



TESTAMENTARY PROCESSES IN THE ASEAN REGION: A BOON OR BANE TO FREE TRADE?

The process of doing business has evolved due to the advent of the Internet and the World Wide Web as it has broken down barriers in dealings and trade. The increase of cross-border expansion and acquisitions have inevitably led to an increased flow of human capital who acquires assets when settling in to a new country. When these foreign owners pass away, cross-border inheritance claims will arise. How easy is it truly to stake one's claim in both movable and immovable assets outside of their country of birth but within ASEAN? In this article, Jeyakuhan S K Jeyasingam, Partner in the Litigation Practice of Zaid Ibrahim & Co. (a member of ZICO Law) discusses the need for a uniform testamentary process in ASEAN to provide a set of rules governing the law of probate in the region.

DECEMBER 2019

The advent of the Internet and World Wide Web has changed the way business is perceived. It has enabled billions of people to deal and trade across borders regardless of nationality, race, religion or gender. In stark reality, the physical dimension of this virtual realm does not necessarily transcend international borders and laws.

Regional trade blocs like the European Union (“EU”), Arab League (AL), South Asian Association of Regional Cooperation (SAARC), North American Free Trade Agreement (NAFTA), African Union (AU) and our very own Association of South East Asian Nations (“ASEAN”) figure very much in this equation.

Increasingly, companies and businesses are involved in cross-border expansion or acquisitions. These situations inevitably lead to an increased flow of human capital from the countries of origin to the

new jurisdiction to help manage, support, or set up businesses and operations. Foreigners settling in a new country will likely acquire assets such as commercial, industrial and residential property, machinery/equipment, vehicles, investments in other businesses, jewellery, cash in company and personal bank accounts and e-Wallets, shares in private and listed companies and unit trusts.

In terms of ASEAN, when these foreign owners of assets pass away, cross-border inheritance claims will arise. How easy is it truly to stake one’s claim in both movable and immovable assets outside of their country of birth but within ASEAN?

To explore the answer to this question, we must first review the six fundamental principles of the ASEAN state.

FUNDAMENTAL PRINCIPLES OF THE ASEAN STATE

In their relations with one another, ASEAN member states have adopted the following fundamental principles, as contained in the 1976 Treaty of Amity and Cooperation in Southeast Asia:

- mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
- the right of every State to lead its national existence free from external interference, subversion or coercion;
- non-interference in the internal affairs of one another;
- settlement of differences or disputes in a peaceful manner;
- renunciation of the threat or use of force; and
- effective cooperation amongst themselves.

The most relevant principle for our purpose is the effective cooperation amongst ASEAN members.

In Malaysia, the methodology of leaving an inheritance under civil law is through a will. Upon the death of the person making the will, known as a testator, a grant of probate will be petitioned for through the High Court. Resealing refers to the process of having the local courts confirming a grant of probate from another jurisdiction which in Malaysia, foreign probates especially from the UK and other Commonwealth countries largely are permitted to be resealed in the High Court. **Figure 1** below sets out the situation in Malaysia versus other ASEAN nations.

TESTAMENTARY PROCESS IN ASEAN

In order to recognise the resealing of probates or wills, a uniform set of laws, via a treaty amongst ASEAN states is clearly desired. It would be necessary to create a one stop physical and/or virtual centre to administer the resealing of probates and wills and set up a legal entity or body overlooking the entire process. This would require political cooperation amongst the member states.

Needless to say, having an ASEAN treaty governing the recognition of wills and the resealing of probate is beneficial to the ASEAN members as it will allow for the flow of return of investments back into the country of the investor or asset owner. Such treaties should conform to a certain set of guidelines and protocols that must be complied with by all members. With a legal set of rules and a better negotiating platform in place, cross border disputes involving wills and probate applications may lessen over time.

The ASEAN states’ compliance with ASEAN treaties is well recorded. The ASEAN Charter, which was signed in 2008, has operated as a new legal framework that legally binds the ten member states. A recent example of this development in the ASEAN state as a result of the treaties is the execution of a Memorandum of Understanding on counter terrorism between ASEAN and Australia. Also the Treaty of

Amity and Cooperation that was signed amongst ASEAN members had successfully reduced the regional hostilities and fought the communist-led insurgencies during the U.S war in Vietnam.

The background of the testamentary process in the ASEAN states must be observed in the light of the similarities and differences in each ASEAN state as well as the availability to reseat the Grant of Probate in the ASEAN states. This is reflected in **Figure 1** below.

The ownership of an inheritance by a foreigner from the ASEAN region in both movable and immovable property is subject to the respective member state’s law. For example, **Indonesia** does not allow foreigners to possess immovable property for a period exceeding one year. Whereas, for cash transfers there are limitations set by the respective ASEAN states. In **Cambodia**, Article 13(1) of the Law on Foreign Exchange requires the import or export of any means of payment equal to or exceeding KHR10,000 or an equivalent amount to be reported to the Customs authorities at the relevant border crossing point, and the Customs authorities should transmit this information on a monthly basis to the National Bank. In **Thailand**, the transfer limit per transaction is at THB475,000 and a person can only send up to THB800,000 per day.

FIGURE 1

	BRUNEI	CAMBODIA	INDONESIA	LAOS	MYANMAR
Is it similar to Malaysia?	Yes	No	Fairly similar	Yes	Yes
Similarities	<ul style="list-style-type: none"> Application to the court for Grant of Probate (“GOP”) is always necessary. Adopted children are deemed to be descendants in the same way as legitimate children. Must be made in writing, dated and signed before two witnesses and witnesses cannot be beneficiaries under the will. 	<ul style="list-style-type: none"> Governed under the Civil Code of Cambodia. Civil courts will handle the inheritance settlement and disputes arising from it. 	<ul style="list-style-type: none"> Kitab Undang-undang Hukum Perdata governs the testamentary process. No joint will. Civil court will handle any inheritance disputes. 	<ul style="list-style-type: none"> The Law on Civil Procedure (Law On Inheritance No. 02/NA) (Lao) governs testacy. Civil court will handle the inheritance settlement and disputes arising from it. 	<ul style="list-style-type: none"> The Administrator General Act governs wills and probate administration requirement. The Probate application system is fairly similar to Malaysia where the High Court holds the power to grant probate to the executor by issuing the executor with a GOP.
Differences	-	<ul style="list-style-type: none"> Foreigners must apply for citizenship to be able to inherit property in Cambodia. There are three types of wills: wills by notarial document, wills by private document and wills by secret document (hybrid of both wills). Half of the deceased’s estate need to be passed to the descendants and only the other half can be passed to foreigners. 	<ul style="list-style-type: none"> The will is by way of a notarial deed. Testator can only leave 1/3 of the assets to a non-direct bloodline. Foreigners are not allowed to own land in Indonesia. Thus they will have to sell or transfer the inherited land within one year of the inheritance. 	<ul style="list-style-type: none"> Wills can be verbal and written and there must be at least three witnesses. The will must be placed in a wax-sealed envelope and then registered with a notary office closest to the area the testator resides, where it will be deposited. Once deposited, the notary office will provide the testator with a certificate noting that the testator had deposited a copy of the will. In practice the notary office will request for additional supporting documents such as evidence of assets stated in the will. 	<ul style="list-style-type: none"> A Burmese Buddhist is generally not allowed to will off his/her assets.
Resealing recognised by Malaysia?	Yes	No	No	No	No
Does each ASEAN state recognise its member nations applications for resealing of the GOP?	Yes	<ul style="list-style-type: none"> The will must be passed over to a Cambodian Court for review to ensure the will conforms to the local regulatory requirements. If the court adjudicates that the will does not comply with the regulations, then the will shall not be legally recognised in Cambodia. 	<ul style="list-style-type: none"> Indonesia does recognise resealing the GOP but imposes a few conditions for foreigners to gain ownership of the immovable property located within its jurisdiction. 	<ul style="list-style-type: none"> Laos does recognise foreign nations’ judgments provided there is a mutual treaty on the recognition of foreign court judgments. If there is no such treaty then the foreign court judgment must be submitted to the People’s Court for recognition. 	<ul style="list-style-type: none"> It is not quite a resealing of a GOP. In Myanmar, the holder of a foreign GOP will need to write to the Administrator General to claim their rights on the assets located in Myanmar. The approval granted by the Administrator General is vital for a foreigner to enforce the claim on the assets of the deceased.
ASEAN body that helps oversee such testamentary claims for assets?	No	No	No	No	No
Inheritance tax to be paid?	No inheritance tax on persons dying on or after 15 December 1988.	No	There is no inheritance tax in place in Indonesia.	There is no inheritance tax in place in Laos.	No inheritance tax in Myanmar but there is stamp duty for inherited assets and gifts.

	PHILIPPINES	SINGAPORE	THAILAND	VIETNAM
Is it similar to Malaysia?	Yes	Yes	Yes	The similarities are only to the extent that both Vietnam and Malaysia have distinctive sets of regulations to govern will writing and administration.
Similarities	<ul style="list-style-type: none"> Application to the court for GOP is always necessary. 	<ul style="list-style-type: none"> Application to the court for GOP is always necessary. No will is legally recognised when made by a person under the age of 21 which is their age of majority. Executor is also a trustee bound under the Trustee Act of each country. 	<ul style="list-style-type: none"> Application to the court for GOP is always necessary. Adopted children are deemed to be descendants in the same way as legitimate children. Witness of a will cannot be a beneficiary under the will. Must be made in writing, dated and signed before two witnesses. 	<ul style="list-style-type: none"> Civil courts will handle the inheritance settlement and disputes arising from it. Has a Civil Code to govern testacy.
Differences	<ul style="list-style-type: none"> The will can be handwritten (holographic) or notarial will. The holographic will not need witness. There is no exclusive Wills Act, but the will and testamentary requirements are provided in the Civil Code. 	<ul style="list-style-type: none"> There is a better administration of the will in the sense that they actually have a will deposit counter at the Court Registry. Singapore have joint wills, which are commonly used for spouses. 	<ul style="list-style-type: none"> No notion of family provision claims. 	<ul style="list-style-type: none"> Previously, immovable properties were not allowed to be transferred to foreign individuals/organisations, however through “renvoi” they can now inherit properties just like the locals. Regardless of the will, Vietnam has a compulsory hereditary system to provide for minor children, parents and spouse. Those who cause the death of the testator, breached their duty of care or coerced the testator in making the will, are forbidden from being beneficiaries. Husband and wife can jointly make a will.
Resealing recognised by Malaysia?	No	Yes	No	No
Does each ASEAN state recognise its member nations applications for resealing of the GOP?	<ul style="list-style-type: none"> Philippines does recognise the member nations applying for resealing the GOP. They call it reprobate. 	<ul style="list-style-type: none"> Yes if it is from a Commonwealth country. It is generally easier and cheaper to reseal a grant if it is obtained in the UK and other Commonwealth countries. 	No	<ul style="list-style-type: none"> Vietnam has a different inheritance law and will format that makes it difficult to recognise their version from other ASEAN countries.
ASEAN body that helps oversee such testamentary claims for assets?	No	No	No	No
Inheritance tax to be paid?	There is estate tax imposed for residents and non-residents, provided the property is located in the state territory.	In Singapore, inheritance tax is only applicable for a person who died before 15 February 2008.	<ul style="list-style-type: none"> Inheritance more than THB100 million is subject to inheritance tax. 10% of the total value of inheritance, is to be paid by the inheritor who is not a descendant or ascendant. 5% of the total value of the inheritance, is to be paid by the inheritor who is a descendant or ascendant. 	There is inheritance tax at a flat rate of 10% for inheritance exceeding VND10 million.

IS THERE A NEED FOR UNIFORM LAW ON TESTAMENTARY PROCESS?

Here's the problem statement - ASEAN states are lacking a uniform treaty to govern the testamentary process in the region. Something that a single international governing body could help address. Cross border claims are not the only effects of the problem. There are certainly jurisdictional issues to consider. Where would such cases be tried? What law or laws would be applicable? The availability of the legal right to reseal a grant of probate is not consistent amongst the member states. Some states do not allow the resealing of probate, such as Vietnam which has complex administration requirements.

Another effect of the problem is the recognition of foreign wills. Compulsory hereditary systems in states such as Vietnam makes it harder if the will has no provisions for the next of kin. In other words, there must be total compliance with the local law on a will being bequeathed as it involves compulsory inheritance. A different problem is presented in Cambodia, whereby foreigners must apply for citizenship to be able to inherit property. In Indonesia, the property will either be distributed to the next of kin or become state's property.

CONCLUSION

As there is currently no uniform testamentary process in ASEAN, we can learn from the experience of the other trade blocs to counter this issue. The EU has a uniform set of laws with regard to inheritance. The regulations create a European certificate of succession that allows the legatees of a will to prove their status in other EU countries. The purpose of this is to ensure there will be a visible body to refer to when there is a problem in resealing a grant of probate.

The answer therefore must lie in putting forth a proposal for an ASEAN treaty to create a body to govern the testamentary process. There must be a uniform set of rules to govern the law regarding probate in ASEAN. Only then will the testamentary process in the ASEAN region be truly considered as a boon to free and smooth flowing trade to the almost 800 million inhabitants of one of the most dynamic economic growth areas on our planet.



If you have any questions or require any additional information, you may contact the following person or the ZICO Law Partner you usually deal with.



Jeyakuhan S K Jeyasingam
Partner

jeyakuhan.jeyasingam@zicolaw.com
t. +603 2087 9999

Jeyakuhan Jeyasingam has over 23 years of experience in Property, Probate and Strata Management Law. He provides commercial litigation services for testamentary and inheritance claims as well as for disputes in stratified and landed property concerning common property, facility management, real estate acquisition, sales and leasing sectors.

He also regularly advises on local and cross-border legal claims against freight forwarders, hauliers/transporters, shipping lines and logistics providers and has represented clients on various civil and labour law matters as well. Jeyakuhan has also advised on corporate law documentation for international projects including those in the oil and gas, manufacturing, telecommunication, construction, education, media, plantation, timber, railway and plastics industries.

This article was edited by ZICO Knowledge Management.

All rights reserved. No part of this document may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, without our prior written permission.

This article is updated as at 4 December 2019. The information in this article is for general information only and is not a substitute for legal advice. If you require any advice or further information, please contact us.

ASEAN INSIDERS,
by origin and passion