

Negotiating the legal systems in ASEAN

By Low Kee Yang and Philip Zerrillo

One may ask: What is a thought piece on legal systems doing in a business magazine? The fact is, as one begins to look at the legal and regulatory systems across the world, one quickly finds that these systems are an essential part of a firm's business environment. Legal and regulatory structures, unique to each country, can facilitate or hinder, enable or limit how a firm operates locally. Laws can often impact business performance more than any other factor, internal or external to the business. You may have control over your finances, human resources, products, processes, supply chains, and even your customers; but legal systems dictate what products you can produce, where and how much you can produce, and where and to whom you can sell them. While the 'sin' industries like alcohol and tobacco are polarised examples of this, it is easy to see how the laws and regulations of a country can impact any business.

The legal system also impacts the nation concerned, specifically in terms of the investments, business and skills that flow into it, and the business models that emerge. We often talk about making companies attractive places to work, but equally important is for policymakers to gauge whether their country is an attractive place to invest, operate and work. The legal and regulatory environment is a critical determinant of this.

Different type of systems

Looking at Southeast Asia, we find a spread of legal systems in operation. At one end, we have countries like Singapore and Malaysia that follow Common Law derived on the basis of judicial decisions of courts and tribunals. The defining characteristic of Common Law is that it is dictated by precedent. To resolve the conflict between two parties, a Common Law court looks to past decisions made by relevant courts, and applies the same principles to adjudicate the dispute. Then we have Civil Law—seen in Thailand, for example—which is based on statutes and notes about those statutes. Codified statutes (as opposed to adjudicated cases) predominate the Civil Law systems and are given seniority over a judge's ruling.

At the other end of the spectrum, we have Shariah law in Brunei, while countries like Vietnam and Cambodia follow Statutory Law promulgated by the legislature. Under Statutory Law, all cases and legal disputes are heard in private and the outcome is not reported publicly. Under Common Law, legal decisions of judges begin to establish precedence or a solid footing for the business person to know how to cross a few of the gaps or open areas not specifically addressed in the writing of the law. Under Statutory Law, the party in power or the government is the only body that creates a new law or statute. Thus, the unpublished outcomes of cases serve as information for future statutes, rather than determining a new precedent.

Managers need to recognise, acknowledge and respond to these disparate legal systems that operate in the region. An area of law that has become very important in recent decades, is conflict of laws (also known as private international law). As a business crosses borders, apart from having to be acquainted with the laws of a host country, there are issues where a country's law should apply. Take a simple example of a joint venture between a Singapore company and a French firm to set up a factory in Vietnam. Which law applies to their contract—Singapore law, French law, Vietnamese law, or all of them? In the event of a dispute, where should the suit be heard and what happens if concurrent proceedings are brought to different countries? And, if a judgment is given, can it be enforced in another country? In the absence of uniform or universal laws, transactions and disputes will invariably trigger complex questions of conflict of laws. A prior understanding of the laws and the implementation of certain legal measures can pre-empt many of the potentially costly and time-consuming disputes.

Different stages of development

Along with a lack of certainty, we see a lack of comprehensiveness and clarity in the laws of many Southeast Asian nations, as these legal systems are also very diverse in terms of their overall levels of development. Many of the newly emerging

nations are wrestling with private ownership and new forms of commerce and are not equipped or experienced to write such laws. When you don't have skilled bureaucrats and lawmakers, laws tend to be vague, limited in their areas of application, and often in conflict with other laws being enacted. For instance, Myanmar's Foreign Investment Law consists of a five-page document, while most such laws are articulated in several hundred pages. This 'brevity' makes the directive ad hoc and open to interpretation, dramatically reducing confidence, especially for foreign business people.

At one end of the spectrum we have Singapore, which has had a well-established legal system for over half a century. The laws are well documented and court cases are well transcribed. This facilitates lucidity and certainty, making it an attractive destination for doing business. In contrast, we have the emerging systems in Timor-Leste and Myanmar where the legal systems are rudimentary at best. Even Cambodia, Laos and Vietnam largely have commercial legal systems that are, for the most part, less than 30 years old.

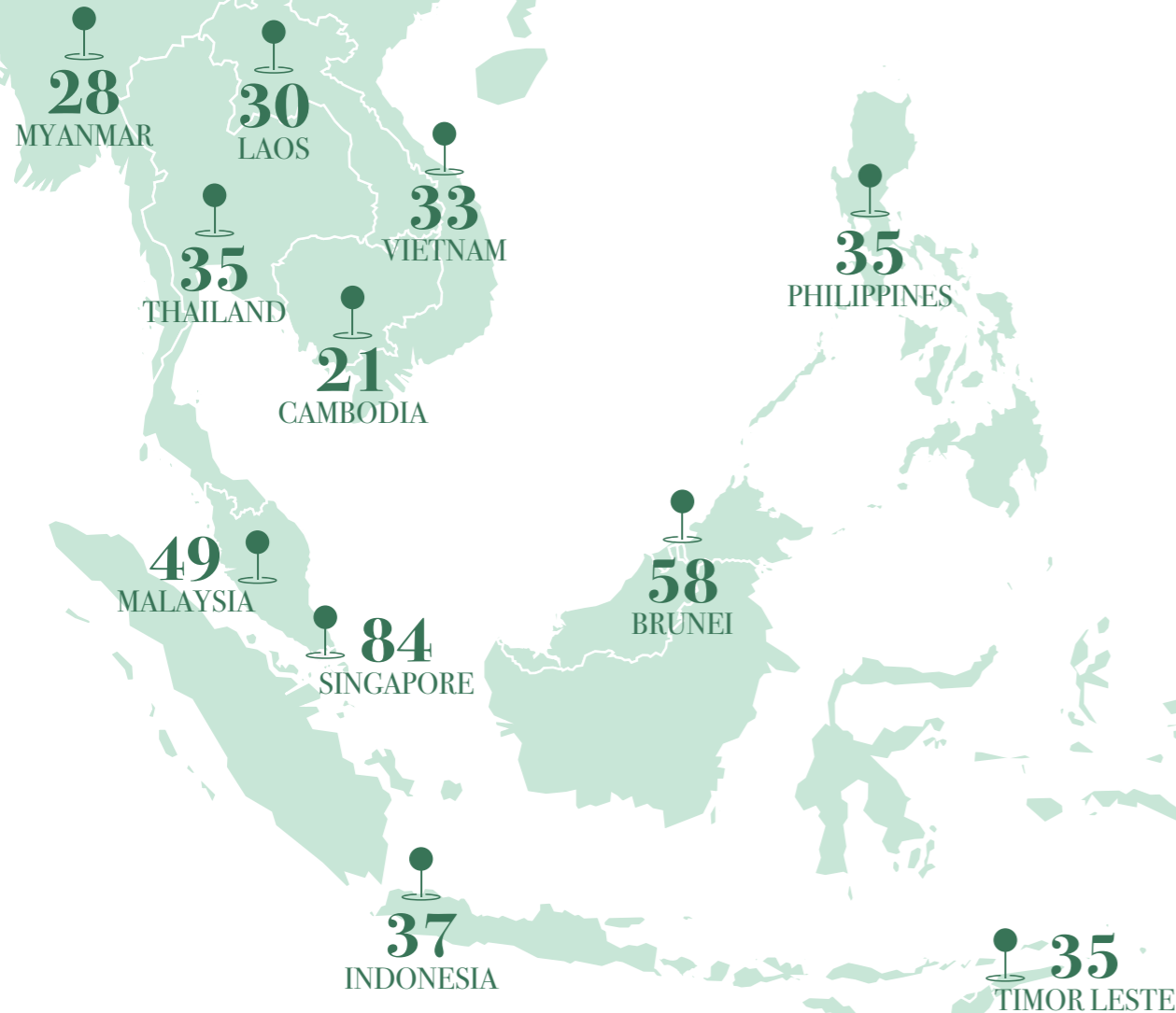
The ideological paradigm that the country truly (not just ostensibly) aspires towards is critical to the legal changes and

the implementation of such changes. For some, fundamental changes have to be made, such as to a country's Constitution, land ownership and tax structures, to name a few. To effect this change, conscious and sustained effort has to be made away from political favours and personal influence towards the rule of law. Even with the best of intentions, change takes time and the successes are, and probably will remain, uneven across the region.

Different views on contracts

Legal transactions in Asia and the West often spring from a difference in mindsets. The Western approach to business contracts tends towards a fiercely negotiated voluminous contract and, subsequently, a strict adherence to the terms that were (apparently) freely agreed upon by the parties involved. In contrast, the approach in some Asian countries is that the contract, after it has been signed, has to be worked out by the parties in a collaborative fashion. Such a policy or philosophy may even be reflected in the country's laws. The difference in thinking can have huge implications and applications as a foreign corporation seeks to operate successfully in the host country.



FIGURE 1: CORRUPTION INDEX

Source: Transparency International, "Corruption Perceptions Index 2016", 25 January 2017

Different degrees of execution

The level of transparency with which laws and regulations are implemented also differs significantly across the countries of Southeast Asia. According to the German-based NGO, Transparency International, on a scale of zero (highly corrupt) to 100 (very clean), the corruption index of most ASEAN countries falls below 50 (refer to Figure 1). While the fight against corruption is yielding results in Laos and Myanmar, we are possibly seeing a step backward on this dimension in Thailand and Cambodia.

Local businesses are able to negotiate through the ambiguity and opaqueness by knowing the 'right' people and having the advantage of homegrown relationships and cultural similarities. Yet transparency and confidence are vital for international investors who don't have access to social influence and have to depend on the legal system when they run into problems. In the absence of clear and evenly applied laws, the local investors with influence are the ones most likely to invest as they have a limited investment horizon/vision and are more confident that they can influence the application of

the law. MNCs, in contrast, are globally accountable, and can't run the risk of violating or even circumventing the laws, unlike locals.

The legal system is a signal to foreign investors, businesses and workers on how they are going to be treated. What may work for a local can prove to be a handicap for the foreign investor. A robust, transparent and fairly applied set of laws appears to be a precondition for attracting foreign economic interest. This change will undoubtedly take time in some of the most rapidly advancing systems. Our advice for investors today is: As MNCs and regional players start to look at ASEAN's investment potential, they need to be aware of the crocodiles lurking in the muddy waters.

It is our hope that this note will stimulate thought and encourage our readers to share their ideas and experiences on this topic. What are your thoughts? We would love to hear from you.

Please submit your comments to: editorami@smu.edu.sg

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Dear Editor,

The article, 'A Walk Through Asia: The Flow of Funds in ASEAN' (November 2017), about the access to lending and to financial markets in particular, makes a powerful point about the connection between individual entrepreneurship and an ecosystem that either supports or constrains it. I would agree that the ingenuity of individual entrepreneurs in accessing funds is to be admired because there is value creation in the ability to seize opportunities in otherwise constraining circumstances.

At the same time, however, one can take a more critical view, or at least one that doesn't focus exclusively on the opportunities created by the ingenious individual, but on the ability of the socio-political system to create fair access to finance. This would certainly be the view taken in the Nordic societies of Denmark, Norway, Sweden, and Finland.

In contrast to several, though not all, societies you described in this article, the Nordic societies are deemed to be high-trust ecosystems with widespread access to financing. In Denmark, for example, mortgage-financed house ownership is the norm (as opposed to renting), and bank-backed financing of new SMEs is widespread. Trust in one another, and in society's institutions is high. One can make an argument either way if societal trust is the prerequisite for equitable access to financing, or if the relationship is reversed.

Either way, it would seem to make sense to embed individual ingenuity in the broader context of societal trust.

Gregor Halff
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Dear Editor,

I enjoyed reading the last edition of *Asian Management Insights* and I wanted to comment regarding the new column 'A Walk Through Asia.' It was a welcome treat to see the discussion regarding the financing challenges of the region. I don't believe that many folks from the West, or even here in Asia, can fully appreciate the complexity of the varied financial systems, their stresses and their inter-workings.

Having lived through a massive currency devaluation, several momentous political coups, and a financial crisis that saw non-performing loans cross 50 percent of all bank loans, Thai managers have had to deal with floods and droughts of capital availability. The scars of these events leave a lasting mark on the way in which business is done. It was great to see this come through in your article.

I have been directing a Masters in Marketing Programme for 20 years now and we have been bringing together student groups to compete in global business challenges. Preparing the students and watching the competitions, it is easy to see that the environment around the start-up community in the U.S. is a very different animal compared to what we have here. With liquid and well-oiled equity markets, the size of the prize is a tremendous motivator for capital to find a home. We are a region in need of a few equity unicorns if we are to finance our potential.

Thanks for taking on issues such as this. It was a welcome addition and I enjoyed the opportunity to read through it and ponder the "what if" questions.

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