

THE "APPROPRIATE" ROLE FOR FOREIGN TRAINEES IN JAPAN

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1. INTRODUCTION

There has been an ongoing debate for the last twenty years over whether Japan's perceived non-litigiousness¹ is a result of the Japanese culture, or a combination of rubbery statistics and institutional factors relating to the Japanese legal system.² One

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1. Many commentators explain the lack of Japanese Lawyers solely upon the non-litigious nature of the people. This unwillingness to litigate was based primarily on a cultural proclivity towards maintaining harmony (*wa*) towards society. See Lansig & Wesenblatt, *Doing Business in Japan: The Importance of Unwritten Law*, 17 INT'L LAW 647 (1983). For how shame affects litigation, see also, Haley, *Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD., 359-389 (1978); Haig Oghigian, *Law and Commerce in Japan*, 46 ADVOC. 699, 703-704 (1988); Richard B. Parker, *Law, Language and the Individual in Japan and the United States*, 7 WIS. INT'L L.J. 179 (1988); Frank K. Upham, *Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Major Pollution Suits*, 10 L. & SOC'Y REV. 579 (1976); Tsubota, *Myth and Truth on Non-litigiousness in Japan*, U. CHI. L. SCH. REC. 8 (1984). Further commentators give an 'institutional factor analysis' to explain the non-litigious nature of the Japanese. The Japanese as "rational litigants will pursue an action in the courts only in circumstances where he estimates the probability of success to exceed the likelihood of failure," J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 266 (1989). Despite these theories it is evident in the U.S. courts that the "Japanese make excellent defendants and plaintiffs," Steven Dickinson, Partner, Garvey, Schubert & Barer, Seattle, lecture at the U. of Washington (Dec. 6, 1996).

2. YUKIO YANAGIDA, et. al., *LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS* 66 (1995). See also Dan Fenno Henderson, *The Role of Lawyers in Japan* published in HARALD BAUM, *JAPAN'S ECONOMIC SUCCESS AND LEGAL SYSTEM* (1997) (Henderson states that when the providers of legal services are recalculated to take into account quasi legal services, this would raise the Japanese to about the U.K. or the French level).

of the institutional factors alleged to have caused the very low litigation rates is the restriction on entry to the legal profession.³ In order to be registered as a Japanese lawyer (*Bengoshi*), a person must spend two years training at the Legal Training and Research Institute.⁴ Of the 25,000 people (mostly graduates from university law schools)⁵ who take the annual examination⁶ for a place at the Legal Training and Research Institute, only 500⁷ are awarded a place.⁸ This has resulted in the number of practicing *Bengoshi* in Japan being restricted to approximately 14,000.⁹ Furthermore, the vast majority of these *Bengoshi* provide services

NOTE: The licensed non-lawyer specialists increase the number of those performing legal work in Japan. The population of practising lawyers is quite small compared with other developed countries. For example, in 1988 there was one lawyer for every 1,500 people in the Former Republic of Germany (West Germany), while in Japan the ratio was one in 9,400. This disparity is less striking when one considers non-lawyers, the ratio becomes one to 1070. See LAW & LEGAL PROCESS IN JAPAN 690 (John O. Haley & Dan F. Henderson eds., 1988); Satochi Nakaichi, *NEC Has Few Domestic Cases, Overseas Subsidiaries Have Many*, JAPAN L.J., Apr. 1992, at 3.

3. David Hood states that The Japanese Federation of Bar Associations' (*Nichibenren*) motives for maintaining a restricted bar include protection of consumers from low quality services, maintaining economic well-being and elite status, as well as preferring high ethics and confidence. See David Hood, *Exclusivity and the Japanese Bar: Ethics or Self-Interest?* 6 PAC. RIM L. & POL'Y J. 199, 205 (1997).

4. *Shiho Kenshu Sho* was created to provide "practical training common to the three branches of lawyers." Shozo Ota & Kahei Rokumoto, *Issues of the Lawyer Population: Japan*, 25 CASE W. RES. J. INT'L L. 315, 317 (1993). HIDEO TANAKA, *THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS* 563-564 (1976).

5. See Richard S. Miller, *Apples vs. Persimmons- Let's Stop Drawing Inappropriate Comparisons Between the Legal Professions in Japan and the United States*, 17 VICTORIA U. WELLINGTON L. REV. 201, 204 (1987).

6. Y. Tamiguchi, *Shiho Kenshu Sho ni Okeru Hosho Kyoiku* [Legal Education at the Legal Training and Research Institute] 25 *Jiyu To Segi* (1975), reprinted in LAW & LEGAL PROCESS IN JAPAN 663 (J. O. Haley & Dan F. Henderson eds., 1988)

7. See Hood, *supra* note 3, at 199; see also Appendix.

8. The Ministry of Justice reformed the Legal Examination Act in 1991. The Amendments provides as follows:

- (1) An increase in the passage rate from 500 to 600 in 1991 to 700 in 1993.
- (2) The Legal Examination Administration Committee was given the power to adopt the method of determining successful candidates.
- (3) The number of examination subjects that applicants must take at the second stage of the examination was reduced from 6-7 (Article 6(2)).

See also Peter Landers, *Legal Exam Remains Toughest, Even After Reform*, JAPAN TIMES WKLY. INT'L EDITION, Aug. 19-25, 1991, at 8; Mark Thompson, *The Paradox of Japanese Law Schools*, 13 STUDENT L. 16, 21 (1985).

9. See Donald L. Uchtmann, Richard P. Blessen & Vince Moloney, *The Developing Japanese Legal System: Growth and Change in the Modern Era*, 23 GONZ. L. REV. 349 at 357 (1988); see also *Change at Home*, ASIA L., Sept. 1996 at 13 (reporting that in September 1996, the actual number of qualified *Bengoshi* was 15,895).

equivalent to an English barrister,¹⁰ leaving very few people to provide the services provided in the U.K. by solicitors.¹¹ While some of these services are provided by other qualified people, there appears to be an inadequate number of people carrying out the activities provided in the U.K. by corporate solicitors.¹²

The apparent shortage of corporate solicitors has been compounded by the growing number of international transactions being entered into by the Japanese. As Japan's trade surpluses have grown,¹³ Japan's overseas foreign investment has dramatically increased. At present it is estimated that there are as few as 500 *Bengoshi* specializing in international transactions (*Shogai Bengoshi*).¹⁴ Such an excess of demand over supply for the services of *Shogai Bengoshi* has caused many of the larger firms of corporate solicitors from America and England to try to establish practices in Japan.

There has been considerable debate over the purported liberalization of the Japanese legal "market." The foreign lawyers argue for greater access to the legal market,¹⁵ while the Japanese take the view that any change to the restrictions on practice has to take account of the fact that approximately 97% of the Japanese applying to become *Bengoshi* are restricted from obtaining *Bengoshi* status.¹⁶ A further argument asserts that more "ambulance chasers"¹⁷ would be detrimental to Japan's very stable culture and society.¹⁸ This argument is generally rebutted on the

10. See Constance O'Keefe, *Legal Education in Japan*, 72 OR. L. REV. 1009, 1009 (1993); see also John O. Haley, *Redefining the Scope of Practice Under Japan's New Regime for Regulating Foreign Lawyers*, 21 LAW IN JAPAN 18, 19 (1988).

11. Kitawaki, *The Myth of Japan as a Land without Lawyers* 1988 INT'L BAR NEWS 13.

12. For example, general counselling and advice during corporate restructuring or any major negotiations or arrangements relating to companies. See John E. Perry, Jr., *A Consumer's View of the Market for Legal Services in Japan*, 21 LAW IN JAPAN 177, 180 (1988).

13. The weakening of the yen in 1996 has liberated Japan's manufacturing industries from its large deficit-producing exports, which they had to shoulder in 1995. See Masao Igarashi, Chief Economist at the Bank of Japan, Speech in Seattle, U.S.A., (Jan. 24, 1997); See also *Japan's Trade Surplus Jumps 25%*, JAPAN TIMES, Aug. 14, 1991; International Institute for Management Development (IMD) World Competitiveness Yearbook, June 1996.

14. Conversation with Tetsuya Itoh, Anderson Mori, Tokyo (Dec. 6, 1996). See also Kunio Hamada, *The Reaction of Japanese Lawyers to the New Law*, 21 LAW IN JAPAN 43, 44 (1988), YANAGIDA, *supra* note 2, at 63.

15. The Liberalisation Debate, ASIA L. & PRAC., Sept. 1996 at 13.

16. Peter Landers, *Legal Exam is Toughest, Bar None*, JAPAN TIMES, July 17, 1991 at 3. Lander notes that in 1990 only 18% of those passing the Bar were on their first, second or third attempt. See also *Reform Eyed to Up Bar Exam Successes*, JAPAN TIMES, Feb. 5, 1991 at 2.

17. See Hamada, *supra* note 14, at 45.

18. See Bloom, *Introduction to Symposium Proceedings*, 21 LAW IN JAPAN 1 (1988).

grounds that foreign lawyers would only be involved in international transactions.

One mechanism by which foreigners can carry on some of the activities usually performed by lawyers in Japan is as a trainee to either a *Bengoshi* or to a foreign lawyer admitted prior to 1955 (*Junkaiin*).¹⁹ Foreign trainees tend to be young foreign practitioners working in an advisory capacity within one of the legal firms specializing in international law (*Shogai Jimu Bengoshi*). These people are usually on secondment from firms in their home jurisdiction for a period of two to four years. *Bengoshi* appear to employ trainees because of their language abilities and knowledge of international law (a subject not taught to *Bengoshi* in their formal training). Trainees are prohibited by the 1949 *Bengoshi* Law²⁰ from carrying out specified activities.²¹ This paper assesses the limitations on the activities of foreign trainees in regard to the current 1994 amendments and suggests an "appropriate" role for foreign trainees to adopt.²²

Chapter 2 reviews the historical development of the occupation of *Bengoshi* and the current regulation of the profession. The scope of the *Bengoshi*'s monopoly of legal services is discussed in comparison to that of a solicitor in the U.K. This review examines the feasibility of whether foreign trainees are able to successfully rely on arguments which purport that their activities are only restricted in relation to litigious matters. This is of vital importance for foreign trainees as it would be unacceptable for a trainee acting in a legal capacity to have questions raised about the legitimacy of that person's actions. The position of the Japanese legal profession within Japanese society and its continual evolution is considered. Hence, the status of the legal profession as a whole has changed from being comprised of innkeepers doing a part time job, to being one of the most respected and highly sought after professions in Japan. This change in status makes some *Bengoshi* feel entitled to expect a monopoly over legal services. It should be noted that regardless of the theoretical situation, the reality is that the *Bengoshi*'s high stature within Japanese society makes it more likely that a Japanese court will interpret the scope of the *Bengoshi*'s monopoly in a way most favourable to the *Bengoshi*.

19. See Dominic A.C. Trindade, Note, *Foreign Lawyers in Japan — A Commentary on the Recent Developments from an Australian Perspective*, 16 MELB. U. L. REV. 32 (1987).

20. BENGOSHI HO (Lawyers Law), Law No. 255 of 1949.

21. See Trindade, *supra* note 19, at 35.

22. The 1994 amendment to the Special Measures Law concerning handling of the legal business of foreign lawyers was passed by the Japanese Diet on June 23, 1994.

Chapter 3 discusses the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers²³ (the "Foreign Lawyers Law") with regard to the negotiations leading to the introduction of the 1994 Amendments. The contention that foreign lawyers should be entitled to a visa to enter Japan pursuant to various treaty rights is also considered. This contention is closely related to the argument that foreign lawyers can legitimately practice outside the *Bengoshi's* monopoly of legal services. This chapter evaluates whether it would be "appropriate" for a foreign trainee to rely on a purported right to obtain a visa under the various treaties.

Chapter 4 suggests the "appropriate" role a foreign trainee should assume within the Japanese legal system.

2. THE JAPANESE LEGAL PROFESSION

2.1 THE DEVELOPMENT OF THE JAPANESE LEGAL PROFESSION

The development of the Japanese legal profession can be depicted by a number of factors.

- (a) The legal profession has a relatively short history;
- (b) The legal profession had a low status from the beginning;
- (c) The legal profession's monopoly of representation of litigants was not established until 1933; and
- (d) Restrictions on entry to the legal profession do not appear to have been very effective in protecting the public from unqualified practice until 1933.²⁴

Until the 1870s, a role equivalent to a solicitor was unknown to Japanese culture and society. It appears that the only people who regularly advised on legal documents and court procedures were the innkeepers close to the courts. The majority of litigants travelled to the courts and had to stay at these inns. Over time the innkeepers became familiar with court procedures and documents and provided general counsel and advice.²⁵ These people became known as *Kujishi*.

However, the *Kujishi's* reputation was exceedingly low. One of the factors for this lack of repute was the *Kujishi's* conflict of interest between giving effective legal advice and their desire to

23. See Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers, Law No. 66 of 1986, reprinted in 21 *LAW IN JAPAN* 193, 196 (1988).

24. See J. Craig, *Foreign Trainees in Japan* (1991) (unpublished paper, University of Melbourne, Australia) (on file with author).

25. Linda Cooper, *Is The Door Half Open or Half Shut? Japan's Special Measures Law Concerning the Handling of Legal Business By Foreign Lawyers*, 18 *N. KY. L. REV.* 417, 419 (1991).

prolong the litigation to increase their boarding charges to the litigant.²⁶ The *Kujishi* also facilitated the bribing of officials.²⁷

Even though the *Kujishi* provided general advice,²⁸ it was clear that prior to the Meiji Restoration of 1876, the *Kujishi* could not appear in Court in a representative capacity.²⁹ In fact, representation was prohibited for litigants prior to the Restoration unless there were exceptional circumstances relating to the litigant (for example the litigant's incapacity due to senility, old age or sickness).

Following the demise of the Tokugawa system, the principles of representation in civil litigation began to be established. In 1872, the first regulations for people performing the function of modern lawyers were promulgated. These "regulations of judicial affairs"³⁰ dealt with the regulation of trial advocates. It was provided that anyone, regardless of qualifications, could act as a litigant's representative and that such representative would be called a *Daigennin*.³¹ However, in 1873 more detailed regulations formalized the appearance of the *Daigennin* before the Courts. In particular, these regulations provided that the *Daigennin* and litigant had to file a formal notice of appearance signed by both the litigant and the *Daigennin*. These regulations also provided that all court documents had to be prepared by a judicial scribe called a *Daishonin*.³² However, there were no qualifications or requirements on the people who could assume these roles, and in fact these roles could be assumed by the same person.³³ Therefore, many people thought these changes were no more than calling the *Kujishi* by a different name.³⁴

In 1876, the Ministry of Justice issued detailed regulations relating to *Daigennin*.³⁵ These regulations established the first legal examination for admission to the bar of a court. However, the regulations did not create a monopoly for *Daigennin* as there was no prohibition on other parties performing the representa-

26. Gino Dal Pont, *The Social Status of the Legal Professions in Japan and the United States: A Structural and Cultural Analysis*, 72 U. DET. MERCY L. REV. 291, 295 (1995).

27. See Richard W. Rabinowitz, *The Historical Development of the Japanese Bar* 70 HARV. L. REV. 61, 64.

28. See Ken Minami, *Japanese Thought and Western Law: A Tangential View of the Japanese Bengoshi and the Japanese American Attorney*, 8 LOY. L. A. INT'L & COMP. L.J. 301 at 314 (1986) ("The role of the *Kujishi* has been likened to a British solicitor.").

29. See Rabinowitz *supra* note 27, at 63.

30. See Shiho Shokumu Teisei Regulation (1872).

31. See Dajokan Proclamation No. 274 (1873).

32. See Rabinowitz, *supra* note 27, at 65.

33. See Craig, *supra* note 24, at 20.

34. See *id.*

35. See *Daigennin Kisoku, Shihosko Futatsu* No. 1 (1876).

tive role. One of the major problems with the examination set for admission to the legal profession, even at that stage of the legal profession's development, was the extreme difficulty of the examination.³⁶

In 1880, the regulation of the profession of representing parties was once again reviewed and a new regime introduced.³⁷ The Ministry of Justice was placed in control of the examination system and admission to the legal profession entitled the representative to appear in any court in Japan.

From a cultural point of view, a controversial change was made in the enactment of the criminal code in 1882, by acknowledging the principle of representation for the accused in criminal cases. In 1889, the Meiji Constitution was enacted. Shortly thereafter, a number of laws were introduced to add flesh to that Constitution. One of those laws was the 1893 *Bengoshi* Law.³⁸ In reality, this law was the first comprehensive regulation of the legal profession.³⁹ Although it provided for admission to the legal profession by examination, there were so many alternative routes to admission to the legal profession that examination really appeared to be the exception rather than the rule. Those who were accepted by alternative routes included all graduates of law faculties in the major universities, judges and procurators.⁴⁰ All *Daigennin* were "grandfathered" and hence could continue to practice as lawyers, from then on called *Bengoshi*.

Even though this law established a monopoly for *Bengoshi* in the representation of litigants and gave a statutory acknowledgement to their position as "legal representatives," the *Bengoshi*'s reputation remained low.⁴¹ The *Bengoshi*'s status may have been affected by the low remuneration received by *Bengoshi* and the increasing number of impoverished *Bengoshi* during the 1920s. The Bar Association appeared to be continually torn by internal factional fighting. In fact, "physical violence at meetings was not uncommon."⁴² One of the reasons for this in-fighting appeared to be the different roles that various factions saw for the Bar Association and *Bengoshi* within Japanese society. The introduction of *Bengoshi* and the Bar Association was

36. See Rabinowitz, *supra* note 27, at 64. Rabinowitz notes that "the *Kujishi* reputation was so poor that his role continued to be tolerated only because the emergence of a money economy vastly increased the volume of litigation and made the services of someone familiar with the operation of its courts imperative." *Id.*

37. See Dajokan, Proclamation No. 37 (1880), cited in Rabinowitz, *supra* note 27, at 65.

38. BENGOSHI HO (Lawyers Law), Law No. 7 of 1893.

39. See Dal Pont, *supra* note 26, at 296.

40. See Rabinowitz, *supra* note 27, at 70.

41. See Dal Pont, *supra* note 26, at 316.

42. See Rabinowitz, *supra* note 27, at 71.

akin to a cultural revolution and hence many people had conflicting views upon its function and importance.

In 1933 a law was passed to establish a monopoly for *Bengoshi* in legal representation.⁴³ This law, the Law of Control of Unauthorized Practice, was opposed by the Bar Association, as the Minister of Justice had control of the enforcement machinery. In the same year, the 1933 *Bengoshi* Law was passed to regulate the legal industry.⁴⁴ Although there were many features of this law with which the Bar Association was not pleased, the 1933 *Bengoshi* Law established the modern legal system under which today's *Bengoshi* operate. In particular, it created an apprenticeship program, but this program was not established until after World War II because of budgetary constraints. In 1946, the first class of the Judicial Research and Training Institute entered into a two year period of apprenticeship training.⁴⁵

The 1933 *Bengoshi* Law was revised during the American occupation. In 1949, another *Bengoshi* Law (1949 *Bengoshi* Law) was passed pursuant to which *Bengoshi* are now regulated.⁴⁶ Probably the most important change included in this revision was that the supervision of the legal profession is now exercised by the Japan Federation of Bar Associations (*Nihon Bengoshi Rengokai*)⁴⁷ and not the Ministry of Justice.⁴⁸ While the Supreme Court has the ability to regulate the profession, it does not appear to exercise this power. The 1949 *Bengoshi* Law recognized the existence of a "legal profession" and was the primary impetus for the *Bengoshi*'s "rapid climb up the social ladder to a high prestige in the eyes of both the government and the public."⁴⁹

2.2 CURRENT REGULATION OF THE LEGAL PROFESSION

This section will outline the substantive legal provisions which govern the Japanese Legal Profession and hence regulate the activities of foreign trainees.

The 1933 *Bengoshi* Law⁵⁰ defined the practice of law as:

43. See BENGOSHI HO (Lawyers Law), Law No. 54 of 1933.

44. See Bengoshi ho (Lawyers Law), Law No. 53 of 1933.

45. See Rabinowitz, *supra* note 27, at 77.

46. See BENGOSHI HO (Lawyers Law), Law No. 205 of 1949.

47. (JFBA) abbreviated to JFBA *Nichibenren*

48. Edward I. Chen, *The Legal Training and Research Institute of Japan*, 22 U. TOL. L. REV. 975, 977 (1991).

49. Andrew B. Levine, *Professionalization of the Japanese Attorney and the Role of Foreign Lawyers in Japan*, 19 INT'L L. & POL'Y 1061, 1072 (1987); Chen, *supra* note 48, at 977.

50. See BENGOSHI HO (Lawyers Law), Law No. 53 (1933).

Performing the business of performing acts of litigation [*sosho ni kansuru koi*] and other legal matters pursuant to the requests [*ishoku*] of a party or other interested persons or appointment by government office.⁵¹

Although this definition refers to "other general legal matters" it can be seen that the law places great emphasis on the "acts of litigation." It would not have been unreasonable in 1933 to interpret the words "other general legal matters" as other matters incidental and ancillary to litigation.

This definition was amended in the 1949 *Bengoshi* Law⁵² to define a *Bengoshi* as:

A person who performs acts and other general legal business relating to law suits, non contentious claims and appeals of dispositions by administrative officers, such as requested from investigation, injections and petitions review.⁵³

However, Article 72 of the 1949 *Bengoshi* Law is now the essence of the *Bengoshi*'s monopoly of legal practice.⁵⁴ Article 72 prohibits people from engaging in various activities if they are not qualified *Bengoshi*. These activities are:

[W]ith the aim of obtaining compensation, engage in the presentation of legal opinions, representations, mediation or conciliation and other legal business in connection with law suits or noncontentious cases and such appeals filed with the administrative officer as requests from investigation, objections, petitions from view and other general legal matters, or act as an agent therefore.⁵⁵

It is unnecessary for lawyers to be admitted and registered as *Bengoshi* in Japan to carry out the usual functions of a corporate lawyer as carried out in America or the U.K.⁵⁶ Thus Mr. Rexford Coleman⁵⁷ established the Tokyo office of Baker & McKenzie using the argument that the prohibitions contained in the 1949 *Bengoshi* Law do not extend to counselling, drafting, negotiating and other tasks performed by lawyers unrelated to litigation. As Article 72 of the 1949 *Bengoshi* Law prohibits activities "in connection with lawsuits or non-contentious cases and other general legal cases," Coleman argued that the *Bengoshi*'s monopoly does not apply to general counselling. A historical analy-

51. Article 1 of the 1933 *Bengoshi* Law cited in Haley, *supra* note 10, at 20.

52. See BENGOSHI HO (Lawyers Law), Law No. 255 (1949).

53. Article 3 of 1949 *Bengoshi* Law.

54. See John O. Haley, *The New Regulatory Regime for Foreign Lawyers in Japan*, 5 UCLA PAC. BASIN L. J. 1, 3 (1986) (hereinafter *New Regulatory Regime*).

55. Article 72 of the 1949 *Bengoshi* Law cited in Haley, *supra* note 10, at 12.

56. See Haley, *supra* note 10, at 18.

57. See Rexford L. Coleman, *Some of the Underlying Politics of the Dispute Involving Foreign Attorneys Under the Japanese Attorneys Law and a Plea for Future Accommodation*, 21 LAW IN JAPAN 64 (1988).

sis supports this connotation as the Japanese *Bengoshi* is perceived primarily as a litigator.

However, this view takes insufficient account of the changing status of *Bengoshi* within Japanese society and narrowly interprets the words "other general legal matters" in Article 72 to be matters relating only to litigation. It is evident that such a restriction⁵⁸ will not be accepted by the *Bengoshi* or the judiciary. It can therefore be concluded that *Bengoshi* is the only party qualified to provide general legal advice in Japan.

From a foreign trainee's perspective it is clearly not advisable to rely on a narrow interpretation of the *Bengoshi's* role as legitimising their activities, as a narrow view takes insufficient account of the development of the Japanese legal profession. Furthermore, such arguments would only be seen as contrary to the interests of the trainee's employers, the *Bengoshi*.

2.3 PROVISION OF EQUIVALENT LEGAL SERVICES (QUASI-LAWYERS)

The role of a foreign trainee must be distinguished from that of a number of people who are qualified to handle legal matters in Japan. These providers of legal services include the following:

(a) *Judicial Scriveners* (Shiho-Shoshi)

Shiho-Shoshi are governed by the Judicial Scriveners Law.⁵⁹ Their functions are defined as:

(i) drafting documents to be filed in Courts, public procurators' offices or local offices of the Ministry of Justice on behalf of other persons; and

(ii) taking the necessary steps relating to the registration and transfers of titled land or other transactions involving the "registration office" or the making of deposits at a public deposit office on behalf of others.⁶⁰

These activities are similar to the functions performed by solicitors either acting in litigation or conveyancing, and as such their activities are very different from those of a foreign trainee in Japan. A foreign trainee will tend to work on international transactions where his language and foreign law ability will be of most benefit to his employer.

58. See Fukuhara, *The Status of Foreign Lawyers in Japan*, (1973) Japanese Annual of Int'l. L. 21.

59. See BENGOSHI HO (Lawyers Law), Law No. 197 of 1950.

60. YANAGIDA, *supra* note 2, at 68.

(b) *Administrative Scriveners (Gyosei shoshi)*

Gyosei shoshi registered on the list of Administrative Scriveners may draft various papers which need to be submitted to government offices.⁶¹ For example, they may draft an application for a driving licence. It is unlikely that the activities of any foreign lawyers will interfere or overlap with the services provided by these people.⁶²

(c) *Patent Attorneys (Benrishi)*

Benrishi are governed by the Patent Attorneys Act.⁶³ Their function is to act on behalf of other persons in relation to patents, designs and trademarks. They appear to occupy exactly the same position in Japan as patent agents or specialist solicitors in the U.K.⁶⁴

(d) *Tax Attorneys (Zeirishi)*⁶⁵

The functions of *Zeirishi* are to advise (legally or otherwise) on matters relating to taxation, and to draft papers, including tax returns, to be filed with the Tax Offices, and to represent people in Tax Office procedures (including appeals). They cannot represent their clients in actions brought in courts. These people appear to occupy a similar role to various tax accountants in the U.K. It is expected that a foreign trainee would interact with *Zeirishi* in the same way that a solicitor would be involved with accountants.

(e) *Corporate Employees in Legal Departments*

These corporate employees have usually graduated with law degrees from universities and, although they do not join the legal profession as such, they become very specialised in law. They may spend many years in their employers' legal section and draft the majority of contracts involving their particular employer. It should be noted that most law graduates regard their duration in the law department as part of their career path towards management.⁶⁶ Foreign trainees will have many dealings with corporate

61. See Takaaki, H. & Dan Fenno Henderson, *CIVIL PROCEDURE IN JAPAN* (Transnational Juris Publications 1985) at sec. 2.09.

62. Administrative Scriveners are governed by *Gyosei shoshi-ho* Law No. 4 of 1951 as amended by Law No. 25 of 1991. *Gyosei shoshi* totalled about 35,000 in 1995. See Henderson, *supra* note 2, at 35.

63. See Law No. 100 of 1921.

64. *Id.* at 2.

65. See *ZEIRISHI HO* (Tax Agents Act), Law No. 237 of 1951.

66. See Tanaka, *supra* note 4, at 571-72.

employees in legal sections that will be similar to dealing with Bank's legal departments in the U.K.

The services provided by these legal specialists show that the *Bengoshi's* monopoly does not extend to the activities of corporate solicitors in the U.K. However, it should be noted that patent agents, tax accountants and in-house counsel are very active in the U.K. While the activities of judicial scriveners may overlap with the activities of corporate solicitors, the judicial scrivener does not appear to advise people on their legal rights.

2.4 COMPRABLE POSITIONS IN ENGLAND AND WALES

A review of the position of unqualified practitioners in the U.K. provides a useful comparison to the position of foreign trainees in Japan. It may be advantageous for any foreign trainee going to Japan from the U.K. to be able to identify his role as a trainee with a well-defined U.K. role.

The legal position in the U.K. is regulated by the Solicitors Act 1974 and various rules made pursuant to that Act. Under the Act, no person shall be qualified to act as a solicitor unless:⁶⁷

- (i) he has been admitted as a solicitor.
- (ii) his name is on the roll.
- (iii) he has in force a certificate. . . .⁶⁸

Section 20 of the Solicitors Act 1974 specifically states: No unqualified⁶⁹ person shall:

- (i) act as a solicitor, or as such issue any writ or process or commerce, prosecute or defend any action suit or other proceedings in his own name or in the name of any other person in any court civil or criminal jurisdiction.
- (ii) act as a solicitor in any cause or matter, civil or criminal. . . .

It should be noted that any unqualified person who wilfully pretends to be⁷⁰ or takes or uses any name, title, adoption or description implying that he is qualified or recognized by law as qualified to act as a solicitor,⁷¹ shall be guilty of an offence and liable on summary conviction to a fine.⁷²

67. See Solicitors Act, § 1 (U.K.) (1974).

68. The issue by the Law Society of a practising certificate is dealt with in the Solicitors Act 1974, §§. 9-18. See *id.* at §§ 9-18.

69. Section 87 defines "unqualified" as "(i) a person not qualified under § 1 to act as a solicitor and thus includes a solicitor whose practising certificate is suspended." Solicitors Act, § 87.

70. See *Symonds v. Incorporated Law Society* 49 J.P. 212 (1884) (Partner in firm of coal merchants threatening proceedings if debt due to the firm was not paid) and *Carter v. Bucher* 1 Q.B. All E.R. 994 (1966).

71. *Law Society v. Waterlow* 8 A.C. 407 (1883).

72. The Administration of Justice Act, 1985, §§ 8, 69 (5) Sch. 1 Para. 6.

The Solicitors Act 1974 takes the view that the legislation is intended to stop the public from being deceived that an unqualified person is a solicitor or that the work has been done by a solicitor.⁷³ Under the Act, an unqualified person is authorized to do research and prepare preliminary drafts of documents and letters. However, all such work should be supervised by a qualified solicitor to the point where the solicitor can hold himself or herself out as having prepared the document. An unqualified person can attend a meeting in the presence of a qualified solicitor, but he or she can not attend alone so as to give the impression of being a qualified solicitor. Similarly, any telephone dealings or negotiations by unqualified people must not create the impression that the unqualified person is legally qualified.

In comparison to the regulation of the Japanese legal profession, the U.K. solicitors appear to have a very clear monopoly within their field. There does not appear to be any suggestion that the monopoly is limited to matters relating to litigation.

2.5 CONCLUSION ON DOMESTIC PRACTICE OF JAPANESE LAW

It is submitted that the history and development of the Japanese legal profession suggests that it is a profession which has had to struggle to achieve a status comparable to that of its Western counterparts.⁷⁴ To some extent this may represent a lack of demand by the Japanese people for litigation related services.

On first reading the relevant laws, the monopoly enjoyed by *Bengoshi* does not appear to be as wide as the monopoly established in the U.K. by the Solicitors Act 1974. In particular, it appears as though a number of functions usually performed by solicitors are performed by other professions and by employees in the case of companies. It has been argued that the monopoly established by Article 72 of the 1949 *Bengoshi* Law only applies to matters directly relating to litigation. It is clear that Article 72 of the 1949 *Bengoshi* Law does not contain the same restrictions on drafting documents that are contained in Section 20-23 of the Solicitors Act 1974.

However, given the development of the Japanese legal profession and the status which that profession appears to have obtained, it would not be unreasonable for foreign trainees to assume that a Japanese Court would interpret Article 72 of the 1949 *Bengoshi* Law as imposing restrictions similar to those imposed in the U.K. on unqualified people. A Japanese Court would be entitled to adopt this interpretation because of the in-

73. Telephone interview with D. Mitchell, *Law Society of England and Wales at Ipsley Court, Redditch Worcester*, United Kingdom (Apr. 17, 1996).

74. See Dal Pont, *supra* note 26, at 313.

clusion of the expression "other general legal matters" in the prohibited activity defined in Article 72.

It is therefore apparent that, as a matter of law, a foreign trainee should ensure that he or she does not carry on activities that may come within the definition of "other general legal matters." If a foreign trainee assumes that a Japanese Court will find that "other general legal matters" equates to "acting as a *Bengoshi*," a foreign trainee would be well advised to follow principles espoused by the Solicitors Act 1974 on the definition of acting as a solicitor.

3. FOREIGN LAWYERS IN JAPAN

3.1. TRAINEES: WHO ARE THEY?

Legal trainees in Japan originally constituted the vast majority of younger American attorneys who gained work experience in Japan after 1955. Under broad interpretation of Articles 3 and 72 of the *Bengoshi* Law, trainees are technically considered to be apprentices who serve as assistants to *Bengoshi* and thus may not practice law in their own right, even law of their home jurisdictions. These attorneys prepare English language documentation for international transactions, and are usually granted one year (renewable) visas.

In 1972, The Japanese Federation of Bar Associations (JFBA) issued a document entitled "Standards Concerning the Prevention of Non-attorney Activities of Foreigners," aimed at severely restricting the legitimate activities of trainees in Japan. According to this document, "all aliens not permitted to engage in attorney affairs in Japan (regardless of whether qualified or not) are deemed unqualified aliens."⁷⁵

In 1955 the only recognized foreign law attorneys in Japan were a dwindling population of "grandfathered" foreign attorneys who had qualified to work in Japan prior to the revision of

75. The following were held to be prohibited:

- (1) Activities such as drafting and rewording of the text of technical assistance and joint venture contracts must be performed under the direction and supervision of a *Bengoshi* or a foreign attorney recognized under former Article 7 of the *Bengoshi* Law.
- (2) An unqualified alien may not independently express a legal opinion regarding such matters as the drafting or revision of a contract because to do so constitutes an act resembling the rendering of legal advice.
- (3) An unqualified alien may not meet independently with a client for purposes of legal consultation and express a legal opinion or give independent legal advice.

See L. Ciano, *Japan Changes to its Foreign Lawyers Law: Black Ships Revisited or Did Someone Miss the Boat?*, HOSEI RIRON [Niigata U. L. & POL. J.], Sept. 1994 at 24.

the Lawyers Law in 1955, and a growing community of trainees. This later group consisted of foreign law clerks who were for the most part recent law school graduates, and some foreigners who were qualified as lawyers in their own home countries and worked at Japanese companies as legal specialists, or for U.K. or U.S. law firms which had set up offices in Japan.

3.2. NEW FOREIGN LAWYERS LAW IN JAPAN

It is submitted that the position of a foreign trainee in Japan has also been affected by the recent debate on the role of foreign lawyers in Japan. Even though the Foreign Lawyers Law does not directly apply to trainees, that law sets the scene for foreign trainees in Japan.

To analyze the enactment of the Foreign Lawyers Law, one must consider the background and negotiations leading to the introduction of that law, the provisions of the law, and thereafter any criticisms that have been made about the law. Following this, one must make a comparison to the present position we are left with, following the 1994 amendments. Review of that law will assist in our understanding of what activities the Japanese regard as appropriate for a foreign lawyer, including a foreign trainee, to undertake in Japan.

(a) *Position Prior to the Implementation of the Foreign Lawyers Law*

The 1949 *Bengoshi* Law provided that foreign lawyers could represent foreign clients and give advice on foreign law. Article 7 provided as follows:

(i) A person who is qualified as a lawyer in a foreign country and has a proper knowledge about the laws of Japan may perform those matters as specified under Article 3 under the approval of the Supreme Court, with the exception of such a person who is mentioned in the preceding article.

(ii) A person having qualifications as a lawyer of a foreign country may perform those matters as mentioned in Article 3 relating to a foreign national or laws of a foreign country, under the approval of the Supreme Court, with the exception of such as first mentioned in the preceding article.⁷⁶

If a foreign lawyer passed a special examination, he could engage in general Japanese legal practice. However, in 1955 the Parliament once again amended the 1949 *Bengoshi* Act to prohibit foreign lawyers from practising law.⁷⁷ As described below, the practice of foreign lawyers has been a very controversial issue.

76. See BENGOSHI HO (Lawyers Law), Law No. 81 of 1949.

77. See BENGOSHI HO (Lawyers Law), Law No. 155 of 1955.

(b) *Negotiations for the Introduction of the Foreign Lawyers Law*

Throughout the 1970s, the investment of Japan's trade surpluses in foreign countries increased the demand for international legal services in Japan. When changes in France in the early 1970s lead to the adoption of the foreign legal consultant system, in New York in 1974 the ABA (American Bar Association) first contacted the Japanese Bar Association (*Nichibenren*) to discuss the adoption of a similar system in Japan.⁷⁸ Many major American law firms attempted to set up offices or create some presence in Japan.⁷⁹ In 1977, the Ministry of Justice approved a visa for Isaac Shapiro to open an office in the name of Milbank Tweed as a foreign office in Japan. However, when Coudert Brothers tried to establish a similar office, the *Nichibenren* pressured the Ministry of Justice to refuse any further visa until the regulation of foreign lawyers was resolved. The resulting frustrations led American lawyers and business organisations in Japan to raise this issue as a trade barrier in bilateral trade negotiations in the 1980s.⁸⁰

The Americans, leading the push for the introduction of foreign lawyers, appeared to regard the issue as a trade restriction. The trade restriction argument had two stems to it:

- (i) It was a restriction on the supply of legal services by American lawyers; and
- (ii) It was a restriction on the ability of American companies to invest in Japan as these companies relied heavily on their lawyers for advice and lawyers were necessary to facilitate any American investment.

In 1982, the Americans placed the foreign lawyers' issue on the trade agenda, and the United States Government became involved in negotiating on behalf of the foreign lawyers. Two petitions were filed with the United States Trade Representative (USTR) under Section 301 of the U.S. *Trade Act of 1974* that alleged unfair trading practices by the Government of Japan as the restrictions on foreign lawyers were effectively restrictions against American companies exporting to or investing in Japan.⁸¹

The Japanese Government approached the issue as a matter of regulation of the Japanese legal system and not as a trade re-

78. Robert F. Grondine, *Foreign Law Firms in Japan Thwarted*, INT'L FIN. L. REV., July 1994, at 11.

79. See 21 LAW IN JAPAN APPENDIX (1988).

80. See *id.*

81. See Richard S. Kanter, *The Japan-United States Treaty of Friendship, Commerce and Navigation: Lawyers as Treaty Traders*, 8 U. HW. L. REV. 339 (1986).

striction.⁸² The Japanese position does not seem unreasonable as Japanese companies do not appear to rely on legal services (other than employees in legal departments) when entering into export or joint venture arrangements. The restriction on the provision of legal services in Japan is a restriction which applies to both Japanese people and foreigners.⁸³

The real problem with the restrictions on the Japanese legal profession is that the barriers of entry are so difficult⁸⁴ that it is close to impossible for an American to become admitted to the Japanese Bar.⁸⁵ However, the Japanese Government was entitled to say that it was not aware of any jurisdiction in which it was easier for foreign lawyers to set up practice than domestic lawyers to gain entry to the Bar. In fact, the Japanese Government could point to the restrictions applying in the United States to foreign lawyers' admission to practice as a relevant example.⁸⁶ The American negotiators complained that the Japanese Government appeared to defer totally to the *Nichibenren*.⁸⁷ The American negotiators believed that it was inappropriate to place so much weight on the beneficiaries of the restriction. However, the Japanese Government stuck to its position that this was an issue that could not be resolved as a purely economic matter but

82. The Japanese do not view the foreign lawyers issue as a trade matter. In their perspective it is the Westerners that categorize the foreign lawyers issue as a trade problem. From a Japanese perspective, the legal profession is a profession in itself, not a trade. See Linda Coulter, *Japan's Gaiben Law: Economic Protectionism or Cultural Perfectionism*, 17 HOUS. J. INT'L L. 431 (1995). Further commentators state that classifying the foreign lawyers issue as one of Japanese protectionism only perpetuates Japan's fears of Western domination.

83. See O'Keefe, *supra* note 10, at 1014.

84. See Mark M. Rubiner, *Cultures Crashing: A Foreign Lawyer in Japan* ["Karuchiruzu Kurashingu"], 32 ARIZ. ATT'Y, Feb. 1996 at 10. (Rubinger depicts his 5 year memorable ordeal stemming from his decision to obtain a license to practice in Japan).

85. Becoming a lawyer, public prosecutor or judge entails entering Japan's one official law school, the Legal Training and Research Institute, which is affiliated with the Supreme Court. To enter the institution, one must pass an extremely difficult examination in Japanese. Taking the national legal examination and entering the Institute is a four-step process: The first step is a qualifying test waived for those who have completed the first two years of general education at a Japanese University. The next step is a multiple choice examination on various fields at law. The next step is an essay portion which spans three days and includes six essays. The final step is an oral examination. The passage rate is three percent, and the majority do not pass on their first attempt. Between the 1960s and the 1970s, the average applicant passed on the fourth attempt. During the 1980s, the average applicant passed in six attempts. As a result, Japan has 14,000 *Bengoshi*, one for every 9,000 people. See Bruce Rutledge, *Seeing it from all Sides: Breaking into Japan's Legal Markets*, JAPAN SCOPE, Autumn 1994, at 59.

86. Within the American Bar System, approximately 34 of the 50 states have no admission system for foreign lawyers. See Akira Kawamura, *The Search for Global Legal Standards*, JAPAN SCOPE, Autumn 1994, at 67, 68.

87. See Coleman, *supra* note 57, at 66.

had to be settled within the structure of the Japanese legal system.⁸⁸

All these negotiations occurred as people were increasingly speaking of the liberalising of Japanese financial markets and the internationalisation of Japan in general (*Kokusaika*). Many people appeared to think that Japan's trade surpluses would result in Tokyo becoming another London, New York, or Hong Kong. It is submitted that this view takes inadequate consideration of Japanese social and cultural attitudes towards financial markets and legal systems.⁸⁹ This expectation appears to be as unrealistic as the expectation of many financial analysts that the liberalization of the financial markets will result in greater takeover activity.⁹⁰ It is submitted that this view also takes insufficient account of the Japanese culture (in particular, the cultural backlash to a takeover).

It is held that the Anglo-Saxon tradition of law differs from the Japanese idea of law's role in society.⁹¹ This is the unspoken source of trade friction. Hence, "lawyers as a whole are outsiders to Japan which is run by insiders."⁹² "Law is something which modern Japan had to accept as an ornament to qualify as a modern state. But Japan's society and economy are run by its own particular set of rules and laws different from the U.S."⁹³

(c) *Introduction of the Foreign Lawyers Law*

On April 1, 1987, the Foreign Lawyers Law⁹⁴ became effective by cabinet order of 6 March 1987. Article 1 of the Foreign Lawyers Law provides that its objective is to promote stability in relation to international business law affairs and ensure that there is adequate Japanese legal advice in foreign countries. The Foreign Lawyers Law promotes stability in international business

88. See Keiichi Tadaki, *The Gaikokuho Jimu Bengoshi System: Circumstances of Acceptance and Scope of Practice*, 21 LAW IN JAPAN 122 (1988).

89. *Profile on Kunio Hamada*, 8 ASIA L. & PRAC., 48 (Nov. 1996).

90. For example, see Fingleton *Screen Play*, EUROMONY, May 1989, at 19.

91. See Koichiro Fujikura, *A Comparative View of Legal Cultures in Japan and in the United States*, 16 LAW IN JAPAN 129, 130-131 (1983); Parker, *supra* note 1, at 193; YOSIYUKI NODA (Anthony H. Angelo, ed. & trans. 1976).

92. One example is Kunio Hamada of Hamada & Matsumoto - A Japanese Law firm specializing in International Law and criticized for employing an English solicitor in its London office. See R. Payle, *Foreign Lawyers Law in Japan*, INT'L FIN. L. REV., Aug. 1994 at 10; Chris Wright, *Interview with Kunio Hamada*, ASIA L., Nov. 1996, at 48 (stating that "proposals to liberalize legal practice and allow foreign firms in Japan to employ *Bengoshi* is for the benefit of large megafirms in the U.S. and Europe.").

93. See Rutledge, *supra* note 85, at 59.

94. See *Gaikokuho Bengoshi Niyoru Horitsu Jimu No Toriatsukai Ni Kansura Tokubetsu Sochiho*. (Act Providing Special Measures for Handling Legal Business by Foreign Lawyers), Law No. 66 of 1986 [hereinafter Special Measures Law].

affairs by creating an international legal profession in Japan with adequate controls over it to ensure that any international disputes are settled properly. Adequate Japanese legal advice in foreign countries is ensured as the Foreign Lawyers Law demands reciprocity for *Bengoshi* practicing in foreign jurisdictions in order for lawyers from those jurisdictions to practice in Japan.

The Foreign Lawyers Law exempts the regulated activities of foreign lawyers from the prohibitions contained in Article 72 of the 1949 *Bengoshi* Law. For a person to be eligible to be admitted as a foreign lawyer pursuant to the Foreign Lawyers Law, that person must have the equivalent qualifications in his or her own jurisdiction to a *Bengoshi* and five years actual experience in that primary jurisdiction.⁹⁵ Naturally, foreign lawyers must satisfy the same ethical qualifications that *Bengoshi* must satisfy. They must also be residents in Japan and have an honest intention of engaging in legal practice (evidenced by a plan) and the financial resources to compensate clients for any damages caused by their practice.⁹⁶ In order to register in the *Nichibenren's* registrar of foreign lawyers, a foreign lawyer must have been licensed by the Minister of Justice as a "*Gaikokuho Jimu Bengoshi*" (control placed under the *Nichibenren*). The Foreign Lawyers Law then prescribes limits upon what the *Gaikokuho Jimu Bengoshi* can do. In particular, the *Gaikokuho Jimu Bengoshi* can only practice the law of their primary jurisdiction and cannot enter into partnership with *Bengoshi*.⁹⁷

Foreign lawyers cannot appear before any Japanese court or agency, prepare any document for such, and cannot represent the transfer of industrial rights or of real property situated in Japan.⁹⁸

95. See Megan Ryan MacMullin, *Foreign Attorneys in Japan: Past Policies, The New Special Measures Law and Future Expectations*, FLA. J. INT'L. L. 55 (1988)

96. See Yoshio Iteya, *Gaikokuho Jimu Bengoshi in Japan*, 21 LAW IN JAPAN 141 (1988).

97. See Law No. 66 of 1986, art. 4.

98. Article 3 provides that "it shall be the function of a *Gaikoku-Jimu-Bengoshi* to perform the legal business concerning the law of the country of primary qualification at the request of the parties concerned or other interested person or upon being entrusted by a public agency. However, the performance of the following legal business shall be excluded:

- (1) representation in regard to procedures before a court or public prosecutor's office or public agency in Japan, or the preparation of documents to be submitted to any such agency in regard to such procedures;
- (2) activities in the capacity of a counsel in a criminal case, activities in the capacity of an attendant in a juvenile protection case before the family court or legal assistance to a fugitive criminal in an extradition case in connection with a request for the examination of extraditability made with the court;
- (3) expression of an expert opinion or other legal opinion as regards the interpretation or applicability of other laws than the law of the country of primary qualification;

(d) *Criticisms of the Foreign Lawyers Law (No. 66 of Law 86)*

The Foreign Lawyers Law has been subject to considerable criticism. For example, the requirement of having five years experience in one's primary jurisdiction has been criticised for the fact that it does not take into account a foreign lawyer's experience outside his or her home jurisdiction, or as a foreign trainee in Japan. However, it is submitted that disappointment with this law for some parties was inevitable, with so many people having different aspirations and interests as to what should be in the new law.⁹⁹

It is submitted that foreign lawyers in Japan affect the ability of foreign businesses to enter the Japanese market.¹⁰⁰ Kanter claims that Article 4 prohibits foreign lawyers from handling all activities unless specifically allowed.¹⁰¹ The 1986 Foreign Lawyers Law has been subject to much criticism inside and outside Japan.¹⁰² The effect of Article 4 is to unfairly penalize foreign companies.

In Japan, Japanese businesses have direct access to *Bengoshi* regarding domestic or international transactions, and to U.K. solicitors regarding U.K. law. Furthermore, regarding local issues Japanese companies abroad have access to *Bengoshi* qualified in a foreign jurisdiction¹⁰³ and to Japanese trading companies for legal and business advice regarding local issues. Alternatively, a U.K. company in Japan has access only to Japanese *Bengoshi* re-

(4) service of documents in regard to the procedures taken for a foreign court or administrative agency; and

(5) representation or preparation of documents in regard to a legal case whose primary objective is the acquisition or loss or change of rights concerning real property situated in Japan or industrial property rights."

Special Measures Law, Law No. 66 of 1986, art. 3.

99. For example, foreign trainees in Japan at the time were very disappointed that the five year requirement of experience in primary jurisdiction did not or would not include time spent in Japan working for *Bengoshi*. The large American corporate legal firms were disappointed that they could not display their name as the legal firm's name in Japan. This was amended by the 1994 amendment maintaining that at least three years of experience is still needed in a *Gaikoku-Jimu-Bengoshi*'s home jurisdiction. Firms can now use their own names.

100. See Moffat, *Foreign Lawyers not Happy with Bill on Legal Practice*, ASAHI EVENING NEWS, Apr. 18, 1986, at 1 col. 1.

101. See Richard S. Kanter, *Small Firm, American Lawyers Could Help Small American Companies in Japan but the Door is Still Shut*, 21 LAW IN JAPAN, 49, 54 (1988).

102. See Christopher Sheehy, *Japan's New Foreign Lawyers Law*, 19 LAW & POL'Y INT'L BUS. 361 (1987).

103. For example, at Masuda & Ejiri, New York (Asahi Law Offices), both Mr. Masuda and Mr. Fujimoto are qualified to practice law in New York. Additionally, Hamada & Matsumoto's London Office employed a British solicitor. However, Hamada & Matsumoto's London office closed in 1993. See also Wright, *supra* note 92, at 48.

garding Japanese law and does not have access to solicitors admitted as *Bengoshi* in Japan.¹⁰⁴

Nichibenren's Board of Governor's sub-committee report states Article 10's real intention is to protect against the influx of foreign lawyers by requiring that an applicant for a foreign lawyer's licence come from a jurisdiction which gives Japanese lawyers the same right in their home jurisdiction.¹⁰⁵

In Ciano's¹⁰⁶ words, given the inadequacies of the 1986 Law, the Japanese Government has been forced to bear continued pressure from the U.S., E.U., and even powerful bodies within Japan itself.¹⁰⁷

3.3. NEGOTIATIONS FOR AMENDMENTS TO THE FOREIGN LAWYERS' LAW (94)

In 1987 the USTR Clayton Yeutter coined the phrase "gimme five," that informed the Japanese Government of five main issues to be addressed in discussions over the Japanese legal system. These inadvertently were included in Carla Hill's (1989 USTR) list of discriminating trade practices¹⁰⁸ for discussions:

1. Allow U.S. law firms to hire Japanese lawyers.
2. Allow U.S. firms to enter into partnership with Japanese Law Firms.
3. Allow U.S. firms to use their names as they are used in the U.S.
4. Allow U.S. lawyers to represent their clients in arbitration in Japan.¹⁰⁹

104. The 1994 amendment has not changed this disparity, as a U.K. solicitor is still prohibited from advising a U.K. company on Japanese Law. *See also* Ciano, *supra* note 75, at 22; Payle, *supra* note 92, at 10.

105. Article 10 provides that:

The Minister of Justice shall not give approval to those who make the application in accordance with the provisions of paragraph 1 of the preceding article unless they conform to the list below:

- (1) The applicant is qualified to become a foreign lawyer and has the experience of having engaged in practice as a foreign lawyer in the foreign country where he acquired such qualification for five years or no more after acquiring it. . . .

Law No. 66 of 1986, art. 10.

106. *See* Ciano, *supra* note 75, at 24.

107. *See* KEIDANREN, IMPROVEMENT OF THE INVESTMENT CLIMATE AND PROMOTION OF FOREIGN DIRECT INVESTMENT INTO JAPAN 10 (1992).

108. *See* Masaka C. Shiono, *Foreign Attorneys in Japan: The International Practice of Law As a Question of Unfair Trade Practices*, 2 AM. U. J. INT'L L. & POL'Y 615, 617-619 (1987).

109. Robert F. Grondine, *A Plea for Partnership: The Struggle for Deregulation*, JAPAN SCOPE 64, 65 (Autumn 1994).

5. Grant credit for legal work done in Japan which can then be applied to the five year's experience needed to obtain a license as a foreign lawyer in Japan.¹¹⁰

The U.S. law firms were again the instigators of discussions which included Japan and the E.U., on the opening of the world's legal markets. In addition to the bilateral discussions with the CCBE¹¹¹ and the *Nichibenren*, there were GATT talks held on December 15, 1993. It is submitted that an impediment to successful negotiations was the different stances of the Nelson Committee and the CCBE. The CCBE apparently pursued its own agenda in talks with Japan:

- (1) focusing on the status of E.U. law,¹¹² and
- (2) concerning the rights of E.U. firms to use their firm names as they are used in Europe, to represent clients in arbitration cases, and to count time worked in any other jurisdiction towards the five-year experience requirement needed in order to become licensed in Japan.

The U.S. desired ending the prohibitions on the hiring of Japanese lawyers and entering into partnership with Japanese firms. The three parties met at Evian, France. It is commonly believed that holding the tripartite discussions here was a strategic error for the Europeans. The Japanese negotiators were able to take advantage of the lack of uniform support between the CCBE and ABA to the detriment of both. It is clear that although the Japanese never considered allowing foreign firms to employ *Bengoshi*, Koji Tsuruoka of Japan's Ministry of Foreign Affairs states that: "If the E.U. had continued to press Japanese lawyers through the door of partnership Japan might have chosen to do so."¹¹³

In June 1994, the Amendment to the No. 66 Law of 1986 was passed. Under the amended rules, reciprocity can only be required as a condition of registration in respect to lawyers who are

110. The fifth item was a response to the interim announcement of deregulation measures issued by the Ministry of Justice on March 10, 1995 and a subsequent announcement by MITI on April 10, 1995. See European Business Community Legal Services Sub Committee, *Reply to OTO Comments* (June 29, 1995).

111. CCBE: Legal Services Committee of the European Business Council. See Grondine, *supra* note 109, at 64-65.

112. If the Japanese characterized E.U. Law as "local law" then only E.U. firms would be entitled to advise on it. If, however, the law was characterized as international law, then E.U. lawyers would have to compete with other international lawyers.

113. Comment made by A. Pease, Partner, Allen & Overy (Nov. 29, 1995). See Ciano, *supra* note 75, at 40.

nationals of countries which are not signatories to the Uruguay Round Treaty.¹¹⁴

The existing ban on employment by foreign lawyers of Japanese lawyers is maintained. However a *Bengoshi* can employ a foreign qualified lawyer. This responded to the fear of the *Nichibenren* of the *Gaikokuho Jimu Bengoshi* ("GJB") of interference in their practice of Japanese Law.

CCBE submits:

- (1) It is not aware of any jurisdiction which permits employment of local lawyers by foreign qualified lawyers in which problems have occurred.
- (2) If there is a real concern that the employment by a foreign lawyer of a Japanese will result in the employer intervening in the handling of the law in which the employee is qualified to the disadvantage of the client, then one might expect to see a prohibition on *Bengoshi* employing foreign lawyers.¹¹⁵

It can be construed that this prohibition operates to penalize *Gaikokuho Jimu Bengoshi* and foreign companies entering Japanese markets. The amendments maintain the existing ban on partnership and on all of the types of continuing business relationships between Japanese lawyers and foreign lawyers in Japan. The amendments to the law allow licensed foreign lawyers to engage in a "joint enterprise" with a *Bengoshi* who has also been qualified for a minimum of five years.¹¹⁶

114. This will be of most interest to the French *avocats*, as following the merger of the two branches of the profession, Japan declared that France no longer satisfied the strict reciprocity requirement. See Grodine, *supra* note 78, at 11.

115. EBC notes, with regard to legal advice on international transactions, that it is not possible to separate each system of law. International transactions usually comprise more than one system of law. The current system places the *Gaikokuho Jimu Bengoshi* in the position of either consulting an independent *Bengoshi* on every occasion or leaving it to the client to find the answer. Clearly these options are avoided if a *Gaikokuho Jimu Bengoshi* could employ a *Bengoshi*. *Foreign Lawyers in Japan*, briefing paper for *Keidanren* from the British Invisibles (Apr. 29, 1995) (on file with the author).

116. On the following conditions:

- (i) The mutual independence of the two separate law firms must be assured.
- (ii) The two firms must make clear to their clients and the general public that they are operating in the permitted format of joint enterprise under the revised law.
- (iii) The Japanese Bar Association must be notified of the existence of the joint venture, and its operations cannot start until its existence has been required by the association.
- (iv) The joint enterprise will be free to determine how the revenues earned and expenses incurred in Japan should be reallocated among Japanese lawyers and registered foreign legal consultants who participate in the joint venture.
- (v) The foreign attorneys who are participating in such joint enterprises in Japan will be allowed to retain their relationships with their

The "joint enterprise" will be a solely contractual joint venture, and no form of single legal or judicial joint entity in which both the Japanese lawyers and foreign lawyers participate will be permitted.¹¹⁷

Under the Japanese Civil Code (*Kumiai*), partnership has a long-standing and firmly-established tradition.¹¹⁸ *Bengoshi* agree that *Kumiai* is the legal basis for Japanese law firms organised in partnerships, however, under Japanese law, *Kumiai* for the purpose of rendering legal advice can only be entered into by *Bengoshi*.

Foreign lawyers seek the right to practice in partnership with *Bengoshi* as *Bengoshi* do with each other. The obligations imposed on a specific joint enterprise (*kyodojigyo*) to operate two independent legal practices that only jointly handle certain legal cases is significantly different from the type of *kumiai* which *Bengoshi* practice.¹¹⁹

According to the amendment to the law, when in a "specific joint enterprise" with a *Bengoshi*, a *Gaikokuho Jimusho Bengoshi* can "handle"¹²⁰ third country law. This gives the *Gaikokuho Jimusho Bengoshi* the right to pass on to the client advice received from lawyers qualified in other jurisdictions.¹²¹

In David Baker's words, "the existing de facto ban on the representation of parties to arbitration held in Japan, by any person other than a Japanese qualified attorney is detrimental to all concerned and not just foreign lawyers."¹²²

(1) It restricts choice and increases cost.

home country law firms, but these relationships can not extend to the Japanese lawyers who participate in the joint enterprise who will be allowed only to share the revenues and expenses from the joint enterprise performed in Tokyo.

See Ciano, *supra* note 75 at 26; U.S. TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATES REPORT ON FOREIGN TRADE BARRIERS cited in Ciano, *supra* note 75, at 25.

117. See Coulter, *supra* note 82, at 456.

118. See *Foreign Lawyers in Japan*, briefing paper for *Keidanren* from the British Invisibles Japan Committee 7 (Apr. 29, 1995).

119. U.S. firms White & Case, Sullivan & Cromwell and Paul, Hastings, Janofsky & Walker and French firm Gide Loyrette Nouel are the only firms to have set up such "joint enterprises." See *The Liberalisation Debate*, 8 ASIA L. PRAC. 17 (Sept. 1996).

120. Handling third party law has not been defined.

121. This right is recognized in the Interim Announcement of the State of Deregulation Measures issued by the Minister of Justice on October 3, 1995 stating that *Gaikoku Jimusho Bengoshi* are not prohibited from conveying legal opinions of a lawyer of a third country on the law of that country to help his client with a clear indication of the source of opinion.

122. Submission of evidence of D. Baker to the Advisory Committee on International Arbitration (May 9, 1994).

- (2) It encourages and justifies resistance to arbitration in Japan by non-Japanese parties.
- (3) It reduces income earned from international arbitration in Japan.

3.4. EFFECT OF THE 1994 FOREIGN LAWYERS LAW ON TRAINEES

It is clear that the Foreign Lawyers Law on its terms does not apply to foreign trainees. As foreign trainees are employed by *Bengoshi* and do not attempt to practice in their own right, the Foreign Lawyers Law does not apply to them. However, if they wish to use their experience as a foreign trainee to become a qualified foreign lawyer, the requirement of three to five years practice in the home jurisdiction of a foreign lawyer is very onerous.

It is submitted that the 1994 amendment, which reduced the experience requirement, only placed the time clock back from what already was. For example, at the time of the promulgation of the 1987 law, the foreign trainees working in offices were allowed to count two years of the time spent in Japan towards the five year requirement.¹²³

The introduction of a law to authorize the activities of the foreign corporate solicitors suggests that the activities of corporate solicitors are within the ambit of *Bengoshi*'s monopoly. If people could provide general legal services without being specifically authorized, there would have been no need for the Foreign Lawyers Law. It is submitted that the enactment of the Foreign

123. Regarding registration as a *Gaikoku Jimusho Bengoshi*: qualification of a lawyer should be evidence that a solicitor is competent to deal with clients directly in Japan in respect to the law of his qualification in the same way one is able to deal with his clients of his country of qualification. Following completion of their formal training, Japanese *Bengoshi* are not required to have any period of experience prior to dealing directly with clients. Clearly even if a period of experience prior to registration as a *Gaikoku-Jimusho-Bengoshi* continues to be necessary, there is no justification for having additional restrictions on the location in which the experience is acquired. Corporate solicitors who are experienced in international work relating to law of their qualification are likely to have obtained some of that experience outside the country of qualification. The requirement that the experience must be gained within the home jurisdiction actually makes it more difficult for international U.K. firms to send to Japan those lawyers for whom the demand is greatest for Japanese clients. Work experience of a lawyer in any jurisdiction should be recognized for the benefit of Japanese clients, not just two years in Japan and three years in the U.K. On October 30, 1997, the Foreign Lawyers Problem Research Committee (The Ministry of Justice and Japan Bar Federation proposed to the Japanese Government the following amendments:

- (1) The five-year experience requirement of a foreign lawyer in his or her home jurisdiction will be reduced to a three-year requirement and in any country. The Ministry of Justice will submit the bill to the Diet in January 1998. *Kisei Kanwa O Teian*, NIHAN KEIZAI SHINBUN (Cho Kan), at 38.

Lawyers Law adds support to the *Bengoshi's* contention that only *Bengoshi* can perform the functions of corporate solicitors.

3.5. INTERNATIONAL TREATIES ARGUMENT

Academics have reviewed various treaties to gain support for any arguments by foreign lawyers regarding their entitlement to visas.¹²⁴ Support is found, for example, by American lawyers in the Japan-U.S. Treaty of Friendship, Commerce and Navigation (1953). In particular, Article VIII of that Treaty provides:

Nationals and companies of either party shall be permitted to engage within the territories of the other party, accountants and other technical experts, executive personnel, attorneys, agents, and other specialists of their choice. Moreover, such nationals and companies should be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other party, for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

It has been argued that these provisions should entitle American legal firms to set up offices in Japan to advise American companies as "specialists" on American law as it relates to Japanese investments.¹²⁵

Furthermore, Article VIII(1) of that Treaty supports American lawyers establishing offices to provide consultation services which are not prohibited by Law No. 155.¹²⁶ That article provides:

Nationals of either party shall be permitted to enter the territories of the other party and to remain therein:

- (a) For the purpose of carrying on trade between the territories of the two parties and engaging in related commercial activities;
- (b) For the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and
- (c) For other purposes subject to the law relating to the entry and sojourn of aliens.

This treaty prompted arguments that if the Japanese Government refused to grant a visa to carry on these activities, it would

124. See Kanter, *supra* note 81, at 339; Note, *Japan's New Foreign Lawyers Law*, 19 LAW & POL'Y INT'L BUS. 361, 377-379 (1987).

125. See Haley, *supra* note 10, at 18.

126. See BENGOSHI HO (Lawyers Law), Law No. 155 of 1955.

be a breach of American treaty rights.¹²⁷ It was contended that the American negotiators should have tackled the Japanese government on the restriction of American lawyers setting up office in Japan as a matter of immigration policy and a breach of this treaty.¹²⁸

As it has been argued that the activities of international solicitors are not prohibited under Japanese law, whether a U.K. solicitor is entitled to a visa to carry out these activities in Japan should be considered.¹²⁹

U.K. solicitors have comparable rights pursuant to the Treaty of Commerce Establishment and Navy of Great Britain and Japan (1963).¹³⁰ Article 11 reads as follows:

... where nationals and companies of one contracting party are entitled, to carry on business in any territory of the other, they shall be entitled to exercise this right either in person or through agents of their own choice or both in such ways to no less an extent than nationals and companies of any foreign country.

As has been submitted above, the right of lawyers to practice needs to be beyond question for lawyers to give confident advice to their clients. It would be unacceptable for a major corporate law firm to advise foreigners on investments in Japan at the same time as the law firm's practice in Japan is in doubt.

Moreover, once again, it is submitted that the provisions in Chapter 2 of the Foreign Lawyers Law make it considerably more difficult for a foreign lawyer to argue that the prohibitions contained on Article 72 of the 1949 *Bengoshi* Law do not apply to him. The Foreign Lawyers Law entitles a *Gaikokuho Jimu Bengoshi* to practice in respect of the legal business concerning the law of the country of primary qualification. Legal business concerning the law of the country of primary qualification is defined as legal business in respect of a legal case or the major portion which is governed by or should be governed by the law of the particular country. Although the Foreign Lawyers Law does not specifically exclude people who are not registered as *Gaikokuho Jimu Bengoshi*, it is submitted that a court would interpret Article 72 of the 1949 *Bengoshi* Law to that effect.

127. See Kanter, *supra* note 81.

128. The Japanese Constitution is the Supreme Law of the land and supersedes any law, ordinance or other act of government. Article 98(2) states that "[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed." Clearly a Japanese treaty provision takes precedence over other laws.

129. Although this paper has concluded that it would be unwise to rely on arguments as to the scope of the *Bengoshi*'s monopoly, it is useful to review treaty arguments to gain an insight to other problems which foreign trainees may encounter.

130. See Article VII OF TREATY OF COMMERCE, ESTABLISHMENT AND NAVIGATION BETWEEN THE U.K. AND JAPAN, Nov. 14, 1962, with amendments.

Although it may be argued that the Foreign Lawyers Law only grants rights to particular people to call themselves "*Gaikokuho Jimu Bengoshi*," it is submitted that it would be unnecessary for the Japanese Parliament (*Diet*) to have enacted the Foreign Lawyers Law if foreign lawyers were not prohibited by Article 72 of the 1949 *Bengoshi* Law.

4. CONCLUSION

Under Article 72 of the 1949 *Bengoshi* Law, the Japanese judiciary regards *Bengoshi* as the only people now qualified to undertake the work usually performed by a corporate solicitor. However, some activities, which are performed by corporate solicitors in the U.K., are performed by people other than *Bengoshi* in Japan. Therefore a foreign trainee can use the 1974 Solicitors Act's definitions of the role of unqualified people in the U.K. as the basis for the trainee's activities in Japan.

Thus the "appropriate" role of the foreign trainee is to:

- (a) undertake research on a legal issue for a *Bengoshi*;
- (b) prepare preliminary drafts of documents to be finalised by a *Bengoshi*;
- (c) attend meetings where it is clear that the trainee is not a *Bengoshi*;
- (d) meet clients where it cannot be construed that the trainee is legally qualified.

Finally, it is submitted that restrictions should not be so comprehensive as to preclude foreign lawyers from effectively representing their clients. The apprehension that outsiders may disrupt the administration of justice can be circumvented by tailoring restrictions that distinguish between those matters related to "court proceedings" and those matters related to "non-court proceedings." Clearly there would be initial problems of distinguishing what is "non-court" activity while acknowledging the Japanese concerns and allowing Japan's cultural and political reasons for prohibiting harmful activities.

By negotiating to reduce the comprehensive restrictions of Article 4 in Japanese law, foreign lawyers and foreign trainees can strike a balance to maintain Japan's legal culture without excluding foreign lawyers and foreign trainees from the Japanese legal system.

APPENDIX

1. *Bengoshi* means a person licensed under a Special Law (Law No. 205 of 1949) to practice law as an independent professional.
2. *Gaikoku* means a foreign country.
Ho means law.
Jimu means office work. In the context of the practice of law, it means non-courtroom practice.
3. *Nichibenren* is the acronym of *Nihon Bengoshi Kengokai* which is established by the *Bengoshi* Law as the national organisation of *Bengoshi*. Under the *Bengoshi* Law, every *Bengoshi* is required to belong both to a regional *Bengoshi* Association and to a *Nichibenren*.
4. The Special Measures Law concerning the handling of legal business by foreign lawyers is referred to as *Gaikokuho Bengoshi ni yoru horitsu Jimu no toriatsukai ni Kansuru to Kurei sochi ho*, Law No. 66 of 1986, or abbreviated to the Foreign Lawyers Law.

TABLE 1

In 1983 the number of licensed non-lawyer specialists was as follows:

Tax Agents	40,985
Patent Agents	2,660
CPA	8,684
Notaries	446
Administrative Scriveners	30,908
Judicial Scriveners	14,860
Total	89,545

Shimin no tame no hokitsuka (Law Specialists for the Century)
213, 219,222,227,235

(Tokyo: *Nihon Hyoron-sha* 1983)

In addition to the people mentioned above, there are other kinds of specialists who handle transactions involving legal matters. They are Immovable Property Appraisers (*Fudosaw Kantei-shi*) (of which there are approximately 4,000); Land and House Investigators (*Tochi Kaoku chosa-shi*) (approximately 18,000); and Specialists in Charge of Building, Land and House Transactions (*Takuchi tate mano torihiki shunin-sha*) (approximately 299,000).