

“Engaging the Asian Legal Market and Strategies Moving Forward”

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Introduction

The ‘Australia in the Asian Century’ White Paper was released in October 2012.² In her foreword to the White Paper, then Prime Minister Julia Gillard was decidedly clear in declaring the rise of Asia in this century and observed, ‘*our nation should actively plan for and shape our national future*’.³ This paper seeks to provide a brief background to the opportunities available in the Asian legal market and proffer several simple strategies for moving forward.

In the December 2013 issue of the *Law Institute Journal*, Andrew Godwin, the director of transactional law at the Melbourne Law School and associate director of its Asian Law Centre, made a noteworthy observation on some of the changes to the Australian legal landscape that have been brought on by the Asian Century.⁴ Godwin remarked, in reference to ‘the trickle of international firms entering the [Asian legal] market’, that ‘Australian presence is increasingly viewed as a crucial piece in the global and regional jigsaw puzzle’.⁵ Beyond his optimism as to the role our legal players have in Asia, what was striking about his observations is that as Australian legal firms embraced the trend towards liberalised legal markets in Asian jurisdictions, this had an effect in our own backyard with the top tier

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² Australian Government (October 2012) *Australia in the Asian Century*, White Paper http://www.murdoch.edu.au/ALTC-Fellowship/_document/Resources/australia-in-the-asian-century-white-paper.pdf.

³ *Ibid.*, ii.

⁴ Andrew Godwin, ‘Going Global: The Australian legal profession in the Asian Century’ (December 2013) *Law Institute Journal*, 43. <https://www.law.unimelb.edu.au/files/dmfile/LIJ_Dec2013_Godwin.pdf>.

⁵ *Ibid.*

Australian firms doing their courtship dances with various global law firms, and with the further entry of prestigious foreign law firms onto the Australian legal landscape.

At the time, Godwin asserted that the rise of Australian firms as key jigsaw pieces in the Asian legal market was due to the following:

- (1) Australia's increasing importance as a destination for foreign investment, particularly in the mining and resources sector; and
- (2) the shift in the power from law firms to clients that begun during the global financial crisis. This shift made it imperative for firms to compete for instructions and provide services on a global basis. Consequently, Australia's sophisticated legal players have leveraged skill and geographic fortune to fight their way onto panels to become key players.⁶

How Australian firms will fare in the short and long term as Australia weathers the post-mining boom economic reality and the softening Australian dollar remains to be seen. The independent bar, however, has largely remained on its own course, but will need to consider how to position itself in the changing legal landscape.

Given the liberalisation of the Asian legal market, Australia's legal profession is in a privileged position to take advantage of its geographic proximity to the key Asian markets. Perhaps our existing presence and '*guanxi*'⁷ that we have built up in Asia over the years will increase the sophisticated legal services Australian lawyers are able to provide in those Asian jurisdictions.

⁶ Godwin, above n 4, 45.

⁷ A Chinese term translated to mean 'networks' or 'connections'. It is understood to be a network of relationships supporting and cooperating with one another towards a common business objective.

Godwin also raises three factors that law firms in Australia needed to grapple with.⁸ This paper will touch on two of these three factors given that the third touches on whether or not firms should focus on servicing outboard investment from Asia into Australia or embrace foreign investment into Asia. This third factor is really a moving feast at this point, and intelligent minds sitting in the big law firms out there will differ in their strategies on how to be as nimble as possible to catch any waves moving in and out of Asia. The two factors I address are: understanding the Asian jurisdictions being targeted by Australian law firms; and the relatively untapped resource of Asia-literate Australian-based lawyers, discussed as part of a raft of strategies moving forward.

Understanding the Southeast Asian Legal Market

There is no doubt that most jurisdictions comprising ‘the Asian legal market’⁹ are now heading towards greater liberalisation. Australia has had long-standing institutional and people-to-people ties to Malaysia and Singapore over many decades. It makes practical sense then to focus our engagement on those two jurisdictions that share the British ‘common law’ legal system. This section is divided into a brief analysis of entry into the Malaysian and Singaporean legal markets, and opportunities for those involved in dispute resolution in the region.

Entry of Foreign Lawyers

In the past, foreign lawyers could only provide legal services in Malaysia if their services pertained to foreign law, and could only provide these services to offshore companies incorporated in the Federal Territory of Labuan (a group of seven islands off the

⁸ Godwin, above n 4, 45.

⁹ Hong Kong SAR, Mainland China, Japan, South Korea, Vietnam, and Malaysia have been liberalising their respective legal market. While Thailand allows a foreign lawyers to own a minority interest in a legal consultancy company, India and Indonesia are very restrictive in allowing foreign law firms to establish a presence in their respective jurisdictions.

cost of Sabah in East Malaysia).¹⁰ Beyond this, foreign lawyers needed to obtain a court order under the Malaysian *Legal Profession Act 1976* or by a Special Certificate for admission by the Attorney General.

Neighbouring Singapore was one of the first Southeast Asian countries to embrace liberalisation of the legal sector in the 1980s and 1990s.¹¹ Lee Hsien Loong, the Singaporean Prime Minister, observed that this was first done to allow Singapore to become a centre for financial services, and while he was the Chairman of the Monetary Authority of Singapore, the Prime Minister had pushed to allow foreign law firms in the country as these firms had the necessary skills to 'perform complex legal services required by financial institutions setting up in Singapore'.¹² These global firms came almost hand-in-hand with global investment. But gradually, the view shifted so that liberalisation of the legal sector was not seen as a mere enabler for the more valuable global investment, but an economic opportunity in itself. In particular, I note the Prime Minister's comments about how international work has helped shape the careers of young lawyers, and has allowed Singapore to position itself as a popular seat of arbitration.¹³

Following in Singapore's footsteps,¹⁴ and partly in reaction to the ASEAN Framework Agreement of Services (**AFAS**) that was to see a 'free flow of legal services among ASEAN countries by 2015',¹⁵ as well as requests from Australia, Korea, Japan, and other countries under the General Agreement on Trade in Services (**GATS**), the Malaysian Bar Council made a proposal to decrease restrictions on access to the Malaysian legal market. The Malaysian Bar Council proposed expansion of the areas of law in which a foreign lawyer could practice in, and the adoption of a Joint Law Venture (**JLV**) regime requiring a foreign

¹⁰ Presentation by Messrs Mah Weng Kwai & Associates to the Law Council of Australia, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/Saturday-BusinessSession4-MrMahWengKwai.pdf>>

¹¹ Ministry of Foreign Affairs Media Centre, 'Entry of foreign law firm benefits S'pore: PM' (June 2012), *Straits Times*, <http://www.mfa.gov.sg/content/mfa/media_centre/singapore_headlines/2012/201206/news_20120611_01.html>.

¹² *Ibid.*

¹³ *Ibid.* In 2010, Singapore was ranked 'joint third, together with Paris and Tokyo, in a list of the most popular seats for arbitration, behind London and Geneva'.

¹⁴ Ranajit Dam, 'Opening up' (1 July 2014) *Asian Legal Business* <http://www.legalbusinessonline.com/features/opening/66302>.

¹⁵ Messrs Mah Weng Kwai & Associates, above n 10.

law firm form a partnership with a local firm in order to practise in Malaysia. This regime would be approved and registered by the Malaysian Bar Council.¹⁶

Malaysia has just recently started to open the door with plans to grant five licences for external firms to set up a 'Qualified Foreign Law Firm' (**QFLF**).¹⁷ The changes made to the Malaysian *Legal Profession Act 1976* only came into force in June 2014, which allow foreign lawyers to now work in a Malaysian law firm. As at the first half of this year, Trowers & Hamlins, a British firm, became the first foreign law firm granted a QFLF licence. The licence requires an applicant firm to demonstrate expertise and experience in Islamic finance. It is important to note that the British firm had a 'non-trading representative regional office in Kuala Lumpur since 2012',¹⁸ so this is not the case of a rapid entry of a foreign law firm establishing a presence in Malaysia, but a sustained and slow engagement.

International firms like Linklaters, Allen & Overy, and Clifford Chance, also service clients in Malaysia via their Singapore offices.¹⁹ Foreign law firms may also enter into a JLV or a Formal Law Alliance (**FLA**) with a Singaporean law practice,²⁰ and many Singaporean firms have formed alliances and are doing similar courtship dances in Malaysia.²¹

These positive changes deal with foreign lawyers who are part of a law firm set up. For the independent bar it is less clear as all barristers are self-employed. It seems unlikely for an individual barrister to gain registration, as a foreign lawyer, in his or her own right without being at least 'employed' by a local law firm. However, there are favourable rules governing the ad hoc admissions for Senior Counsel or Queen's Counsel.

¹⁶ Ibid; see also Jayanth Krishnan, 'The Joint Law Venture: A Pilot Study' (2010) 28 *Berkeley Journal of International Law*, 431.

¹⁷ Godwin, above n 3, 44. See also http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Country_Fact_Sheets/Asia/PFL%20Malaysia_map.pdf.

¹⁸ John Grimley, 'The Current State of the Malaysia Legal Market: A Q&A with Eddie Law, Founder of eLawyer.com.my' (26 May 2015) *Asia Law Portal* < <http://asialawportal.com/tag/foreign-law-firms-in-malaysia/>>.

¹⁹ Ranajit Dam, above n 14.

²⁰ Law Council of Australia, *Practise of Foreign Law Fact Sheet: Singapore* http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Country_Fact_Sheets/Asia/PFL%20Singapore_map.pdf.

²¹ These include Wong Partnership, Rajah & Tann, and Allen & Gledhill.

Ad hoc admission in Singapore

For Australian Senior Counsel or Queen's Counsel, securing ad hoc admission in Singapore is possible. In 2012 the rules of court were amended to permit overseas Senior Counsel or Queen's Counsel to seek ad hoc admission.²² In recent years, a handful of applicants seeking ad hoc admission in Singapore have enjoyed mixed success.²³

Ad hoc admission in Malaysia

The position in Malaysia is more restrictive than in Singapore.²⁴ I am personally aware of two Senior members of the Victorian Bar who had previously been granted ad hoc admission in Malaysia to conduct Court proceedings in Malaysia. These proceedings were primarily concerned with 'insider trading' prosecutions.

Emerging market for dispute resolution

Asian Infrastructure Investment Bank (AIIB)

The AIIB is a international financial institution focused on supporting infrastructure construction in the Asia Pacific region. Of the 57 prospective founding members of the AIIB, 52 states have signed the Articles of Agreement including Australia. Only Myanmar and Singapore have ratified the Articles of Agreement.

It is estimated there will be US\$3 trillion worth of infrastructure works before 2020. Key areas of development for improving living standards include transport, energy and telecom infrastructure. The initial capital of US\$100 billion has been subscribed and will

²² Section 15(1) of the *Legal Profession Act (Cap. 161)* read with the *Legal Profession (Ad Hoc Admissions) Notification 2012* (GN No S 132/2012) (Singapore).

²³ In *re Heather Rogers QC* [2015] SGHC 175, Chong J dismissed Rogers QC application. However, in *re Geraldine Andrews* [2012] SGHC 229, Andrews QC (as she then was) succeeded in her application. For further analysis on this, see Josh Wilson QC and William Lye, 'Ad hoc admission in Singapore – the saga continues' (6 August 2005) *CommBar Matters*, <http://www.commbarmatters.com.au/2015/08/06/ad-hoc-admission-in-singapore-the-saga-continues/>.

²⁴ For example, ad hoc admission to appear as Counsel in the High Court of Malaya in West Malaysia is governed by s. 18 of the Malaysian *Legal Profession Act 1976* which requires the applicant to satisfy that he or she possesses special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia. In Sabah, East Malaysia, it is governed by s. 10 of the *Advocates Ordinance 1953*.

afford opportunities for investor-state dispute resolution. This looks to be an important area for the Bar to observe and participate in as a source of dialogue with our counterparts and clients in the Asian legal market.

Singapore International Commercial Court (SICC)

The SICC is a division of the Singapore High Court and part of the Supreme Court of Singapore. It was set up to hear transnational commercial disputes, particular from Asia. Currently, there are c three former Australian justices who could be designated by the Chief Justice of the Supreme Court of Singapore to hear cases in the SICC.

There is opportunity for Australian lawyers to appear in the SICC. Admission process is governed by the *Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014*. Any foreign lawyer who is qualified to practise law in Australia, has at least five years' experience in advocacy before any court or tribunal, and is sufficiently proficient in the English language to conduct the proceedings may apply for registration. In an "offshore case", a party may be represented by the registered foreign counsel in SICC proceedings without retaining a local Singapore lawyer.

The SICC has started hearing its first case — a US\$809 million dispute between Australian and Indonesian companies over a joint venture agreement for the production of sale of upgraded coal from East Kalimantan in Indonesia.²⁵

Strategies Moving Forward

²⁵ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* (SIC/S 1/2015). See also *PT Bayan Resources TBK -V- BCBC Singapore Pte Ltd* [2014] WASCA 178 (25 September 2014). The appeal from the Court of Appeal of the Supreme Court of Western Australia to the High Court of Australia was heard by the High Court on 10 and 11 August 2015. See http://www.hcourt.gov.au/cases/case_p14-2015. On 14 October 2015, the High Court unanimously dismissed the appeal. The High Court held that it is within the inherent power of the Supreme Court of Western Australia to make a freezing order in relation to an anticipated judgment of a foreign court which, when delivered, would be registrable by order of the Supreme Court under the *Foreign Judgments Act 1991* (Cth). See *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2001] HCA 36.

There is a Chinese saying: *Nothing is impossible. But everything is difficult.* This is the likely perception of many Australian lawyers thinking of engaging with Asia. The culture is different. The food is different. The legal system is different. Yet leaders have identified that the world will be transformed by 2050 with Asia's share of the global Gross Domestic Product doubling that of the major Western economies.

Any plan to engage in the Asian legal market could include the following strategies:

Resolve to become Asia-literate

Occasionally travelling to Asia for holidays does not make one 'Asia-literate'. Lawyers who are 'Asia-literate' have a deeper interest and knowledge of the Asian culture and hold the necessary language skills and cultural adaptability that enables them to thrive in the Asian legal market. However, having language skills is only one part of the equation. Developing *cultural intelligence* is equally important, given such knowledge will enable one to navigate the complexities brought on by a multi-racial, multi-religious, and multi-lingual Asian market.

Invest time and resources to build your brand in Asia

Many of the larger Australian legal firms that have set up practices in the Asian jurisdictions have spent the last several decades investing their resources and people in those jurisdictions. The early Australian legal pioneers have also built strong relationship capital with Asian clients and created a brand in those markets. They are now reaping the rewards of the various jurisdictions liberalising their respective legal markets.

For new and smaller entrants, time and resources are limited and therefore it is more effective to adopt a smarter strategy. These could include:

- Publishing specialist articles in an Asian law journal;
- Attending the opening of the legal year;

- Participating in non-legal, trade or economic focused conferences held in Asia;
- Participating as a delegate in an Australian trade missions to Asia;
- Leading a small delegation to visit the Judiciary and/or Bar Associations in an Asian jurisdiction; or
- Contributing towards various Continuing Legal Education programmes in Asia.

Redesign the packaging

The legal profession in Asia is primarily a fused profession. Hong Kong remains a split profession with an independent bar. Asian lawyers are therefore more adept to working in teams as between different law firms, particularly in Malaysia when it involves complex litigation. In Singapore, where Senior Counsels are generally appointed from the ranks of partners in the top tier law firms, it is common for a smaller law firm to retain a Senior Counsel from another law firm to represent the client of the smaller law firm.

Australian solicitors and barristers could work together by being open to adopting a different model of engagement in litigious and non-litigious legal work. Traditionally, the model of engagement is the '*Client-Solicitor-Barrister*' model where the barrister is briefed by the solicitor to advise or appear in a litigious matter. An interesting model that is increasingly finding traction with Asian clients is the '*Client-Barrister-Solicitor*' model where the client accesses the barrister directly for strategic advice, and the barrister then recommends an appropriate solicitor to undertake work not within the barrister's scope of the retainer. This approach need not be limited to litigious matters. For instance, the client could retain the barrister on a direct access basis to provide the strategic advice only, and the solicitor could undertake the transactional work. Such a model works well with law firms from Asia.

Asian client also prefer a fixed costs approach to their litigation or transaction matter. Many Asian clients are likely to quibble over a \$500 per hour rate but are content to be given

a fixed fee estimate of \$500,000 for the entire litigation. Similarly, Asian law firms that brief Australian Senior and Junior Counsel prefer a lump sum fee rather than separate fees from Senior Counsel and Junior Counsel.

Conclusion

Asia is a culturally and linguistically diverse place. The differences in philosophies and values between the East and West often pose navigational challenges. It is clearly not for everyone. Many Australian lawyers remain comfortable working in their own jurisdiction. For those who are more inclined to look for opportunities in Asia, particularly in Malaysia, Singapore and Hong Kong, there is a familiarity of the common law legal system in those jurisdictions. The liberalisation of the Asian legal market in those common law jurisdictions creates opportunities.

Australian lawyers are well placed to promote their legal skills and expertise to the growing Asian legal market. In order to be effective in engaging with Asia there needs to be, first, a resolve to be interested in Asia; and secondly, a corresponding commitment to invest time and resources in Asia and to develop a simple framework for engagement based on a deeper understanding of Asian cultural values and its collective approach.

The measure of success will ultimately depend on Australian lawyers adopting a whole-of-legal profession approach in preparing its plan to engage in the Asian legal market. This will require the legal profession across state lines seeking support from government and the judiciary to lay the foundation of this whole-of-profession approach.