Council of ASEAN Chief Justices

Common Values, Aspirations and Principles

Concept Note

Objective

1 This Concept Note proposes the development and articulation of a non-binding set of shared values, aspirations and principles which may be commonly held by our courts when faced with the challenge of resolving cross-border disputes involving children.[1] To avoid doubt, this Concept Note and the proposed shared values, aspirations and principles are aspirational in nature and their application is subject to each country's applicable laws and regulations.

Background

2 At the 7th Council of ASEAN Chief Justices ("CACJ") Meeting in Thailand on 22 and 23 November 2019, the CACJ adopted the Bangkok Declaration. In the said Declaration, the CACJ agreed, at paragraph 15, for the "Working Group on Cross-Border Disputes Involving Children to discuss and consider developing a common set of values, aspirations and principles".[2] A common set of values, aspirations and principles is crucial as it gives direction to our efforts and enables us to create consensus on how challenges posed by cross-border disputes involving children can be tackled. It will lay the foundations for the project and guide those who will labour on it beyond our time.

[1] This Concept Note applies only to cross-border disputes involving children in the context of family matters. For the avoidance of doubt, this Concept Note does not apply to criminal cases involving children.

[2] This is confirmed at para 8(iii) of the Hanoi Declaration.

The centrality of the best interests of the child

3 The first proposed common value is for the courts to place the best interests of children at the centre of all cross-border disputes involving children. It is suggested that a child's best interests refer to her well-being in every aspect: physical, intellectual, psychological, emotional, moral and religious well-being, both in the short term and in the long term.

4 It is further suggested that the courts should aim to focus on a child's best interests in parental disputes because parental conflict is known have a negative impact on children. Continued exposure to inter-parental conflict and violence during marriage has been shown to have long-lasting adverse psychological, emotional and behavioural effects on children.[3]

5 Notwithstanding the impact which inter-parental disputes may have on children, they remain outside of the legal framework when the disputes are heard in the courts. As a result, the parents may not act in the child's best interests when their personal interests do not align with those of the child. It would therefore be ideal for a judge to focus on the needs and best interests of the child by ensuring that any order he or she makes takes that into account as a central consideration.

6 Fortunately, it is widely accepted that in resolving any disputes, including cross-border disputes involving children, the court will regard the best interests of the child as central. Indeed, the United Nations Convention on the Rights of the Child ("UNCRC") pronounces that in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests

[3] Emery and Emery "Children's Adjustment Following Divorce: Risk and Resilience Perspectives" (2003) 52(4) Family Relations 352–362; and Burke, McIntosh, & Gridley Parenting after Separation. A Literature Review prepared for the Australia Psychological Society, 2009; Amato and Botth, A Generation at Risk: Growing up in an Era of Family Upheaval (Cambridge: Harvard University Press, 1997).

of the child shall be a primary consideration".[4] Accordingly, contracting states have a duty to ensure that the child is accorded such protection and care as is necessary for her well-being.[5] Since its enactment in 1989, the UNCRC has achieved near universal acceptance, having been ratified by 194 countries, which include all ASEAN member states. As our respective countries have ratified the UNCRC, recognising the centrality of a child's best interests in cross-border disputes involving children would give effect to our commitment.[6]

The importance of parental responsibility

7 The second common aspiration is for the ASEAN judiciaries to recognise the importance of parental responsibility. This is consistent with the global shift away from expressions of this notion as "parental rights", which suggests that parents own rights over their children. Instead, the term "parental responsibility" emphasises the common responsibility which both parents bear in caring for their children and providing for their best interests. It clarifies that parents carry out duties in the interests of their children and not in their own interests. In the context of cross-border disputes involving children, it highlights that while parents pursue their respective interests in the proceedings, they should not lose sight of the impact of their conduct, including the manner in which they litigate, upon their children. For instance, parents should not involve

[4] UNCRC at Art 3(1).
[5] UNCRC at Art 3(2).
[6] Under the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("Hague Abduction Convention"), the participating nations agree to select the courts of the country of habitual residence of the child to be the courts to decide all issues of custody and care. Every other court will thus seek only to, as quickly as possible, return the child to the court of her habitual residence. Thus, it could be suggested that an individual child's interests is not strictly the paramount consideration when a court is determining a return application under the Hague Abduction Convention. Nevertheless, it can be said the approach under the Hague Abduction Convention enables the best interests of the particular child to be applied at the private international level. In arriving at the presumption that the court of the child's habitual residence is best positioned to determine the child's best interests, the court is still applying the best interests principle through its conviction that the court of residence is most able to understand the child's needs and make orders for her best interests: Debbie Ong, *International Issues in Family Law in Singapore* (Academy Publishing, 2015) at para 8.27.

their children in litigation by encouraging or instructing them to file affidavits disparaging, and to testify in court against, the other parent.[7]

8 Widespread recognition of the concept of parental responsibility is reflected in Article 18(1) of the UNCRC, which prescribes parental responsibility as the primary method for the upbringing and development of the child, and imposes an obligation on contracting states to promote joint parenting: "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern." As with the centrality of the child's best interests, recognising the importance of parental responsibility would give effect to our commitment to the values stated in the UNCRC.

A restorative and therapeutic approach for Family Justice

9 The third common aspiration flows from the first and second. In light of the negative impact which parental conflict may have on a child and the responsibility of parents to safeguard their child's best interests, it is suggested that we should aspire to adopt a restorative and therapeutic approach in family justice.

10 The restorative and therapeutic approach entails awareness of the human, social, psychological and emotional aspects of the law. It encourages us to adopt a problem-solving approach that enables us to assist litigants to address

[7] In one case in Singapore, the children (aged 9 and 15) filed multiple affidavits stating that they wanted their mother to have sole custody, care and control of them, and for their father to pay their maintenance in a lump sum so that they would have no contact at all with him. The contents of the children's affidavits were greatly disturbing. They called their father a "Mega-evolved Sexual Fetishist womanising pervert" and referred to him as part of the "Evil Trio". The court found that the divorce proceedings had been "highly traumatic" for the children; their mother had undermined their emotional and psychological wellbeing. The mother was admonished by the court and the children's affidavits were wholly disregarded: see *VDZ v VEA* [2020] SGHCF 2.

underlying issues and prepare them for the future. In the arena of parent-child relationships, this approach aims, among other things, to help families heal and find a way forward and reduce acrimony between parents, and improve and restore the strength of relationships between parties, so that they can cooperate for the best interests of the children. To be clear, judges or lawyers are not expected to become counsellors or psychologists. However, it encourages judges and lawyers to be conscious that underlying problems do exist and to intentionally think of how these problems can be resolved.

11 This can be contrasted with an adversarial approach to litigation, under which the court decides matters based on the arguments and evidence presented by the parties. Disputing spouses who wish to present their respective cases in the best light are often selective in the information they provide, especially when they are influenced by their emotions. Further, as mentioned above, the children's best interests may be lost in the midst of litigation. Thus, a purely adversarial process may not be appropriate.

12 In this regard, it is suggested that one of the possible ways of adopting a restorative and therapeutic approach in resolving family disputes involving children is to involve other relevant disciplines such as psychology, sociology, behavioural science, and even neuroscience. Counsellors, social workers and psychologists can work with families and provide judges with relevant information to enable them to make decisions which are in the best interests of the children. Where possible, alternative dispute resolution methods such as counselling and mediation (conducted by the Court[8] or privately) should be adopted at an early stage of the proceedings. There is a variety of restorative and therapeutic approaches that may be considered, such as collaborative family practice, through which lawyers and other family specialists work with the parties to negotiate an agreement that best suits the family. It would be for each

[8] This includes "compromise settlements" conducted by the courts in Cambodia.

ASEAN judiciary to consider and adopt the approach that best suits their legal system.

13 The Common Procedure for Dealing with Cross-Border Disputes Involving Children Within ASEAN sets out how mediation can be used by different jurisdictions in ASEAN as a pre-cursor or complement to court cases relating to cross-border disputes involving children. This is complemented by the proposed Code of Ethics for Mediators in such disputes. We have also had meaningful discussions and training sessions during the ASEAN Family Judges' Forum. The first, which focused on general mediation principles, was conducted in Manila in 2017 while the second, which focused on skills and mediation of cross-border disputes involving children respectively, was held in Singapore in 2019. We can thus build on the work we have done so far in striving towards our goal of therapeutic and restorative family justice in ASEAN.

14 It should also be clarified that a therapeutic and restorative approach to family justice does not necessarily mean that cases should be managed less robustly. Indeed, the quick resolution of cases which enables parties to transition to the next phase of their lives without unnecessary delay can be therapeutic as well. Thus, effective case management may form an integral part of a therapeutic and restorative approach. This brings us to our next proposed aspiration: continued cooperation among ASEAN countries to improve processes in the area of upholding the best interests of children.

Continued co-operation to improve processes in cross-border disputes

15 The advent of globalisation has led to an increase in international families with spouses from different countries. This has generated a variety of cross-border legal issues, including cases of international child abduction and

international relocation. Such disputes can give rise to parallel proceedings, which is where parties commence parallel proceedings in different jurisdictions.

16 Parallel proceedings can lead to high legal costs as parties litigate in more than one jurisdiction. In the context of family disputes, parallel proceedings can be especially onerous. A member of a family in distress is typically poorly equipped – psychologically, emotionally and often financially – to engage in protracted and costly litigation. Where the results of these proceedings are in conflict, the resulting uncertainty and confusion may be a tremendous source of frustration and intensify the animosity between the parties. The outcome may be even worse for the child, whose future may hang in the balance between conflicting decisions on relocation or custody.

17 ASEAN judiciaries may therefore consider working together to facilitate efficient case management and the speedy resolution of cases, which would provide children with certainty in their care arrangements. The Working Group has already done good work in this context. The Common Procedure for Dealing with Cross-Border Disputes Involving Children Within ASEAN sets out a voluntary procedure for arranging for mediation and other modes of alternative dispute resolution. Further co-operation can be explored in relation to other stages of legal proceedings (for example, post-mediation) to facilitate the timely resolution of parallel proceedings, while ensuring that the sovereignty of each jurisdiction and the independence of each judiciary is fully respected.

Recognition of the differences in cultures, values, societal norms and legal systems between ASEAN countries

18 Notwithstanding the need for close co-operation and the common ground we have in recognising the centrality of the best interests of children and the importance of parental responsibility, there are differences in cultures, values, societal norms and legal systems within ASEAN. In the context of cross-

border disputes, we should take these differences into account so that we can better understand the actions and the conduct of litigants from other jurisdictions. Doing so may also enable us to adopt a holistic view of a child's best interests, which could entail the cultural and societal aspects of his or her upbringing. Indeed, many Courts already include cultural and religious background in their analysis of a child's best interests.[9] The consideration of these differences could enable us to make more well-rounded decisions in cross-border disputes involving children.

19 It is also suggested that these differences should also be borne in mind when conducting cross-border mediation for disputes involving children as they may also affect the way parties behave.[10] It could, for instance, affect how the words of one party would be perceived by the other party. It could also affect preferences as to how mediation should be conducted. For instance, some cultures may prefer mediation to be conducted in a structured way, while other cultures may value creativity and deviation from the usual rules. Thus, to avoid miscommunication, mediators may be encouraged to keep an open mind and seek to understand and be mindful of cultural differences that could shed light on the conduct of parties or affect the priorities of these parties. If possible, mediators should have appreciation of the relevant cultures involved.[11] Mediators should also encourage parties to be aware of these differences. Such understanding creates a relationship of trust which is crucial for successful mediation.

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[9] Cynthia R Mabry, "Blending Cultures and Religions: Effects that the Changing Makeup of Families in our Nation have on Child Custody Determinations" Vol, 26, 2013, Journal of the American Academy of Matrimonial Lawyers. See also the "Equality before the Law Bench Book" published by the Judicial Commission of New South Wales, which includes statistical or cultural information about various cultural groups and guidance on how judicial officers may take into account such information.

[10] Thomas Gaultier, "Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?", Spring 2013, Vol 26, No 1, International Law Practicum, p 38.

[11] Euromed Justice Project Handbook on Good Practices Concerning the Resolution of Cross-Border Family Conflicts, p 114.

20 It may also be appropriate to recognise the differences between the legal systems of the ASEAN jurisdictions, so that we are aware of the possibilities and limitations and the steps that can be taken in cross-border disputes. In this regard, the Country Profile template and flow-chart enables us to quickly review the key aspects of each other's legal systems. Where specific questions arise, ASEAN judiciaries may also consider communicating with each other, while ensuring that judicial independence is respected at all times.

21 In addition, ASEAN judiciaries may learn about each other's legal systems through visits, such as the meeting in Malaysia between family judges of Malaysia and Singapore in August 2022, where the latest developments in family and probate law in both jurisdictions were discussed.

Draft declaration

22 In light of the above, CACJ may consider adopting the following declaration articulating the above-mentioned non-binding common set of values, aspirations and principles:

In cross-border disputes involving children, ASEAN judiciaries may, to the extent consistent with laws and regulations applicable to each judiciary:

a) recognise the children's best interests to be the primary consideration;

b) recognise the common responsibility which both parents bear in caring for their children and providing for their best interests;

c) aspire to adopt a restorative and therapeutic approach;

d) continue exploring the possibility of continued co-operation between ASEAN judiciaries to improve processes in cross-border disputes involving children;

e) recognise the differences in cultures, values, societal norms and legal systems between the various ASEAN jurisdictions.