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CONFERENCE REPORT

The Globalisation of the Australian Legal Profession in the Asian Century: a Report of the Paper Presented at the Joint Study Institute, 2013

Abstract: This piece, by Celine Kelly, is a report on a paper that was presented at the JSI 2013 in Melbourne and explores the key points made by Andrew Godwin on the globalisation and liberalisation of legal services in the Australasia region. The talk included a discussion on the pros and cons of globalisation and case studies of legal services in South Korea, Singapore, Japan, China, India and Australia.
Keywords: globalisation; legal services

JOINT STUDY INSTITUTE 2013

I was lucky enough to be awarded a BIALL bursary to attend the 2013 JSI (Joint Study Institute) which took place in Melbourne in February of this year. Since its inception in 1998 the JSI has given law librarians from many common law jurisdictions an opportunity to come together to examine and discuss global concerns to the profession. The conference was co-sponsored by the international organisations of the Australian Law Librarians' Association, the British and Irish Association of Law Librarians, the New Zealand Law Librarians' Association, the American Association of Law Libraries and the Canadian Association of Law Libraries/ Association Canadienne des Bibliothèques de Droit.

The conference took place in sunny Melbourne at various locations throughout the sprawling campus of Melbourne University. During the programme delegates had the chance to attend tours of a selection of libraries including the stunning libraries of the Supreme Court of Victoria and the State Library of Victoria. Lively and thoroughly enjoyable social events ensured that delegates got to socialise and share ideas, opinions and thoughts on librarianship and many other topics and to have a whole lot of fun.

The theme of the conference was '*The Australian Legal Landscape: Global and Comparative Perspectives*'. Papers were delivered by Melbourne Law School academics on topics which included Australia's constitutional rights, trends in legal education and the profession in Australia, financial services and big tobacco's legal challenges to plain packaging in Australia. For this article I'll be reporting on Andrew Godwin's engaging paper titled *The Globalisation of the Australian Legal Profession in the Asian Century*. I found this absorbing session timely considering the implementation of the Legal Services Act in England & Wales and the changes proposed to the profession in Ireland under the Legal Services Regulation Bill.

Andrew Godwin was in private practice for 15 years, 10 of which were spent in Shanghai. Andrew then moved to pursue a focus on legal education and professional training and development for lawyers. With this background Andrew is a highly regarded specialist on Chinese law and legal practice in Australia and Greater China and well positioned to speak on the globalisation of legal services.

INTRODUCTION TO LIBERALISATION

To introduce the topic to the room Andrew identified key terminology to give us a conceptual framework in relation to the regulation of legal services globally. When we discuss liberalisation in the international legal markets, what do we mean? Essentially liberalisation means opening up markets to foreign lawyers. Liberalisation has been a particularly big issue for the Australasia region because of emerging markets like China and the increasing importance of these markets to the global supply of goods and services.

There are many economic benefits that flow from allowing the import of legal services. One of the greatest benefits is encouraging foreign investment. Lawyers tend to follow their clients to target markets. The role that foreign lawyers will have in this process really depends on how sophisticated the target market is and whether

there is a need for foreign lawyers to provide support or bring their expertise to the process. Tax revenue is another significant benefit for the host country. Foreign firms will plan on generating revenue which will generate tax in the host country. Liberalisation may improve competition and help raise standards within the local profession. However, it came as no surprise to hear that local lawyers in more than one jurisdiction have taken exception to the influx of foreign lawyers and firms to their markets.

Concerns around liberalisation are often associated with the sensitivities around certain legal work in the areas of public administration, sovereignty and litigation against the state. However, most international commercial law firms are focused on doing deals, raising their own revenue and helping their clients to do the same.

As previously mentioned there may be many concerns among the local professions. Local lawyers may be anxious that they will be squeezed out of their profession and that their interests will be diluted by those of foreign firms. They can be wary of the impact that liberalisation will have on their working culture and concerned that foreign lawyers, who are there to practise foreign law, may cross the line into the local law.

GATS

The international framework in which the import and export of legal services operates is the General Agreement on Trade in Services (GATS) framework[1]. GATS is a multilateral trading agreement and was the first world trade agreement to cover trade in services. Countries are free to sign up to GATS and may include legal services in their commitment. GATS is regulated on the basis of 4 modes of supply:

1. Cross-border supply: occurs where a lawyer in Jurisdiction A provides advice to a client in Jurisdiction B via email, phone, fax etc.
2. Consumption abroad: client from Jurisdiction B gets advice from lawyer in Jurisdiction A by visiting lawyer in Jurisdiction A. This mode is not contentious as it concerns the ability of citizens to buy legal services when abroad.
3. Commercial presence: The ability of lawyers from Jurisdiction A to set up a permanent presence in Jurisdiction B. This mode has created the most controversy.
4. Presence of natural persons: a lawyer from Jurisdiction A comes to Jurisdiction B temporarily to give a client advice in Jurisdiction B. This mode is often known as "fly-in, fly-out".

CASE STUDIES

After discussing the reasons for liberalising markets and the regulation of the process Andrew went on to discuss the extent to which various countries in the Australasia region have liberalised their markets and the experiences of these countries.

South Korea

Until very recently South Korea was a GATS member but had made no commitment to legal services. There were concerns over the different notions of the rule of law between South Korea and foreign countries, and that more letting in of foreign lawyers could lead to a more litigious culture which would run contrary to Confucian ideals. There were also concerns that opening up the legal market would set off a 'domino effect' that would lead to the domination by foreign firms of the domestic market.

In 2011 South Korea signed up to Free Trade Agreements with the EU and in 2012 with the US. Under the agreements there were three stages to the liberalisation process. Stage one allowed foreign lawyers to set up a representative office in South Korea to advise clients on laws of their own jurisdiction. These foreign firms were more prohibited from practising Korean law and from hiring local lawyers (a situation similar to China). Stage two, to which South Korea has now moved, permits lawyers to work together and collaborate where domestic and foreign legal issues are involved and to engage in profit sharing. Each firm must retain their own identity as no joint ventures are permitted yet. Stage three will mean that foreign and local firms can enter into joint ventures and that foreign firms can hire local lawyers.

In South Korea the Foreign Legal Consultants Act regulates the activity of foreign firms and lawyers. Under this legislation foreign lawyers must be called "foreign legal consultants". The naming is an interesting issue and reflects the concerns that many jurisdictions have regarding entry of foreign lawyers, and confusion in the market as to the work that they are permitted to undertake. To date about 13 firms have established in South Korea with another round of applications currently under review.

Singapore

Since the late 1990s Singapore has permitted foreign law firms to establish joint venture entities with local firms. These joint ventures proved to be less successful than anticipated due in part to the cost of establishment, career restrictions imposed on lawyers and the level of integration permitted between partner firms. The Rajah Report in 2007[2], which undertook a comprehensive review of the entire legal services sector in Singapore, brought about Qualifying Foreign Law Practise licences to permit foreign firms to practice Singapore law directly in certain permitted areas. (Basically every aspect of Singapore law except for litigation and "ring-fenced" areas such as family law, conveyancing and probate law.)

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Japan

For the last decade Japan has permitted foreign firms to enter the market as specific joint enterprises. Initially these enterprises allowed an alliance between the foreign and local firm to cooperate and handle matters together in various areas, not including litigation. Full liberalisation occurred in 2005 when foreign lawyers were permitted to employ Japanese lawyers and to establish enterprises jointly operated by a registered foreign lawyer and a Japanese lawyer or corporation under a partnership contract.

China

China is an interesting market in that it can be considered liberalised in terms of permitting foreign firms to practise foreign law but it is still restricted in terms of allowing joint ventures or partnerships with Chinese firms or allowing foreign firms to practise PRC law. Andrew spoke of the interesting grey area that has arisen in this country. When the huge international companies arrived on Chinese shores to set up their operations, the legal expertise to meet the requirements of these companies did not exist locally. The situation arose where foreign firms were advising informally on PRC law and, when formal legal opinions were required, arrangements were in place to have them issued via local firms. This grey area and its regulatory uncertainty has triggered, what Andrew described as, a professional "tug of war"[3] between the local profession and foreign lawyers.

The question remains as to which model China will eventually adopt. Will the joint venture model, which has yielded mixed results in many regions, be bypassed in favour of opening the market up completely to allow foreign firms to employ PRC qualified lawyers and practise PRC law?

India

India made a fascinating case study as it is not liberalised at all. While the government has indicated that it will consider opening up the market in the future, at present there are a number of considerable obstacles in place. First the Indian Bar Councils are very conservative. Second the legislation which governs lawyers, the Advocates Act, provides that only 'advocates' may practise law in India. Who is an advocate? An advocate is a person with a law degree who is enrolled with one of the local Indian Bar Councils. A strict interpretation of the legislation would extend so far as to prevent a foreign lawyer flying in to advise the client on foreign law on Indian ground.

This issue came to light in a case that was decided in 2009[4]. A number of law firms had attempted to avoid the restrictions of the Advocate Act by applying for a licence to set up a liaison office via the Reserve Bank of India. A group of Indian lawyers filed a petition challenging the validity of these licences. The court confirmed that the Advocates Act does not permit foreign lawyers to establish a presence in India. Comments made by the court reflect the prevailing view in relation to the purpose of lawyers and the legal profession in India. In effect what was of concern to the court was the need to "ensure the dignity and purity of the noble profession of law". This view reflects that taken in other courts where the practice of a noble profession rather than a service with a profit-making purpose is highlighted. As one court put it "the heaven of commercial competition should not vulgarise the legal profession"[5].

This outlook is not terribly encouraging for foreign lawyers and firms. To compound matters, new proceedings were launched against 31 foreign firms and legal process outsourcing businesses. Several allegations were made against these foreign firms including violation of immigration laws, having offices and practising law in the form of LPOs, treating the practice of law as a business venture and many more. In 2012 the Madras High Court ruled[6] that foreign lawyers cannot practise law in India, subject to 2 exceptions: first, they may do so on a fly- in, fly- out basis; and second, they may do so in the context of international commercial arbitration. The Bar Council of India has filed an appeal before the Supreme Court against the decision.

Australia

Australia is a liberalised market but until very recently it was dominated by national, domestic firms. Since 2010 however there has been an influx of global international players who have established a presence in Australia via various different methods including Swiss Verein, full merger and integrated alliances. When discussing the drivers of this activity Andrew mentioned Australia's proximity to Asia, its rich natural resources, its relatively buoyant economy and the high quality of its lawyers.

FINALLY

To wrap up the session Andrew spoke of the effect that globalisation has had on law graduates in Australia. Australia has traditionally been a popular recruitment pool for international firms. Now the decision for a newly qualified Australian lawyer to go offshore immediately is quite a mainstream one. In response, law school curricula in the region have tended to become more international in focus. While answering a question from the audience on the importance of foreign lawyers being able to speak the language of the host nation, Andrew mentioned that this will depend on the type of work that the lawyers are doing. Speaking personally, he spoke of how while in private practice he would not have been able to work in the way he did if he had not spoken and been able to read Chinese. However in an international practice the primary focus will tend to be on expertise in the law rather than on the local language.

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Footnotes

[1] General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 UNTS 183, 33 ILM 1167 (1994).
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[3] Godwin, Andrew. (2009) The Professional 'Tug of War': The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform. *Melbourne University Law Review*, 33(1), 132–162.
[4] *Lawyers Collective v. Chadbourne* et al. (WP1526/1995).
[5] *Bar Council of India v. M V Dhabolkar* [1976] AIR 242.
[6] *AK Balaji v The Government of India* et al. (WP 5614/2010).

Biography

Celine Kelly is Knowledge Services Manager with A&L Goodbody in Dublin and previously worked in the Library of the Law Society of Ireland. Celine is a member of the steering committee of the BIALL Solos and Small Teams affiliate group.

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Current Awareness

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