

INVESTING TIME IN ASIA – STRATEGIES FOR FRUITFUL CO-OPERATION

Introduction

I am given to understand that the topic which I have been asked to address today was “inspired” by the remarks made by the Chief Justice of Singapore when he visited Melbourne last year. Ideally, he would have been the best person to provide the sequel to his speech. However, the baton has been handed, or in more appropriate terms, delegated to me. I shall do my best to rouse your interest on the opportunities available to Australian lawyers in Asia and in particular Singapore.

The legal landscape in Singapore

I begin by providing a brief introduction to the legal profession in Singapore. It is fair for me to say that English law and therefore English lawyers currently enjoy the best visibility amongst Singapore lawyers. However, this did not happen by accident. There are three main reasons for this current state of affairs:

- (a) **History:** Singapore was a member of the British Empire from early in the 19th century until 1963. As a consequence, it should come as little surprise that the English common law and certain English statutes were applied and, to some extent continue to apply, in Singapore.
- (b) **Commercial:** London was traditionally and still remains a major centre for international commercial, banking and shipping work. From time to time, the

clients who the English law firms represent would instruct Singapore counsel for a host of reasons – to arrest vessels, obtain Mareva injunctions or discovery, or commence proceedings in the local courts. The English law firms therefore represent an important source of work for Singapore lawyers. To maintain the relationship, Singapore law firms reciprocate by instructing them when their input or involvement is required.

- (c) **Exposure:** UK universities are the first port of call for many Singaporeans who choose to study law overseas, and this may implicitly serve as a contributing factor towards our reliance on UK law. Further, it is not uncommon for UK law firms and Barrister Chambers to offer internships to young Singapore undergraduates and lawyers. This has helped foster relationships with Singapore lawyers and law firms. Likewise, the senior clerks of the leading commercial sets in London, such as Essex Court, 20 Essex Street and Fountain Court, visit Singapore regularly. Fountain Court started an essay competition a year ago while Essex Court is sponsoring a mooting competition for all lawyers practising in Singapore (local and foreign) with less than three years of post qualification experience. Such events have certainly created more profile for UK law firms and Barrister Chambers alike. There is no reason why Australian law firms should not offer similar arrangements with Singapore firms on an exchange basis, or look to market its services to Singapore law firms. After all, 4 of the top 10 most liveable cities in the world are located in Australia, with Melbourne in pole position.

The current perception of Australian lawyers by the legal fraternity in Singapore

Some of you may be wonder where this leaves Australian lawyers in the Singapore context.

First, I believe the friendship and co-operation between the Singapore and Australian Bench has never been better in the history of the 2 countries. We regularly visit each other and are invited to speak at major law events in our respective countries. This culminated in the recent historic signing of an MOU in August 2010 between the Supreme Court of New South Wales and the Supreme Court of Singapore on References of Questions of Law.

Second, for all the reasons outlined above, it was common for the Singapore Bench and Bar to cite UK decisions in support of legal propositions. However, this practice has changed in recent times as Singapore begins to develop her own case law, and in the process, no longer regard UK decisions as offering the preferred solution. Where the reasoning offered by another jurisdiction is more compelling than that of the UK courts, the Singapore Courts will not hesitate in declining to adopt the UK approach. In fact, in a number of cases, our Court of Appeal has preferred Australian authority over English case law. In addition, there are numerous statutes in Singapore that are based on the Australian equivalent. Some examples of these include statutes relating to white-collar crime, companies, construction adjudication and intellectual property. This can only be good for the Australian Bar. Singapore's familiarity with English QCs stems from the frequent references to UK decisions in

which their names appear. The increased reference to Australian case law will provide better profile and more visibility to the leading Australian Silks. Only recently, I had the occasion to consider the opinion of Mr Justin Gleeson QC which was tendered in aid of a case involving an anti-suit injunction. In my written Judgment, I complimented Mr Gleeson for his fair and objective opinion on the Australian Securities and Investments Act and the Fair Trading Act.

Third, the Chairman of the Singapore International Arbitration Centre, Professor Michael Pryles, is an Australian. You will be hearing from him at the next session. The next Dean of the National University of Singapore's Law Faculty will also be an Australian given that the two shortlisted candidates are both Australians. As such, there is no question that Australian lawyers form an integral part of the legal landscape in Singapore and, more significantly, are highly regarded in Singapore.

Opportunities for Australian Lawyers

Foreign lawyers are now an integral part of the legal landscape in Singapore

When I entered the profession in 1982, there were no more than 50 foreign lawyers practicing in Singapore. Today, there are nearly 1,200 foreign lawyers practicing in either foreign or local law firms. The massive increase occurred under the watch of our current Chief Justice when he was the Attorney-General. The increase in number of foreign lawyers did not hurt the local profession. When I entered the profession, the largest local law firm had about 30 lawyers. Today, the largest local practices have in excess of 300 lawyers. It would be fair to say that during this period, smaller practices and sole practitioners were affected, but many of them have since

consolidated their practices by merging or forming alliances. This is not necessarily a negative development for the profession in Singapore.

There are a total of 107 foreign law firms in Singapore. 29% are these foreign firms come from the UK. Another 19% come from the US. Although the UK firms represent 29% of the total number of foreign law firms in Singapore, they employ nearly 50% of all foreign lawyers in Singapore. To date, there are only 6 Australian law firms with offices in Singapore. The largest is Allens Arthur Robinson, which entered into a joint venture with a local firm. These six Australian firms employ 55 foreign lawyers, or 4.7% of the total number of foreign lawyers.

To provide a broader perspective of Singapore's legal profession, let me compare the number of lawyers per capita in Singapore against other major jurisdictions. Currently, the lawyer-to-population ratio in Singapore stands at 1:1,268. This is relatively small compared to say US (1:265), Germany (1:593) and New Zealand (1:391). While Singapore has no plans to grow the legal profession to the same extent as the US, the statistics nonetheless support the case for attracting more talented lawyers (foreign and local) into Singapore.

These statistics illustrate two points. First, there is a huge appetite for foreign lawyers in the legal profession in Singapore. Nearly a quarter of lawyers in Singapore are foreigners. Second, Australia's market share of the foreign law practice pie in Singapore is fairly small. There is certainly room for Australian firms and Australian lawyers to grow and develop in Singapore.

I should add that foreign lawyers are very much part an integral part of the profession in Singapore. There is a Foreign Lawyers' Chapter under the Professional Affairs Committee of the Singapore Law Academy which I currently chair. Under this chapter, foreign lawyers can and are strongly encouraged to participate in various initiatives involving the entire profession, such as *pro-bono* work, continuing legal education and the promotion of Singapore law.

FLA, JLV and QFLP

Singapore recognises that in order to stay competitive, we cannot afford to adopt an insular and parochial attitude towards foreign competition. At the same time, we recognise the need to develop and promote local talent. With these twin objectives in mind, the government introduced various unique schemes to permit foreign lawyers to collaborate with local law firms. Over the years from 2000 to 2008, three different models were introduced to encourage collaboration with foreign law firms. The three models are the Formal Law Alliance ("FLA"), Joint Law Venture ("JLV") and the Qualifying Foreign Law Practice ("QFLP"). The FLA and JLV models were introduced in 2000 while the QFLP model was introduced more recently in 2008. I shall briefly describe their key features and differences:

- (a) All three models permit the foreign law firms to establish some form of presence in Singapore.

- (b) They each permit participation in the practice of Singapore law to varying degrees, and only in certain areas of practice, through lawyers registered to practice Singapore law.
- (c) Both the FLA and JLV models allow the sharing of profits although there are restrictions on scope and extent of profit sharing. These restrictions were put in place to prevent the local practice from being overwhelmed by the foreign practice.
- (d) For both FLAs and JLVs, there must be at least 5 foreign lawyers residing in Singapore, with more than 5 years of relevant experience, of which two must be equity partners or directors in the foreign firm. This requirement ensures that foreign firms are committed to Singapore.
- (e) While FLAs do not appear to impose a ceiling on the number of foreign lawyers, JLVs, however, impose several requirements on the mix of local and foreign lawyers:
 - (i) In the JLV or its foreign constituent, they are required to have more foreign lawyers (with more than 3 years of experience) plus local lawyers practicing foreign law, than local lawyers practicing Singapore law.
 - (ii) In the Singapore constituent of the JLV, there must be more local lawyers in active practice than foreign lawyers registered to practice Singapore law.

- (iii) The number of equity partners or directors from the foreign firm cannot exceed the same from the local firm.

- (f) The least formal of the three models is the FLA. It does not require one to establish a separate firm or entity. As its name suggest, the FLA is only an alliance. JLVs, however, involve setting up a partnership or company as a separate operating vehicle.

The FLA and JLV models have both achieved limited success. The JLVs with English law firms have largely remained intact while those involving US firms failed within the initial years. Through various consultations, it was felt that Singapore was ready for increased competition by allowing greater participation of foreign lawyers. In addition, it was felt that allowing greater participation of foreign lawyers would encourage them to use Singapore law in their transaction documents and bring more multi-jurisdiction deals to Singapore. This led to the introduction of the QFLP model in 2008. This model allows the greatest degree of participation by foreign lawyers to date. Under this model, the QFLP can practice Singapore law in all areas except domestic litigation and general practice, such as constitutional law, conveyancing, criminal, family and trust law. Six QFLP licences have been awarded to date. Each license is valid for an initial period of five years.

What does the implementation of the three models tell you about the legal profession in Singapore? First, Singapore does not adopt a protective attitude against foreign lawyers. The pre-dominant consideration is what is in the best interests of the country. Second, it recognises the need for a strong local Bar. That is the reason why the changes were introduced incrementally, to give local firms time to adjust.

For this reason, the local firms have grown significantly despite the foreign competition. Third, it acknowledges that local lawyers can learn and improve by working and collaborating with foreign lawyers. Finally, Singapore is constantly reviewing its rules concerning foreign lawyers and will not hesitate to make bold changes if the circumstances require. One such bold change is the impending relaxation of *ad hoc* admission of QCs.

Ad hoc admission of QCs

Prior to 1991, there was some concern that Singapore was becoming a “suburb” of the “Temple” and the “Chancery”. Far too many QCs were appearing before the Singapore courts. It was felt then that this was not in the best interest in developing the local Bar. As a consequence, amendments were made to our Legal Profession Act in 1991 to introduce 2 further requirements to curb the admission of QCs. Post-1991, an applicant must satisfy the court that:

- (a) First, the case is of “*sufficient difficulty and complexity*”, and
- (b) Secondly, the case merits admission “*having regard to the circumstances of the case*”.

The objective of the amendment was to help develop a strong core of good advocates at the Bar by restricting access to QCs only in the more difficult and complex cases (*Price Arthur Leolin v Attorney-General* [1992] 3 SLR(R) 113 at [5], per Yong CJ). Prior to the 1991 amendment, the applicant need only demonstrate

that the QC has “*special qualifications or experience for the purpose of the case*”, a threshold that was not difficult to satisfy.

In 1997, Singapore introduced the Senior Counsel scheme to recognise the leading advocates at the Bar. Since then 65 SCs have been appointed of which 41 are still active at the Bar. Some have retired and 6 have been appointed to the Bench. However, the SC scheme has also brought about unintended and unanticipated consequences. Most of the SCs practice at the top 5 law firms. Most of the financial institutions and banks in Singapore have the top 5 law firms on their panels. As a result, it has become increasingly difficult for individuals to instruct the top commercial SCs to act against banks and financial institutions. I have witnessed this phenomenon for myself on the Bench. In every case involving a bank which I have presided over, the banks were represented by the top SCs while the individuals were represented by advocates from the smaller practices. Further, many young Singapore lawyers have not had the opportunity to work on cases with the leading QCs. In the interim period, the Bar has also produced a breed of SCs who are ready to face more competition. It was felt that the time had come for Singapore to review her position on the admission of QCs. Through a series of consultative dialogues with the Senior Counsel Forum and the Law Society, we received feedback that the local Bar prefers to relax the admission criteria for QCs, as opposed to a scheme (the Independent Counsel Scheme) to “anoint” a few select QCs to be granted licences to practice before the Singapore Courts. The Bar acknowledges that the relaxation of the *ad hoc* admission criteria would introduce more competition. It reinforces my observation that the SCs are prepared to handle more competition and their belief that more choice is healthy for the overall development of the Bar. The

Ministry of Law has informed the Bar that their feedback will be given serious consideration. I believe it is likely that the criteria for *ad hoc* admission will be relaxed by reverting to the pre-1991 position instead of the proposed Independent Counsel Scheme. The amendment is expected to be announced early next year. It is envisaged that the court will act as the gatekeeper for the *ad hoc* admission of QCs. I should add that at the hearing, the court will have the benefit of the views from the Attorney-General's Chambers and the Law Society as to whether the case in question and the QC concerned merit *ad hoc* admission. The good news is that *ad hoc* admission will be applicable to Australian Silks as well.

International Arbitration

Recently, I attended a conference in Kuala Lumpur organised by the Malaysian Judiciary. The principal objective of the conference was to assist in Malaysia's endeavour to develop its International Arbitration practice. I was asked to share Singapore's success story in promoting and developing International Arbitration. As some of you may know, Malaysia has a closed door policy for legal services. No foreign law firm is allowed to set up practice in Malaysia. In my candid view, I told the delegates that it is not realistic for any country to achieve any significant success to develop International Arbitration without the presence of international law firms. Until Malaysia recognises the need to liberalise its legal services market, its ambition will be severely impeded. Those who have been following developments in Malaysia closely will know that their Prime Minister has announced, some two weeks back, plans to liberalise the legal services sector.

In recent years, apart from allowing foreign law firms to set up offices, Singapore has made significant strides to fulfil her aspiration of becoming a preferred international arbitration centre, alongside global leaders such as New York, London, Paris and Hong Kong. We have witnessed a considerable increase in arbitration caseload even though in many such cases, the disputes have no connection with Singapore at all. It is clear from industry players that Singapore's arbitration-friendly laws, the supervisory role of the Singapore Courts, effective overseas marketing and the business boom in Asia are the main contributing factors to her increased popularity.

In terms of hardware, Maxwell Chambers, Singapore's world-class, customised, purpose-built complex for arbitration cases, was launched in January 2010. It received strong endorsement very early on when two leading London sets, Essex Court Chambers and 20 Essex Street, rushed to take up office space when the building was still undergoing refurbishment.

In terms of software, the Singapore International Arbitration Centre amended its rules last year to introduce an expedited procedure for claims below S\$5,000,000. It also introduced rules allowing the appointment of an emergency arbitrator (prior to the constitution of the Tribunal) for emergency interim relief in appropriate cases. These amendments were introduced to enhance the pro-arbitration landscape in Singapore and to keep up its competitive edge.

The participation of Australian lawyers in Singapore arbitration as arbitrator or counsel is relatively small. I believe that less than 5% of arbitrators appointed are of Australian nationality, though the actual number of Australian arbitrators in Singapore is likely to be higher as the available statistics do not take into account

those arbitrators who were appointed, for example, by consent. 30% of the cases involve companies from India, HK, Indonesia, Vietnam and China. The largest growth areas for arbitration work are India and Indonesia. It is easy to market to the Indians and Indonesians. First, they are comfortable with our language, culture and geographical proximity. Second, they themselves prefer not to refer disputes to arbitration or the courts in their own jurisdiction. In other words, there is a significant push factor to refer disputes outside India and Indonesia. This experience is quite different from say Hong Kong or China and recently Malaysia as they have similar ambitions to develop their arbitration practices. Having said that, the arbitration case load from China, HK and Malaysia are not insignificant.

In the field of international arbitration, one way of working around Australia's geographical disadvantage is to seek arbitration work in Asian arbitration capitals, namely Singapore and Hong Kong, by offering your services and expertise to their principal consumers *ie* India, Indonesia and Indo-China. I personally believe the next boom area for international arbitration is Indo- China *ie* Thailand, Vietnam, Laos and Cambodia. These countries are undergoing a business revolution. Inevitably disputes will arise, requiring the services of competent lawyers. Their domestic jurisdictions will not be sufficiently sophisticated to handle such disputes.

Regionalisation

I observe that not many Australian firms have overseas branches. To date, out of the thirty largest Australian firms by headcount, 6 have set up offices in both North Asia and South-East Asia. Only 10 have office(s) in Asia. Regionalisation is an expensive

exercise. It can drain the firm's financial resources. Such offices must be managed by motivated and talented lawyers whose posting would entail a heavy opportunity cost on the firm and the lawyers. A proper strategy and firm commitment towards the cause are absolutely necessary to minimise the risk of failure. Before embarking on any expansion plans beyond your domestic shores, the following points must be carefully examined:

- (a) **Strength of domestic practice:** It is essential for your domestic practice to be strong as regionalisation is simply an extension of your brand name. Without a strong brand name, success would be an uphill and expensive task.
- (b) **Business Strategy:** Your regionalisation exercise must be driven by a strong business case. Ideally, one should have some key clients with either business presence or interests in the chosen jurisdiction.
- (c) **Leaders:** You must choose the correct partner to lead the charge. At the same time, it is vital for the partnership to support the overseas partner by referring work, deploying motivated lawyers and being patient. Patience is crucial because in the initial years, the overseas venture is likely to operate at a loss.
- (d) **Areas of Practice:** You must choose the relevant areas of practice with strong potential for growth in the chosen jurisdiction. For example, one does not set up a shipping practice in a land-locked jurisdiction, even if the firm has

considerable expertise in that area. The selected practice areas will also depend on the strength of your brand name in those fields of expertise.

- (e) **Local Partner.** It is absolutely critical to choose the correct local partner. The wrong local partner will harm your brand. You need to be able to sleep comfortably at night knowing that your foreign practice is in the hands of good, competent and, most importantly, honest people.

Conclusion

I hope I have done enough to whet your appetite. Singapore is a unique jurisdiction. Its legal landscape is very dynamic. It has a mature Bench and Bar. It believes in foreign competition because it recognises that it is critical to develop its own local talent through “osmosis” by encouraging, facilitating and promoting collaboration with foreign lawyers. It offers many exciting opportunities for foreign lawyers, including Australian lawyers, to work in Singapore. In addition, Singapore can also be used by Australian lawyers as a gateway to explore opportunities in India, Middle East, ASEAN and North Asia. If you are successful in attracting work to Singapore, it would indeed be a win-win situation for both Singapore and Australian lawyers.

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Speech delivered by Justice Steven Chong at the Engaging the Asian Economies – Law & Practice 2011 Conference in Melbourne