



## Exporting Legal Services

Andrew L. Stoler  
Executive Director  
Institute for International Trade  
The University of Adelaide

### Introduction

Not that long ago, few people paid attention to international trade in services and even fewer thought about the possibilities of international trade in legal services. Legal services were the kind of thing that individuals and businesses obtained locally. When they had need of legal services outside of their own country, they turned to local law firms in whatever jurisdiction they found themselves in. Here in Australia, it used to be the case that most law firms were small, typically with less than 20 partners, with the business focussed on the local market.

Much has changed. Today, two of the biggest twenty-five global law firms are headquartered in Australia. Together, they employ thousands of lawyers and maintain offices in a half dozen countries. These modern law firms work for international clients and they service their domestic clients in much of those clients' overseas business requirements for legal services. The market has exploded but we are only seeing the tip of the iceberg because trade in legal services is unfortunately amongst the most heavily regulated and constrained service sectors.

In my brief comments today, I plan to address (1) the importance of trade in legal services; (2) the challenges faced by providers of legal services; and, (3) a selection of current liberalization initiatives that may well have an impact on the future global market for legal services.

### Importance of International Trade in Legal Services

In many respects, legal services can be seen as one of the infrastructure services that facilitate the operation of national and global economies. Most important business transactions require the intervention of lawyers at some stage and like other business-facilitating services, access to good, reliable and competitively priced legal services features importantly in the overall competitiveness of the transaction. Very often, there can be a lot at risk.

There is a growing need for many branches of law - particularly those that pertain to international business and trade - that have heretofore been scarcely known, let alone developed. Subjects such as corporate restructuring, cross-border mergers and acquisitions, intellectual property rights and competition law have increased the demand for greater and more sophisticated legal services.

When we talk about international trade in legal services, we can generally differentiate the services according to whether they involve work on a legal firm's home country law or whether it is advising on foreign or international law matters. The way legal services providers are treated in the market place often depends very importantly on which of these two branches of legal advice we are discussing. For the purpose of WTO negotiations, legal services are generally further subdivided along the following lines:

- Legal advisory and representation services concerning criminal law;
- Legal advisory and representation services in judicial procedures concerning other fields of law;
- Legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.;
- Legal documentation and certification services; and
- Other legal advisory and information services.

Statistics on trade in legal services are quite sparse. However, available data show that the legal sector has enjoyed continuous growth over the past several decades. While the number of professional providers of legal services grew by twenty percent in the EC Member countries between 1973 and 1993, it tripled in the USA over the same period. At the end of the last century, the number of lawyers in the USA approached 860,000, with output of legal services estimated to have a value of some \$148 billion. At the same time, there were 617,000 lawyers in the EC, with an output of some Euro 176 billion. Of the 100 biggest firms in 2002, 69 were American, 17 were British, 7 were Canadian and 5 were Australian.

More recently, Asian law firms are starting to become active on the global stage. In Hong Kong, there are now 569 law firms, 49 of which are foreign and annual revenue exceeds \$1.5 billion. In Singapore, the legal services sector earned revenue of Sg\$ 849 million in 2000.

In the WTO GATS, trade in services is divided into four modes of supply. The first mode is cross-border trade, where the lawyer in country A sends his advice to a client in country B. In the second mode, which is referred to as consumption abroad, the client from country B goes to country A to purchase his legal advice from his foreign lawyer. In mode 3, the law firm establishes a local base in the country of the client and provides services from this local base. Finally, in the GATS fourth mode, lawyers will move temporarily from their home country to provide legal services in the country where the client does business. Clearly, all of these modes of delivery apply to modern trade in legal services and it is important to international law firms to gain as much liberalization as possible in all of these modes in order to successfully ply their trade in global markets.

### **Challenges to Exporters of Legal Services**

Now, here's the rub. As important as trade in legal services is for the smooth functioning of the global economy, many countries impose important restrictions on the ability of foreign law firms to provide legal services. Most of these barriers involve regulatory matters, some of which may be justified but others of which are clearly discriminatory only in the interest of providing protection to domestic suppliers. A rough catalogue of the restrictions applying to exporters of legal services would include the following measures:

- Nationality requirements for practitioners;
- Restrictions on the movement of managerial and professional personnel;

- Restrictions on the legal form through which the service can be delivered – for example prohibitions on incorporation or joint venture requirements;
- Restrictions on foreign equity;
- Restrictions on partnership between foreign and locally licensed professionals and restrictions on hiring locally licensed professionals;
- Restrictions on the use of international and foreign firm names;
- Residency requirements – and in particular, requirements as to a period of prior residency;
- Qualification requirements of domestic law;
- Licensing requirements, including for the practice of foreign law; and,
- Regulations relative to ethical standards.

Of course, many of these restrictions and requirements have legitimate justification, but even where this is the case, sometimes the way in which the objective is achieved can be more restrictive on foreigners than necessary. There are ways for foreign law firms to work around many of the restrictions on doing business, although doing so may entail higher costs for the firms and their clients. Taking Indonesia as an example, and drawing on information available on the "Legal 500" website, we can see a number of ways to surmount problems posed by imposed restrictions:

"No international law firm is permitted to open an independent office in Indonesia. It is a criminal offence for a foreigner to advise on Indonesian law without a license from the Indonesian Ministry of Justice.

...

Some international law firms have significant teams focussing on Indonesian work, based mainly in Singapore but also in Hong Kong. These teams possess very real knowledge of the Indonesian market. While they cannot advise on Indonesian law, they are often more active on major deals in the jurisdiction than the Indonesian counsel they instruct to handle the local law aspects of a transaction.

...

The Hong Kong office of Cleary Gottlieb Steen and Hamilton LLP handles capital markets, M&A and large-scale restructuring work in Indonesia. The firm has particular strength internationally in sovereign advice, and has been advising the Republic of Indonesia on capital markets since the Indonesian Government re-entered that market in 2004. This recently included advising on a US \$2 billion bond offering.

The Hong Kong and Singapore offices of Sidley Austin handle corporate finance and capital markets work in Indonesia including, recently, advising PT Indosat Tbk on consent solicitation relating to its issuance of high-yield notes worth US\$ 300 million.

...

Some international law firms have chosen to establish associations with leading Indonesian firms in which the local firm becomes the preferred supplier of local law advice. Australia-based Allens Arthur Robinson has an association with Widyawan & Partners."

[Source: "Legal 500"]

Just looking at those few examples in just one of the countries in the region, we can see how the law firms can be skilled at making flexible use of the different modes of services supply to undertake some significant and valuable work in an international market that might - at first glance - appear to be closed to international exporters of legal services.

Recently, under contract to the ASEAN Secretariat in Jakarta, our Institute here in Adelaide, together with partners in the Philippines, Indonesia and Thailand, undertook a study of barriers to trade in business services within the ASEAN countries. The study covered trade in legal services, as well as trade in accounting, architectural, management consulting and computer and related services. We looked at the extent to which ASEAN member countries had made liberalization commitments under either the WTO or the ASEAN AFAS and conducted an extensive survey of firms to gain a cross-ASEAN appreciation for the restrictive of trade in these sectors.

Among the accredited professions, legal services are by far the most restricted in ASEAN. Only five of the ten ASEANs have even made commitments under the regional AFAS. In all of the member countries of ASEAN, there are nationality requirements – although these are applied with varying degrees of severity. In the Philippines, foreigners are absolutely prohibited from practicing in the legal profession. In Singapore, on the other hand, the rules were loosened somewhat in 2000 and joint law ventures and formal law alliances are now permitted between local and foreign firms. But foreign lawyers are not permitted to appear in court. These are just some illustrations of the challenges found in the ASEAN region.

In Australia, by contrast, admission to practice Australian law is open to anyone who satisfies the educational, practical legal training and character assessment requirements. A candidate has to demonstrate knowledge of the eleven basic areas of legal knowledge, undertake articles of clerkship or approved practical legal training course and be assessed as a fit and proper person. Qualified registered foreign lawyers are permitted in Australia to practice under limited licenses and are allowed: to use their own firm name; to enter into commercial association with Australian lawyers and law firms and to practice foreign and international law without the need to undertake an unnecessarily burdensome process to meet admission requirements such as would be required to practice Australian law.

At least in our Asia-Pacific region, it is far easier for foreign lawyers to practice foreign and international law in Australia than it is for Australian lawyers to do so in other countries in the region.

### **Liberalization Initiatives**

There are a number of ways in which restrictions on the practice of legal services can be liberalized. Through negotiations in the WTO or in regional groupings like ASEAN's AFAS, governments may schedule liberalization commitments on aspects of trade in legal services. Liberalization can also be effected through bilateral free trade agreements, such as those that Australia has entered into with Singapore and the United States. Another way of achieving liberalization is through negotiated changes to the applicable international rules. Australia is one of the leading proponents of achieving liberalisation through a change in the underlying rules and has made a significant proposal (S/CSS/W/67) in the WTO services negotiations to this effect. In particular, Australia has proposed the adoption by WTO Members of specific guiding principles for conducting trade in legal services. These proposed principles include:

- Formal recognition, on reasonable terms, of the right to practice home-country law, international law, and where qualified, third country law, without the imposition of additional or different practice limitations by the host country;

- Formal recognition, on reasonable terms, of the right of foreign law firms to establish a commercial presence in a country or economy without quota or other limitations concerning professional or other staff, location, number and forms of commercial presence, and the name of the firm;
- Formal recognition, on reasonable terms, of the right of foreign law firms and lawyers to enter freely into fee-sharing arrangements or other forms of professional or commercial association, including partnership with international and local law firms and lawyers;
- The right to practice local law to be granted on the basis of knowledge, ability and professional fitness only – and this to be determined objectively and fairly through a transparent process;
- Formal recognition of the right, on reasonable terms, of a foreign law firm to employ local lawyers and other staff;
- Formal recognition of the right to prepare and appear in an international commercial arbitration.

In addition, Australia maintains in its proposal that nationality and residency requirements are trade-distorting barriers that should be eliminated. Consumer protection, ethical standards and quality of service, together with safeguarding the rule of law, should be achieved through other, more appropriate, non-discriminatory regulatory means.

Pretty clearly, the guiding principles suggested by Australia in its submission to the WTO are consistent with the approach already taken in this country – including the limited licensing concept as applied to the practice of foreign and international law.

### Conclusions

The importance and significance of international trade in legal services will undoubtedly continue to grow rapidly in the years to come. International business and the rising amount of mergers and acquisition activity apparent on the global scene will increasingly require the services of expert lawyers. Where barriers to trade in legal services exist, law firms and their clients will work hard to get around these barriers because they have no other choice. But, this might also involve unnecessary duplication and higher costs than would be the case in the absence of trade barriers.

The Australian Government and Australian law firms are not afraid of competition in legal services and have consistently argued in bilateral, regional and multilateral fora for the reduction of barriers to trade in legal services. Given that legal services today might well be viewed as one of the economy's underlying "infrastructure services" it is important to maintain this position into the future.

In all of this, the opportunities for Australian law firms to increase their exports of legal services are readily apparent. Even where barriers continue to inhibit the degree to which Australians can realise the potential of exporting, important opportunities still exist. The export of legal services is an important market that will only continue to grow in the future and it is a market where Australians are well positioned to benefit from future business possibilities.