

International Law: The Role of Foreign Lawyers in Japan

Introduction

Despite the western influences on modern Japanese law, there has been a reluctance to allow foreign attorneys to practice in Japan. Although recently a new bill has been placed before the Diet to relax the restrictions on foreign lawyers, even if passed, strict constraints on their scope of practice will still exist. This paper will highlight the problems facing foreign lawyers not only in terms of the limitations of their work, but their role in society and the difficulties faced in adapting to life in Japan

Historical role of foreign lawyers in modern Japan

In 1859 after many years of isolation, under much external and internal pressure, Japan opened up its borders to the outside world, allowing foreign trade. With the foreign trade came the inevitable presence of foreign lawyers to protect the foreign interests.

Since then, Japanese attitudes and regulation towards foreign lawyers have run parallel to their state of international co-operation or isolation. Thus from the 1860's to the 1930's, or during the post-war occupation, foreign lawyers were welcomed, whilst during the prelude to the Second World War and the post-occupation assertion of nationalism and independence, foreign lawyers were prejudiced against with virtual prohibition of practice. Until recently, foreign attorneys have found high barriers to practising in Japan, this being part of a protectionist trade policy.

With Japan increasingly facing greater pressure from the western nations, trade barriers against legal services have started to be broken. In 1986, the Special Measures Law was passed, whilst in 1994 as part of the Uruguay Round of the GATT talks, further reform was proposed resulting in a new bill.

At present, the law does not allow foreign law firms to open offices under their own name, but only that of their partners at that office. The new bill though, intends to allow firms to practice under their better known names. For lawyers to practice though, five years experience is required in their home jurisdiction, which must also extend reciprocity towards Japanese lawyers (bengoshi). The requirement of reciprocity though is to be dropped, whilst two years of experience as a trainee will be permitted to count towards the five year qualification period.

Partnerships with or the hiring of Japanese lawyers though is still prohibited under the new bill, although joint enterprises are allowed. Therefore foreign lawyers can now operate with bengoshi on an equal footing, sharing fees from joint cases. More

significantly, foreign lawyers under the new bill will be permitted to act in cases involving Japanese law, if law from their jurisdiction is also involved.

Foreign lawyers though are still prohibited from appearing in court or arbitration, or cases involving purely Japanese law, these restrictions though also exist in many other jurisdictions. Despite the loosening of regulations in the new bill it is still regarded as restrictive, due to the inability to form partnerships, hire bengoshi, and the five year qualification period. Many of the international firms though have managed to circumvent the problems involving working with bengoshi, by sharing the same building as Japanese law firms thus providing a 'one stop' service.

International firms have been keen to open offices in Japan in order to remain close to their clients with Japanese interests, allowing convenient access and greater expertise. The need for close personal contact is regarded as particularly important in Japanese business relations, thus further explaining the presence of such offices despite limited profit-making. Many of the firms though believe that although profits at present are limited, eventually the market will be prised open, resulting in increased demand, which these firms will be best placed to meet.

Foreign lawyers must be licensed by the Japanese Federation of Bar Association, Nichibenren, having proved a good professional standing in their home jurisdiction and a strong financial basis to practice. In addition to the foreign lawyers, international firms will employ a plethora of trainees, working as consultants of their home law, but unable to work independently as attorneys. The role of lawyers in Japan though is seen to differ greatly from that of their home jurisdiction.

Japanese perception of law & lawyers

Traditionally, Japanese society, albeit law-abiding, remains distant from the law. The employment of legal means to settle disputes being viewed as a last resort, where negotiations have failed. Relationships are bound by a code of honour 'giri', and parties will attempt to abide by such a code opposed to the law, with differences reconciled whilst retaining honour. The use of courts thus, is considered an admission of inability to settle amicably indicating the degree of hostility between the parties. Therefore in contrast to England, where the threat of courts is the first step towards negotiation, opposed to a last resort, much fewer cases are dropped before reaching court.

This perception of Japanese society has led to the theory that the Japanese are less litigious than westerners. For individual rights were traditionally not recognised, hence the small number of lawyers and the growth of extra-judicial 'honourable' settlement methods such as negotiation and arbitration. In addition, litigation is viewed as both lengthy and expensive.

The perennial argument though is whether the lack of legal consciousness and litigious nature prompted the minimal recourse to law, hence the lack of lawyers and non-judicial settlement methods. Or whether the lack of lawyers and availability of cheap, quick non-judicial methods has prompted the lack of litigation in Japan.

Even in business contracts, the sense of *giri* is seen to permeate through the relationship, thus where disputes arise negotiations will be employed before recourse to law, where the emphasis is on maintaining long term relationships opposed to short term gains. However, once litigation is used, the Japanese lawyers will be as tough as their western counterparts. Furthermore it has been contested that such practices are not wholly particular to Japan, with many businesses in the UK operating upon similar lines.

Japanese lawyers though have a limited scope of practice, their workload involving almost purely litigation. The drafting of documents and contracts being left to a vast number of para-legals and judicial scriveners (quasi-lawyers), who are seen to work within industry. Therefore, there are very few *bengoshi* dealing in international or corporate matters, these being areas of expertise for many foreign lawyers. The foreign lawyers though may only give advice pertaining to their home jurisdiction, with many international contracts being written in English and bound by English law, there is a demand for those with such knowledge. Furthermore, much of a lawyer's workload will involve the advising of take-overs, mergers and acquisitions by Japanese companies in their home jurisdiction.

This relative expertise is a major factor in the *Nichibenren*'s protectionist attitude, who fear that if international firms were given too much leeway, they would be preferred over the *bengoshi*s. For whilst the large international firms have substantial resources and offices world wide, even the largest Tokyo firms only have around 20-30 lawyers and one office.

The restrictions on foreign lawyers though coupled with the difficulties they face in terms of adapting to life in Japan may explain the low number of foreign lawyers practising in Japan.

Difficulties facing foreign lawyers

The difficulties facing foreign lawyers may be divided into two distinct categories, those arising from the restrictions of the Special Measures Law and those due to the different legal, business and social culture of Japan.

The restrictions on foreign lawyers in Japan has lead to many problems in practice, where firms attempt to set up offices in Tokyo. Due to the five year requirement, firms will be need to staff the office with more experienced and therefore more expensive lawyers, resulting in greater costs all round. Whilst the prohibition on appearing before courts and arbitration has rendered it difficult for foreign lawyers to act solely for their clients,

requiring the assistance of bengoshi. Thus as stated earlier, many firms now share the same buildings as a Japanese firm to provide a more convenient service.

The vastly different culture of Japan is likely to cause problems for a newly arrived foreign lawyer. For not only will their scope of practice differ, but so too the public perception of lawyers. For example, the presence of one's lawyer at a business meeting in Japan is considered insulting, implying a lack of trust and hostility towards others at the meeting. Although lawyers are generally accepted as essential in international business transactions, to ensure the formalities are abided by, their presence at meetings may still cause offence.

Foreign lawyers may also feel a degree of hostility from Japanese lawyers who feel protectionist towards their profession. There may also be a degree of resentment at the relative ease at which the foreign lawyer was able to gain their professional qualifications. For in Japan, those wishing to enter the legal profession face an extremely arduous and competitive process. Firstly, usually on completion of a degree, a State exam will be sat, where there is only a 1-2% pass rate. Those who pass will then enter the national training centre, where they will train to become an attorney, public prosecutor or judge for a period of two years, after these two years though, employment is virtually guaranteed. Although there is no nationality requirement for those becoming bengoshi, foreigners are usually deterred by not only the enormous competition but the inevitable language difficulties. Japanese being an extremely hard language to grasp orally and even more so in terms of reading and writing.

It is partly due to the intense competitiveness of the system that the bengoshi is a highly respected profession. It is uncertain though whether this would extend to foreign lawyers, whose views and value judgements differ from that of traditional Japanese philosophy. This is in context of a wider tension between the traditional conservative views rooted in Japanese culture opposed to the modern, liberal, western ideals that are slowly permeating society with the younger generation. This is highlighted in the legal profession, where fears concerning foreign lawyers prompting western style litigation in Japan exist.

From a social perspective, foreign lawyers may find difficulty in being accepted, this arising from a perceived aversion of the Japanese towards outsiders. Japanese society is felt to revere the 'group', and attempt to conform to the requirements of the group. Hence outsiders such as foreign lawyers may feel a less friendly attitude towards them, furthermore, they must be extra careful not to breach the customs of the group.

Difficulties may also occur though, in adapting to life in Japan. Foreign lawyers will invariably be based in Tokyo, where due to the density of population, accommodation will inevitably consist of a small apartment in a high rise block at an extremely high rent. Moreover, the cost of living in Japan is extremely high, whilst the pace of life is fast even in comparison to cities such as London. Language, as described earlier, will also pose problems to the foreign lawyer.

Foreign lawyers working with Japanese people will also become accustomed to the differing work ethic, the main theme of this involving 'life time employment'. This applies particularly to white collar firms, where the employee will remain at the company for the entirety of their working career. This concept of commitment to the company overlaps with the notion of belonging to the company, where the company is seen to provide many social and leisure pursuits for its employees, thus play a major part of the lives of the workers and their families.

The concept of 'life time employment' though, does not in general extend to females, who often leave work on marriage. Whilst there are career women who continue to work after marriage, and equal opportunities legislation, the lack of effective enforcement and the continuation of traditional attitudes result in women still facing many prejudices.

Conclusion

Foreign lawyers in Japan therefore, face difficulties in adapting to their professional and social life. The future of their role though is dependant on Japan, and their international relations. For any reform of the tight restrictions on the foreign lawyers will coincide with the relaxing of attitudes, indicating a greater role for Japan in the new world order.

With fifty years now, since the end of the Second World War, Japan is eventually coming out of its shadow and reasserting itself to play a larger international role, in areas other than that of economics. This though has created much debate, nationally and internationally, over what position Japan should adopt. For with such wealth, and economic power, Japan has the potential to exert great political and possibly military influence on international affairs especially in the Pacific Rim, in order to maintain stability. However, some feel that the war should not be forgotten and Japan should continue in its current role of a minor player in non-economic affairs. It seems likely though that Japan will soon play a larger role in international affairs, this signifying a further shift away from the traditional customs and values steeped in Japanese society, towards that of the western world.

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361

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