

ASEAN Research Digest

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Research Partner: **ZICO**law



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ASEAN SHOULD FOCUS ON LOW HANGING FRUITS IN LEGAL HARMONISATION

Lifting-the-Barriers Report 2014: Legal

OVERVIEW



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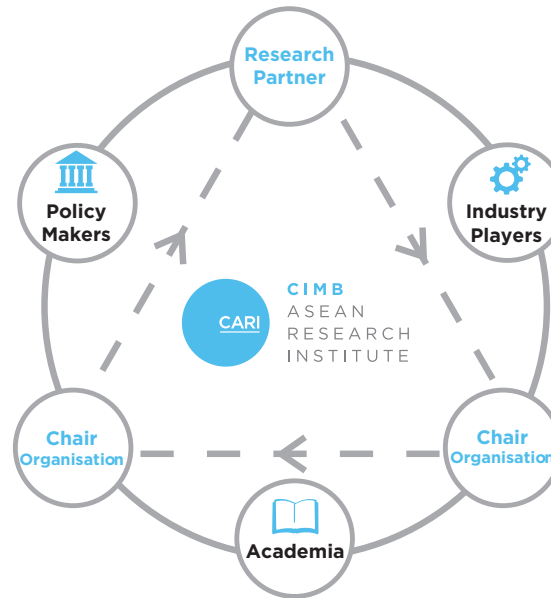
Research objectives:

The CIMB ASEAN Research Institute (CARI) in collaboration with the ASEAN Business Club (ABC) launched the Lifting-The-Barriers Initiative (LTBI) in 2013 as an integrated year long research platform involving core research as well as stakeholder engagement.

The objective was to adopt a vertical approach by means of identifying bottlenecks and barriers hindering free trade of prioritised sectors in the context of the ASEAN Economic Community (AEC).

The LTB Initiative targets six identified sectors which have pressing relevance to the business landscape in ASEAN and will play a major role in the successful formation of the AEC. The six sectors were Retail, Legal & Tax, Food & Beverages, Financial Services & Capital Markets, Minerals, Oil & Gas and Automotive & Manufacturing.

RESEARCH STRUCTURE



Two leading **ASEAN corporations** were selected to champion each sector, providing the direction and experiential insight into their industry. The input from these champions, or chair organisations, were key to understanding the issues faced by industry stakeholders and to develop the recommendations as part of the discourse.

CARI's Research Working Committee and its Strategic Advisors also worked closely with each of the six nominated Research Partners in producing these reports.

The Research Partners were either top management consulting firms or academic institutions who provided the technical knowledge and quantitative analysis required.

METHODOLOGY

The Lifting-The-Barriers Initiative (LTBI) is divided into four phases.

PHASE I

PRELIMINARY RESEARCH

Core research and compilation of qualitative and quantitative input from targeted sectors.

PHASE II

ABC FORUM



LTB Roundtables



Plenary Sessions

PHASE III

LTB REPORTS

The final outcome, a set of white papers, for ASEAN policy makers and community to effect real changes in the region.

PHASE IV

FINDINGS SOCIALISATION

The findings from the LTB reports will be prioritised and presented to various stakeholders including policymakers.



ASEAN SHOULD FOCUS ON LOW HANGING FRUITS IN LEGAL HARMONISATION

By: ZICOLaw | Published by: CARI, September 2014

Co-Chair 1: Chew Seng Kok, Regional Managing Partner, ZICOLaw | Co-Chair 2: Adrian Ball, Managing Partner, EY



BACKGROUND

Research objective:

To explore barriers to legal harmonisation in ASEAN and provide possible solutions to move the process along.

- Effective legal framework and good governance are necessary for inclusive and sustainable development.
- Legal harmonisation is the way forward for ASEAN integration as it:
 - ▶ Helps to remove uncertainty
 - ▶ Reduces cost
 - ▶ Increases the quality of legal insitutions in less developed countries
 - ▶ Generates greater business confidence
 - ▶ Fosters international trade through lower transaction costs
 - ▶ Advances ASEAN community-building goals.
- While ASEAN member states have embraced the importance of legal harmonisation within the region, progress has been slow in adopting binding legal frameworks to govern the relationships between them.
- Harmonisation of the region's legal frameworks is complicated due to the legal and economical disparity between member states as well as the number of constituents or stakeholders that regional policies need to reconcile.
- There seems to be a preference of operating on an ad hoc basis of understanding and informal agreements.

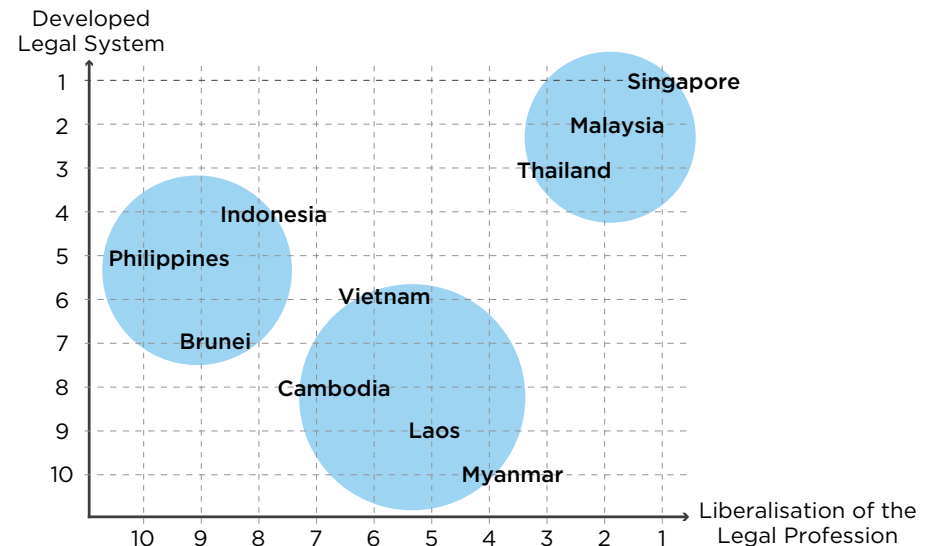
The current status of the legal system in ASEAN

- Integration of trade in services is one of the ASEAN's key integration initiatives and ASEAN has been pushing for liberalisation of its legal services to help facilitate legal harmonisation.
- Standardisation is usually done step by step:



- However, there are certain prerequisites that are needed for an effective legal harmonisation system:
 - ▶ Countries should have a fairly developed and well-functioning legal infrastructure in place.
 - ▶ The existing legal infrastructure should be able to support the new implementation as intended.
 - ▶ The harmonisation process should involve full understanding and cooperative measures from legal
 - ▶ Countries should ideally have similar levels of socio-economic development.
- ASEAN does not meet any of the above-mentioned criteria.
- Unlike the EU, ASEAN laws are far from being harmonised. The figure below shows ASEAN countries at different stages of legal development. The legal systems were based on two factors of development:
 - ▶ **Liberalised** - The existence of policies that relax the regulatory restrictions on the ability of lawyers (local and foreign) to provide legal services in their jurisdiction
 - ▶ **Liberal** - The absence of regulatory restrictions on the ability of lawyers (local and foreign) to provide legal services in the jurisdiction

The current position of ASEAN legal systems/professions



Source: World Justice Project, APEC, ASEAN Law Association and internal sources

Disclaimer: Analysis of some jurisdictions was done based on very limited open source information. The opinions expressed in this chart are those of the presenter and do not necessarily reflect the official position of the ASEAN countries.



- Only a few ASEAN countries have implemented policies to regulate and enforce liberalisation of legal services.
 - ▶ In the assessment, greater weight was given to the countries that had made concerted efforts to liberalise their legal professions than those whose restrictions on legal services were absent.
- In evaluating what constitutes a “Developed Legal System” a combination of quantitative and qualitative data was used, relating to:
 - ▶ Civil justice
 - ▶ Criminal justice
 - ▶ Regulatory enforcement
 - ▶ Protection of commercial contracts and IP rights
 - ▶ Absence of corruption in the judiciary
- **The conclusion is that none of the ASEAN member states have the same level of legal development and they are also at different stages in legal services liberalisation.**

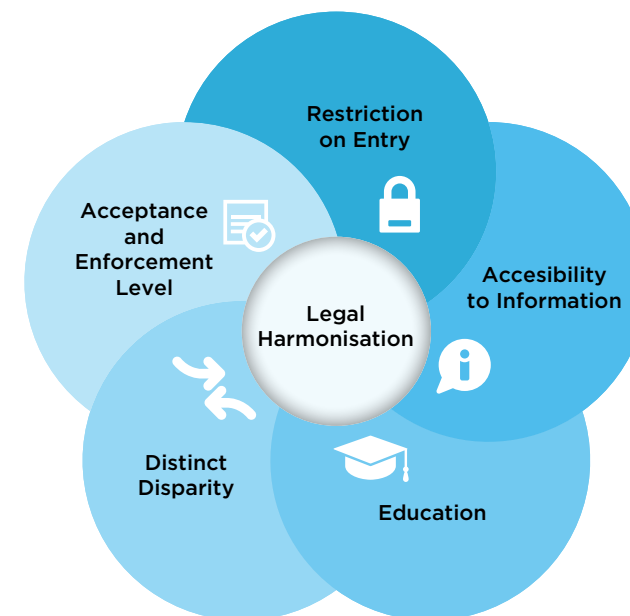
KEY FINDINGS

- The study found five key barriers to legal harmonisation in ASEAN.

Five main barriers identified

- 1. Disparity between the countries**
- 2. Poor enforcement and acceptance level**
- 3. Liberalisation - restrictions on entry**
- 4. Low access to information**
- 5. Education disparity**

Barriers to establishing harmonisation in the legal system of ASEAN



1. Disparity between the countries

- The path towards legal harmonisation is filled with challenges due to the divergence in cultural, political, and social makeup of ASEAN countries.
- There is a clear disparity between member states in the inequality of market capture capabilities, which could be because of differences in economic development, infrastructure and labour skills.



Example: Singapore, with its economic strength, high quality infrastructure and labour, is preferred for international arbitration.

- The economic gap between the more advanced and less advanced ASEAN members naturally leads to regulatory inconsistency and gaps in legal infrastructure between members.

2. Poor enforcement and acceptance level

- Although AFAS was created with the purpose of facilitating liberalisation of services, very few binding agreements have been made and many ASEAN countries still have strict restrictions on legal services.
- Not all ASEAN countries have adopted an open market policy in their legal systems and legal services within the region remain heavily protected with a strong tendency by member states to shield their own national champions against foreign threats.
- The legal services in ASEAN are still heavily protected, due to several reasons:

Protection of national champions
Local lawyers apprehensive of competition
Attachment to own legal traditions
Aversion to a supranational authority

Information not easily available or transparent

3. Liberalisation – restrictions on entry

- Local legal institutions have been challenged by the changed legal landscape due to globalisation and can no longer take their position for granted.
- Implementation of liberalisation efforts is very different from one country to another in ASEAN.

SINGAPORE	Singapore introduced in 2008 the Qualifying Foreign Law Practice licences (QFLPs), which allows licensees to employ Singapore qualified lawyers to practise in certain areas of Singapore law.
MALAYSIA	Malaysia recently implemented a ruling where foreign law firms are allowed to open offices if they have proven expertise in international Islamic finance.
PHILIPPINES	The Philippines restrict the practise of law to citizens of the Philippines. A foreign lawyer is not allowed to obtain a limited licence to offer advisory services in foreign and international law.
MYANMAR	Myanmar's legal system has been described as dismal. Enforcement is poor and Myanmar's lawyers lack an independent bar association to set rules and standards and look out for their interests.

4. Low access to information

- Foreign investors looking to invest in ASEAN need to look at the laws of each country due to the disparities in the legal frameworks.
- This can be a challenge, especially for those investing in the CLMV countries, where information is not easily available or transparent, and often needs to be translated.
- The problem is especially acute in the CLMV countries, due to several reasons:

Poor management of records
Laws and regulations in local languages
Different regulations for different sectors
Legal uncertainties pertaining to legal definitions
Unclear drafting or communication of policies

Information not easily available or transparent

- The lack of harmonisation of legal terms and uniformity in approach with in ASEAN create barriers for potential investors.

5. Education disparity

- Legal education differs among ASEAN countries, leading to a disparity of skills and knowledge.
- To add to the difference, the legal systems of the ASEAN countries differ greatly:
 - ▶ Common law systems in Brunei, Malaysia and Singapore
 - ▶ Civil law systems in Vietnam and Indonesia
 - ▶ Hybrids of both laws in Thailand and the Philippines.
- This leads to different forms of qualification in each member state, and the differences are so significant that foreign qualified lawyers are required to re-qualify in order to be able to practise law.
- ASEAN students are also not taught in depth about other ASEAN countries' legal systems and are often more familiar with the EU and English laws than their neighbours' laws.



KEY FINDINGS

- Addressing the above-mentioned barriers and successfully harmonising the legal systems of ASEAN is a long term process and will involve a lot of time and effort from each member state.
 - This includes simplification, standardisation and harmonisation of laws, standards and policies governing the member states.
- Meanwhile, ASEAN should focus on the low-hanging fruits, in order to help facilitate ASEAN legal harmonisation and move the process along.

Recommendations to facilitate ASEAN legal harmonisation

1. Harmonisation of contracts

Issue	Harmonisation of contracts is important when it comes to attracting investors into the region as this eliminates ambiguity or uncertainty and discrepancy.
Recommendation	Establish an ASEAN institution or an official body to oversee the standardisation of contracts.

2. Official governing language

Issue	As ASEAN is a multilingual region, some terms are not standardised or possess the same definition. This causes uncertainty for investors.
Recommendation	Establish an ASEAN institution to govern the terms used to ensure that all terms and definitions are standardised. English language should be set as the regional language for standardisation purposes.

3. ASEAN Arbitration Centre

Issue	The increased cross-border trade has resulted in the rise of cross-border disputes. Arbitration is becoming the preferred dispute resolution mechanism because of its affordability, speed, and privacy.
Recommendation	Establish an ASEAN Arbitration Centre that governs ASEAN arbitration matters and standardise arbitration classification within the region. This would eliminate any overlapping arbitration rules, low quality regulation, and uneven enforcement.

4. ASEAN Registrar of Companies

Issue	Due to the disparities and different form of record keeping, ASEAN constantly faces difficulty obtaining updated information from one reliable source.
Recommendation	Establish a centre to act as the registrar for all information relating to the legal industry within the ASEAN. It should also keep member states updated with the ever-changing laws implemented throughout the region with records of rulings and policies kept in a hassle-free one-stop format.

5. Movement within ASEAN

Issue	The movement of people is one of the most important aspects for businesses such as the legal services, however, not enough has been done to ease the movement of people within ASEAN.
Recommendation	ASEAN should implement visa-free travel within member states to help deepen regional integration.

- The assessment of the report reveals that ASEAN is far from achieving full harmonisation of its legal services.
- Although the implementation of the AEC will not be fully accomplished before 2016, the direction and commitment towards the AEC appears to be irreversible.
- The extent of legal harmonisation in ASEAN depends on the political will of each member state.
- Although there is no quick solution to achieving full legal harmonisation, the authors believe that if the above recommendation were implemented, the process of legal harmonisation among the ASEAN countries would be more successful

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