solicitor-General Gleeson observes, for instance, that Asia has a particular sensitivity to increased transaction cost because:[102]

> a. when compared with other regions around the world, the Asia-Pacific is a region made up of many countries and their geographical dispersion makes travel including to resolve disputes more expensive;
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> b. the Asia Pacific region is populated with common law, civil law and hybrid systems;
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> c. a multitude of different languages is spoken, making it more difficult for parties to access and understand the laws and procedures of countries they engage in business with; and
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> d. the region is also made up of varying levels of economic growth resulting in considerable differences in the sophistication of court practices and procedures including amongst other things the use of technologies enabling overseas appearances.

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99 Al Chandler "Thailand: Something Special" (1 June 2011) International Financial Law Review (online) <www.iflr.com/Article/2855518/Thailand-Something-special.html>.

100 Giovanni Ferri and Li-Gang Liu "How Do Global Credit-Rating Agencies Rate Firms from Developing Countries?" (2004) 2 Asian Econ Papers 30 at 35.

101 Kee-Hong Bae, Lynette Purda and Michael Welker "Credit rating initiation and accounting quality for emerging-market firms" (2013) 44 J Intl Bus Stud 216 at 219.

102 Justin Gleeson "An Australian Perspective on International Commercial Litigation: The Challenges and Opportunities" (Paper presented at Conference on International Litigation in the Asia Pacific, Wuhan University, China, 23-24 September 2013) at 8-9.

Unsurprisingly, as a result of the foregoing problems and issues during the negotiations and documentation phase, the interpretation and performance of international commercial contracts may be difficult. In a 1991 Harvard Business Review study, for example, only 51% of the joint ventures were considered successful,[103] meaning, each partner achieved returns greater than their cost of capital.[104] In 2001, the same group did a follow-up study and found that the success rates inched to 53%.[105] Another study in 2003 reported a failure rate between 30% and 61%, and that 60% of announced joint ventures failed to start, or faded away within five years.[106] Reasons for the failure of course are not limited to purely legal concerns and may include marketing failure, failure to adapt to cultural differences, poor communication and other commercial issues.[107] Nonetheless, these 'non-legal concerns' may be rooted on issues and problems that arose during the negotiation and documentation phase such as inadequate information, differences in attitudes towards contracts, failure to take into account the effects of local laws, incomplete documentation, etc.

A major legal problem during the performance stage is that the expected effect of the contract may not necessarily happen (ie, the direct effect of transaction risk). There are several reasons for this. First, international contracts are not totally immune from the effects of the laws of the forum or any third party state.[108] Laws of the forum or the relevant third party state, even if not chosen in the international contract, may provide a different legal result from those intended or envisioned by the parties. Moreover, legal concepts which parties may have in mind may be given a different legal effect because of the differences in the general legal framework and remedies available. Second, there are other practical issues that may vary the intended legal effect. While the law may have been complied with on paper or that the envisioned effect of the law had been properly taken into account in the contract, the lack of resources especially in emerging countries, may lead to a different manner of implementation, result or interaction with the international

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103 James Bamford, David Ernst and David Fubini "Launching a World-Class Joint Venture" (1 February 2004) 82 Harv Bus Rev 91 at 91.

104 At 91.

105 At 91.

106 Blakenewport "Joint Ventures Explained" (6 June 2007) <www.blakenewport.co.uk/bna-news-and-media.asp?id=18>.

107 See Lipman, above n 20 at 39-50.

108 Cordero-Moss, above n 34 at 8-9.

contract. Third, language and socio-cultural differences in understanding the contract and most especially during the performance stage further complicate international commercial contracts. While parties may sign a contract in the English language, the local jurisdiction may require a contract written in the local language and the same may have conceptual differences given the lack of one-to-one correspondence in the legal language of the legal systems. In addition, as mentioned, differences in the attitude towards contracts, and thus parties' expectations, may translate to issues in contract interpretation and performance.

In the 2011 survey of the International Association for Contract and Commercial Management, ten of the clauses listed that were involved in a dispute where over their interpretation or performance, in more than 20% of cases:[109]

Delivery / Acceptance	41%
Price / Charge / Price Changes	38%
Change Management	32%
Invoice / Late Payment	32%
Performance / Guarantees	27%
Service Levels / Warrantees	27%
Payment	25%
Responsibilities of the Parties	22%
Liquidated Damages	22%
Scope and Goals	21%

The other clauses which are usually involved in contractual disputes are: Limitation of Liability (16%), Indemnification (14%), Cause of Termination (14%), Intellectual Property (12%), Audits/Benchmarking (10%), Assignment (8%), Dispute Resolution (8%), Data Protection (7%), Reporting (7%), Insurance (6%), Rights of Use (6%), Confidentiality and Non-Disclosure (5%), Product Substitution (5%), Freight and Shipping (5%), Force Majeure (5%), Merger Clause (4%), Applicable Law and Jurisdiction (4%), and Export-Import Regulation (3%).[110] It is interesting to note that 8% of the disputes involve the interpretation and performance of the dispute resolution clauses and 4% involve the applicable law and jurisdiction clauses.

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109 DiMatteo, above n 82 at 19-20.

110 At 20.

In sum, international commercial contracts carry tremendous risks, and are pregnant with controversies – from its negotiation, documentation, interpretation and performance, and effect of language and socio-cultural differences- all of which may give rise to serious issues, problems and challenges. These problems and issues are further aggravated in Asia because of its outstanding diversity and complexity. Nevertheless, risks may be managed better through the use of Choice-of-Forum clauses which will be discussed further in the next section.

V FUNCTION AND PURPOSE OF CHOICE-OF-FORUM CLAUSES

Choice-of-Forum clauses, also referred as 'jurisdiction agreements', 'Choice-of-Court clauses', 'forum selection clauses' or 'litigation agreements' are contractual clause(s) that provide the jurisdiction where the party may have their disputes arising or connected to the international commercial contract be resolved. The clause, which may refer the disputes to a domestic, foreign or even international court, has two aspects: prorogation, whereby jurisdiction is conferred by the agreement of the parties upon a forum which might not otherwise have jurisdiction, and its counterpart, derogation, whereby the jurisdiction of one or more for a which otherwise would have had jurisdiction is excluded by the agreement of the parties.[111] In addition, a Choice-of-Forum clause may be exclusive (mandatory) or when jurisdiction is conferred on one forum to the exclusion of all other forums, or non-exclusive (permissive) where the agreement identifies a preferred forum or merely excludes one or more possible jurisdictions.[112]

The importance of Choice-of-Forum clauses can be better appreciated if seen from the interests of the parties, forum state, and international community. For the parties, this is usually in the form of reduction of risks, gains in efficiency, and acquisition of certainty and predictability. For the forum state, this is usually the attraction of investments and trade. For the international community, the advancement of international commerce and trade through enhanced judicial cooperation and certainty in terms of jurisdictional outcomes are the primary motivations.

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111 Peter Nygh *Autonomy in International Contracts* (Clarendon Press Oxford, 1999) at 15.

112 At 15.

5.1 Parties' Interests

The parties' interest in choice-of-forum clauses has important commercial aspects. As earlier mentioned, litigation risk is the primary threat to a transaction because it is only in the course of litigation that the risks to which the transactions are prone will materialise.[113] Hence, where the litigation will occur in case a dispute arises is a key consideration in commercial transactions. According to Fentiman, international commercial litigation is the continuation of international commerce by other means.[114] Hence, the Choice-of-Forum clause determines the efficacy of enforcing the other party's obligations and finding remedy for non-performance.[115] Moreover, it is an investment decision such that the objective is a good return on that investment; thus the direct concern is not winning or losing, but with the financial implications of either outcome.[116] Hence, where to litigate may go into the very financial valuation or consideration of the commercial transaction involved. The choice is also a means to crystallise the relative strengths and weaknesses of the parties, and therefore provides a framework for negotiating a settlement, which parties may take into account in putting financial value to the transaction.[117] In a similar manner, the general cost levels and efficiency of the chosen court to handle the dispute translate to direct financial expenses on the part of the parties (eg, court fees, lawyers' fees, duration of the proceedings, etc).[118]

As regards the legal aspects, Choice-of-Forum clauses define a whole range of legal and tactical issues – both substantive and procedural. First, fixing the forum appropriately guides the parties in drafting the contract. As the discussion below shows, forum law impacts a wide range of legal issues, and the parties cannot properly take these into account unless they fix the forum court through the Choice-of-Forum clause.[119] The Choice-of-Forum therefore gives parties greater predictability as to the legal impact of their contract.

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113 Fentiman, above n 51 at 5.

114 Richard Fentiman *International Commercial Litigation* (Oxford University Press, 2nd ed, 2015) at 276.

115 At 276-277.

116 At 277.

117 At 277.

118 At 333.

119 Trevor Hartley *Choice-of-Court Agreements under the European and International Instruments* (Oxford University Press, 2013) at 4.

Second, the Choice-of-Forum clause shapes the claimant's choices whether to claim, what to claim, and how to claim. Location of defendant's assets,[120] the value of these assets,[121] availability of effective enforcement mechanisms to seize and secure them,[122] costs of locating the assets,[123] court costs,[124] immunities available to the defendant,[125] etc are important considerations of the claimant in pursuing a claim in a particular forum. Furthermore, what cause of action to file is defined by the forum court's conflict of law rules[126] particularly its rules on characterisation of the dispute (eg, is the dispute contractual, a tort or otherwise?),[127] jurisdictional rules (ie, subject matter and personal jurisdiction rules), the kind of provisional remedies available (ie, the availability of a relief may be tied to the type of action filed),[128] the nature and amount of damages the court can award,[129] the extent of judicial discretion[130] (eg, the existence of grounds for dismissal under *forum non conveniens*[131] may depend on the cause of action), the defences available to the defendant,[132] the substantive outcome of the decision (eg, is a declaration of title sought?),[133] among others. Additionally, the cause of action may be shaped by the chosen court's rules on determining the validity or enforceability of the Choice-of-Forum clause, along with rules of interpretation, which goes into the scope or what actions to file. As regards how to pursue the claim (ie, the sequence or strategy

120 See Fentiman, above n 114 at 279.

121 See Fentiman, above n 51 at 333.

122 At 332-333.

123 See At 333.

124 At 333.

125 See eg, Reid Mortensen, Richard Garnett and Mary Keyes *Private International Law in Australia* (LexisNexis Butterworths, 3rd ed., 2015) at 80.

126 Fentiman, above n 51 at 332.

127 Fentiman, above n 114 at 279; Peter Nygh, above n 111 at 88.

128 Fentiman, above n 51 at 332.

129 At 333.

130 Adrian Briggs *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) at 198.

131 Ronald Brand and Scott Jablonski *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (Oxford University Press, 2007) at 1.

132 Fentiman, above n 114 at 282.

133 Ibid.

employed), the chosen forum determines the entire procedural aspect of the case like how a claim is to be made including the contents of the pleading. This is because the laws of the forum court (*lex fori*) determine the procedure of any action filed.[134] As such, the chosen court determines the kind and extent of interlocutory reliefs and other remedies available for purposes of forcing the other party to negotiate and gain a tactical advantage during negotiations.[135] Likewise, the chosen court determines the discovery procedure available, which along with the interlocutory reliefs can also define the possibility of an out-of-court settlement.[136] Similarly, the rules of evidence of the chosen court determine the approach as to what documents or witnesses will be presented and how to present them during trial.[137] The possibility of third party proceedings is also a function of the rules of the chosen court.[138]

Third, important aspects of the Choice-of-Law clause may depend on the rules of the chosen forum. For one, even before applying the chosen law, the chosen court already has a large discretionary space to determine whether or not to proceed with the action filed through its inherent power to define and determine its own jurisdiction (ie, *kompetenz-kompetenz* principle). If this hurdle is accomplished, the characterisation of the dispute of the forum court, as shown above, may determine the application of the chosen law. This may depend on the rules of the chosen forum. Other aspects which are determined by the chosen forum include the power of the parties to designate the chosen law,[139] the existence[140] of the Choice-of-Law clause, and the evidence to be presented so as to prove the contents of the foreign law.[141] Whether or not to resort to depeçage (ie, splitting the case into issues which may then require different laws being applied)[142] or renvoi (ie, reference to the laws of a foreign jurisdiction pursuant to conflicts rule)[143] are also dependent on the forum court. In the absence or unenforceability of the

134 Richard Garnett *Substance and Procedure in Private International Law* (Oxford University Press, 2012) at 5.

135 See Fentiman, above n 114 at 277.

136 See at 284.

137 See Garnett, above n 134 at 189.

138 Fentiman, above n 114 at 284.

139 Nygh, above n 111 at 86.

140 At 90.

141 See Fentiman, above n 114 at 283, 668.

142 Nygh, above n 111 at 137.

143 At 86.

Choice-of-Law clause, the rules of the chosen forum determine what happens next.[144] The mandatory rules[145] and public policy[146] of the chosen forum can even trump the chosen law. Hence, to a large extent, how the Choice-of-Law clause will be applied depend on the Choice-of-Forum clause. Fentiman even strongly argues, 'success in a cross-border dispute does not depend so much on a claimant's prospects under any particular national law. It depends on the relevant rules for choice of law, the relative scope of the substantive law and the domestic law of the forum, and the forum rules for establishing the content of foreign law.'[147]

Fourth, the chosen court also determines important litigation issues like neutrality, [148] susceptibility to corruption, [149] predictability of results (eg, jurisdictions with not much experience in dealing with a particular type of dispute or issue imply greater unpredictability),[150] availability of technical expertise to deal with the issues,[151] and other case management issues (eg, number of cases in court dockets).[152] These are important factors defined by the Choice-of-Forum clause that the parties should take into account during trial or pursuing settlement.

5.2 State Interests

States also have strong interests in promoting Choice-of-Forum clauses. These clauses have become an integral part of attracting investments and trade and ensuring competitiveness in the global market, especially that they have become a common feature of international commercial contracts.[153] In *Bremen v Zapata Off-*

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144 At 266.

145 At 199.

146 See eg, *Civil Code* (Philippines), art 1306; Nygh, above n 111 at 233.

147 Fentiman, above n 114 at 283.

148 At 287.

149 Trevor Hartley "The Modern Approach to Private International Law: International Litigation and Transactions from a Common-Law Perspective" (2006) 319 Recueil des Cours de l'Académie de droit international de La Haye 9 at 115.

150 See eg, Chandler, above n 99; Fentiman, above n 114 at 285.

151 See *Bremen v Zapata Off-Shore Co* 407 US 1 (1972) at 12; Hannah Buxbaum "Forum Selection in International Contract Litigation: The Role of Judicial Discretion" (2004) 12 Willamette J Intl & Disp Resol 185 at 195.

152 See Fentiman, above n 114 at 460; Buxbaum, above n 151 at 190.

153 Eg, *Explanatory Memorandum to the Proposal for a Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements* /*COM/2014/046 final - 2014/0021 (NLE) at 3-4; Law Reform Committee Report of

Shore Co., the US Supreme Court, for instance, highlighted that 'the elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.'[154] Furthermore, guaranteeing their enforceability reflects the country's general commitment to reliability of contracts, and thus as a result may also improve the probability that judgments coming from the forum state will be enforced and recognised in another country to the extent that it would not be stricken down on public policy grounds because it shares with the other country the same values as regards contracts and Choice-of-Forum clauses. Moreover, for forum states and especially for dispute resolution centres, there is a strong incentive to implement the Choice-of-Forum clause so as to influence the development of the law as regards certain commercial issues.[155]

Furthermore, given the commercial nature of the transaction usually involved, and the presence of foreign parties, the state may also have commercial incentives in enforcing Choice-of-Forum clauses. This has been the view, for example, in the case of the Commercial Court in London where commercial litigation has been considered an important source of money for the United Kingdom.[156] The Commercial Court's attractiveness has not only ensured a steady flow of court fees but also generated a flourishing practice for the expert advisers, solicitors and barristers, and business for the hotel proprietors and travel firms.[157] Singapore has likewise seen the same potential for its newly-established Singapore International Commercial Court,[158] and this may be achieved through strong recognition of jurisdiction agreements designating the courts of Singapore as the chosen forum. Such commercial incentive is also acknowledged in the United States where a survey conducted by the American Bar Association showed that over 98% of the respondents indicated that a convention on choice of court agreements would be useful for their practice.[159]

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the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005 (Singapore Academy of Law, 2013) <www.sal.org.sg/Lists/Law%20Reform%20Committee%20Reports/DispForm.aspx?ID=38>at 2.

154 *Bremen v Zapata Off-Shore Co* 407 US 1 (1972) at 13-14.

155 Law Reform Committee, above n 153 at 2.

156 Mary Keyes *Jurisdiction in International Litigation* (Federation Press, 2005) at 25.

157 At 25.

158 Singapore International Commercial Court "A Prime Destination for International Commercial Dispute Resolution" (2015) <www.sicc.gov.sg/About.aspx?id=21>.

159 American Bar Association "Recommendation Adopted by the House of Delegates August 7-8, 2006" (2006) at 2.

The enforcement of Choice-of-Forum clauses also addresses or at least provides a reliable framework for preventing forum shopping. As a result, if the state enforces the Choice-of-Forum clause, the state can address the issues arising from forum shopping like unfairness, adverse effect to local court resources, and undermining of foreign legal systems.[160]

5.2.1 Interests of the International Community

The advancement of international commerce and trade through enhanced judicial cooperation and certainty in terms of jurisdictional outcomes is the primary reason why the international community promotes Choice-of-Forum clauses.[161] The reliability of these clauses is seen as a key factor to economic growth especially in the context of facilitating global and intra-regional trade.[162] Being an aspect of party autonomy, its promotion is also aligned to the prevailing liberalist philosophy of promoting freedom and reliability of contracts. As a key to wealth creation, Choice-of-Forum clauses may be seen as channels of progress, and thus development and even global stability.

VI CONCLUSION

The case of international commercial contracts in Asia is curious for a number of reasons. Asia's increasing prominence in trade and investments, for instance, has emphasised the importance of international commercial contracts in facilitating cross-border transactions, and the many forms they assume to mirror the complexity of these transactions. Nonetheless, despite the complexity, diversity, innovativeness and variety of trade and investment transactions in Asia, international commercial contracts in Asia are dominated by standardised, English-language, drafted in common-law style contracts. While this scenario reflects the demands and uncertainties of international trade and investments in Asia, such has produced a curious situation especially in light of the wide differences in culture, preferences, attitudes towards law and contracts, languages, legal systems, standards, approaches, stages of development, legal infrastructure, etc. among Asian societies. Hence, this has translated into issues in contract negotiation,

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160 See Keyes, above n 156 at 28-29.

161 Eg, Convention on Choice of Court Agreements 44 ILM 1294 (opened for signature 30 June 2005, not yet in force), preamble ("*Choice-of-Court Convention*"); American Bar Association, above n 159 at 5.

162 Yeo Tiong Min "International Litigation in Asia: Will the Hague Choice of Court Convention Make Any Difference" (paper presented to Japanese Society of International Law Annual Meeting, Shizuoka, 12-14 October 2013) at 1 <www.jsil.jp/annual_documents/2013/1012224.pdf>.

documentation, conduct of due diligence, and especially during performance. Thus, if cross-border transactions generally carry high risks, those in Asia could be much higher. The more qualified legal opinion, lower credit ratings and statements of governments attest to this situation.

One way to manage the much higher levels of risk in Asia is through the Choice-of-Forum clauses. Serving both commercial and legal functions, these clauses have reduced risks by providing greater certainty and predictability of dispute outcomes for parties. States also have a strong incentive to recognise them because of their ability to attract investments and trade, not to mention the business they can generate for the legal profession. The international community favours them because they advance international commerce and trade through enhanced judicial cooperation and certainty in terms of judicial outcomes. Given the higher risk profile of Asian cross-border transactions and the curious characteristics of the international commercial contracts used in Asia, the robust capacity of Choice-of-Forum clauses in managing transaction risks provides a strong incentive for Asian countries to recognise and implement these clauses.