The Roles of Lawyers in U.S.-Japanese Business Transactions

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This article deals with the organization, qualifications and roles of lawyers in U.S.-Japanese transactions, with emphasis on the liaison lawyer. It is not easy for the liaison lawyer to define his specialty because it is determined by the transactions, and they sprawl across the borders of two or more countries and cut across multiple fields of substantive law. Some awkward professional problems and postures can result. First, there are unusual threshold problems of language and multiple bar membership, different professional ethics and scopes of practice, and conflicting governing laws. Then once in the practice, the liaison lawyer's inventory of useful doctrine, even when it is limited bilaterally to the U.S. and Japan, covers most of the law of both countries, plus relevant international and third country law. If he attempts to marshall such a body of law systematically, he risks superficiality or submersion in contingent detail. As a result he is reduced to the legal problems of specific transactions between specific countries for something manageable to discuss. This is especially true

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1 For convenience, we will use the term “liaison lawyer” to designate those legal experts either here or in Japan or both, who hold themselves out as experts in U.S.-Japanese transactions.
3 See Ohira and Stevens, Admission to the Bar—A Comparative Study, 38 WASH. L. REV. 22 (1963) infra. See also Bengoshi hō (Lawyers Law), Law No. 205 (1949) art. 30 (3), prohibiting a lawyer from serving as a director of a profit making company. Even though article 7 (4) excludes article 30 from those provisions applicable to alien lawyers admitted to the bar, the local bar associations have imposed this limitation on the foreign lawyers in their association rules. E.g., Tokyo Bar Association, Tokyo bengoshikai jun-kaiin kaihō (Regulations of the Tokyo Bar Association for associate members) Reg. No. 9, March 19, 1960, art. 6. Assuming the authority for the rule is sound, the United States lawyer finds his conduct restricted in unfamiliar ways.
4 See for more general, rather than transactional or bilateral, analysis, Masse, The Lawyer's Role in International Trade, in LEGAL PROBLEMS IN INTERNATIONAL TRADE AND INVESTMENT (World Community Ass'n, Yale Law School 1962) Surrey, American Investments Abroad—Foreign Legal Aspects for American Lawyers, 7 PRAC. LAW. (No. 8) pt. I at 13 (1961); and pt. II at 8 (1962); also similar material in ABA-ALI, Joint Committee on Continuing Legal Education, LAW GOVERNING
standpoint of the U.S. businessman, realizing of course that there is usually a corresponding transaction from the Japanese side. The fact that post-war capital-flow has been toward Japan means, however, when the discussion gets to the subject of the organization and roles of the several lawyers required to handle the more complex transactions.

THE MAJOR CATEGORIES OF TRANSACTIONS

It is convenient to classify the U.S.-Japanese transactions which most commonly flow through Tokyo liaison law offices as a hierarchy, progressing from transactions with little to those with a maximum involvement in Japan; for it is this degree of involvement which determines the lawyers' roles in handling the transaction. Viewed in such a fashion, we can list the major types of transactions\(^5\) from the that the investment transactions listed below seldom occur in reverse.

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\(^{5}\) For recent materials in English on substantive problems in Japanese trade and investment, the recent looseleaf bibliographical volume, THE LEGAL KEY TO INTERNATIONAL TRADE AND INVESTMENT, Section Y [Far East] is the most convenient. For other specialized recent bibliographies on international trade and/or investment in general, but with an occasional article relating to U.S.-Japan business, see LEGAL PROBLEMS OF INTERNATIONAL TRADE AND INVESTMENT 226 (World Community Ass'n, Yale Law School 1962); Selected English Language Materials on Doing Business Abroad, 16 RECORD OF N.Y.C.B.A. 215 (1961); Carleton, Selected Bibliography of Legal Aspects of International Trade [1959] U. ILL. L.F. 427 (1959).

\(^{6}\) Izawa and Shattuck, Letters of Credit in Japanese-United States Trade, 38 Wash. L. Rev. 169 (1963) infra. The most detailed material on all legal phases of trade transactions is the eight-volume set entitled, Boeki jitsumu koza (Yuhikaku). In English one of the most detailed descriptions and collections of rules is found in Japan Foreign Trade News (No. 110) 23 (1960); a simple exposition is found in Yamaoka, Exchange and Trade Controls—Particularly in Japan, DOING BUSINESS ABROAD 33 (Prac. L. Inst. 1962).

Trade transactions, on the other hand, are balanced bilaterally and are in great number.

1. Occasional trade transactions without general representation in Japan. Lawyer participation is limited largely to drafting document forms and claims adjustments.

2. Regularized course of trade through a Japan agent, branch or subsidiary.

3. International transportation.

4. Licensing of technology (patents and trademarks or technological assistance and know-how).

5. Loans by United States banks to Japanese operators.


7. Direct investments in manufacturing joint ventures with a Japanese firm, with or without accompanying technological assistance or patent licensing agreements, and with or without foreign exchange licenses or foreign investment validations.

8. Japanese manufacturing operations, wholly-owned by United States interests, but with sales handled by a Japanese firm.


Covering Coca Cola and atomic reactors from the United States and pearls and ships from Japan, the array of products sold (and sometimes jointly produced) in the U.S.-Japanese trade has combined to make Japan our best customer (excluding Canada), and we are likewise Japan’s biggest single buyer. During the last ten years, much of the architectural work has been done in establishing legal positions in Japan for major United States corporations; their technology has been

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8 These arrangements have been materially affected by the 1962 Japanese Tax amendments. See Way, The New Japanese Approach to the Taxation of Foreign Individuals and Enterprise, 38 Wash. L. Rev. —— (1963) infra; also the recent U.S.-Japan Tax Treaty re-negotiations may affect sales organization.


10 See special issue: Gijutsu teiketsu o meguru hoteki mondai (Legal problems revolving around technological assistance agreements), Juristo (No. 257) 14 (1962).


12 Bradshaw, Joint Ventures in Japan, 38 Wash. L. Rev. 58 (1963) infra.

13 Japan's 1961 exports amounted to $4,322,000,000 of which $1,141,000,000, or about 25%, went to the U.S. Economic Planning Agency, Japanese Government, Economic Survey of Japan 49 (1962).
more instrumental than most people realize in the rehabilitation of Japanese industry. Still, much of this sort of fundamental legal planning remains to be done, and, of course, structural readjustments as well as routine legal problems of operating plants and servicing investments will increase as the new joint projects get under way.

**TYPES OF LAWYERS’ ROLES**

There are several lawyers’ roles in U.S.-Japanese transactions, including both specialists and non-specialists. The Japan specialist’s job is a career, not an *ad hoc* preparation. Unlike the resourceful trial attorney, who can in fact learn enough about the sacroiliac to try a personal injury case, the corporate attorney cannot study up to handle, unassisted, a U.S.-Japan joint venture negotiation in Tokyo.

When an American corporation sets about gathering the legal advice needed for a joint venture in Japan, it will find that the profession is just beginning to organize efficiently for the job. The corporation will start of course with its regular lawyer here, and the regular lawyer will eventually retain a liaison lawyer. Usually the liaison lawyer will be based in Tokyo, but there are a few in the United States. Three or four firms have affiliated offices both in Tokyo and here.¹⁴

Usually the liaison lawyer will be admitted to practice both here and in Japan, although there are several American attorneys in the United States who handle Japanese-American transactions, but who are not qualified as lawyers in Japan. Also there are a few United States lawyers in Tokyo liaison law offices, who are not qualified to practice there.¹⁵ Several Japanese lawyers have also established themselves in the liaison field, quite independent from the American-managed, liaison offices in Tokyo, which have dominated the field since 1950 and which usually include several Japanese lawyers as partners and associates.

In complex transactions, the Japanese firm negotiating with a United States firm, will also have a legal expert, probably from its corporate

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¹⁴ There are two or three law offices in New York that seem to have more than a correspondent relationship with a Tokyo office, and also one in Chicago, one in Seattle and one in San Francisco.

¹⁵ Unauthorized practice of the law is made a crime by the Lawyers Law, art. 77. What constitutes “practicing law” is defined in the Lawyers Law, art. 72 for purposes of restricting the activities of non-lawyers. The definition includes court work, legal counselling and opinions, but it does not cover such services rendered without compensation, nor is legal drafting the exclusive province of the lawyer. *E.g.*, Judicial Scriveners (*Shiho shoshi*) are explicitly authorized to draft many legal documents. *Shiho shoshi-hô* (Judicial Scriveners Law), art. 1 (1), *Roppo sensho* 157 (1963).
staff. He will ordinarily not be a member of the Japanese Bar Association, for it is customary in Japan to have our office lawyer's type of work done by law-trained, but unadmitted employees. Recently some Japanese corporations have also been retaining a liaison lawyer in Tokyo to sit in on the negotiations to advise and assist with the drafting.

The ranks of this legal line-up may be made even more complex by three characteristics of American professional and business organizations. First, there are potentially a number of lawyer participants subsumed under our category of "regular corporate lawyer." Broken down, this role may turn out to be filled by a lawyer in the corporation's own law department, or it may include such a salaried lawyer, plus the corporation's outside law firm. Secondly, the outside law firm may in turn assign several lawyers to the problem, including tax, licensing and other experts ordinarily maintained intra-murally by the better large law firms. The organization of lawyers into large firms of specialists is still little known in Japan. But one type of expert, the patent counsel, ordinarily practices separately in both the United States and Japan, and in arranging licensing agreements it is quite common to have an American and a Japanese patent counsel (benrishi) on the team also.

The third American peculiarity unknown to Japanese practice,

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16 Leaving aside the question of whether the first four years in a Japanese and a United States university are comparable, we can say that, in general, such study in the Japanese university law department is undergraduate study rather than graduate study such as our LL.B work. The law department is not concerned primarily with training practicing lawyers but with training employees for the governmental and business bureaucracies. See Woodruff, The Japanese Lawyer, 35 Neb. L. Rev. 417 (1956) for further information.

17 O'Meara, Organizational Structure, Operation, and Administration for Large Corporate Law Department (25 or more lawyers), 17 Bus. Law. 584, (1962); Continuing Education of the Bar [Calif.], Functions of Corporate Legal Departments 1 and Bibliography 229 (1961). Note that in 1961 there were 22,533 salaried house counsel in the United States—8.9% of the lawyer population. American Bar Ass'n, The 1961 Lawyer Statistical Report 62. In Japan practically no lawyers are employees of corporations; to hold such a job they would have to obtain special permission from the bar. Lawyer's Law, art. 30 (3), as amended to 1961.


19 Tweed, The Changing Practice of Law, 11 Record of N.Y.C.B.A. 13 (1956); see also Owen (Reporter), Organization of a Lawyer's Offices (1962). This latter is a brief report to the International Bar Ass'n, Edinburgh Conf., 1962, on the types of law office organization in various countries.

which has often added another dimension, and perhaps another legal participant, s the tax-haven device.\textsuperscript{21} In the past this procedure has often meant that a United States corporation would cause a subsidiary from a third country which does not tax foreign income to act as a vehicle for the Japan operation. In fact, because of foreign exchange disadvantages and the fact that the Japanese corporate tax has been as high as the United States tax and credits which are available, this device has not had the utility in Japanese operations that it may have had elsewhere. Nevertheless, perhaps for uniform organization throughout all of their foreign operations, or for non-tax reasons, or apparently in some cases because of inadequate advice, a few corporations have used the tax-haven device in Japan.\textsuperscript{22} Where tax-haven corporations are used, of course, a corporate lawyer from the third country will be required to make the corporate adjustments entailed.

In summary then, the whole team of legal experts who might have roles in a Japanese joint venture of maximum complexity are:

1. The United States corporation’s regular U.S. lawyer:
   a. One or more lawyers from the corporate law department; and/or
   b. One or more lawyers (tax, licensing, corporate and international transactions experts) from an outside law firm.

2. The United States corporation’s special liaison lawyers usually retained by or through the regular counsel, and usually including an American and a Japanese lawyer working together: either
   a. Lawyers based in Tokyo; or sometimes
   b. Lawyers based in the United States; or
   c. Lawyers with offices in both Tokyo and in the United States.

3. The Japanese corporation’s regular staff experts in legal matters (non-lawyers).


\textsuperscript{22} For governmentally validated joint ventures, which almost never have a 50 percent U.S. interest, the 1962 United States tax changes, taxing undistributed income of foreign subsidiaries, where United States citizens own 50 percent or more, will make no difference. But considering only the U.S.-Japan operation, there is little advantage in a tax-haven, even if it does avoid United States tax on undistributed income of the tax-haven.
5. The United States corporation's U.S. patent attorney.
6. The United States patent attorney's Japanese correspondent.
7. The United States corporation's tax-haven corporate lawyer.

Organization of U.S.-Japan Legal Services

To the corporate executive the foregoing legal line-up is doubtless a rather frightening prospect, and rightly so. Even under present make-shift organization, seldom will all of the lawyers listed above get involved in any but the most complex Japanese projects, and even then most of them would play relatively minor roles. The major responsibilities would fall on two key figures: (1) a lawyer from either the corporation's legal department or the outside firm, who selects the other lawyers and integrates the U.S.-Japan operation into the overall corporate pattern, both domestic and foreign, and (2) the liaison lawyer, a U.S.-Japan expert who marshalls the applicable Japanese legal information and interprets and interpolates for the coordinating home office attorney.

These two roles are of course quite different. The home-based coordinator is a generalist and a connoisseur of lawyers. He knows much about United States law as it relates to foreign operations and much about the overall operation of the client corporation, including its other potentially conflicting foreign operations. The liaison lawyer is a specialist on U.S.-Japan business law. He usually has only a rough notion of the larger canvas upon which the generalist is painting.

Home Office Generalist. It takes little imagination to understand that, as the corporation extends its operations into a number of countries, this role of keeping foreign exchange, tax, corporate and sales arrangements consistent with each other, as well as with the domestic business becomes impossible for corporate counsel, unless the foreign operations will support a sizeable legal staff. Thus, the small or medium sized manufacturer with a product or technology saleable in a dozen European, Asian and Latin American countries,

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23 Hickman, Corporate Legal Departments and Retained Counsel, in Continuing Education of the Bar [Calif.], Functions of Corporate Legal Departments 9 (1961).
24 Id., at 2, where it is said that a list has been made of 1000 companies with legal departments of five or more members.
but with a modest net income per country, poses a challenge to the legal profession to organize an efficient service commensurate with the client’s needs. We will have to wait for the future to tell whether ultimately these needs will be met by corporate legal departments, or by the outside law firms which have heretofore handled the domestic work, or instead by other more specialized metropolitan firms whose main concern is the coordination of legal factors in multiple foreign operations. Perhaps in the larger, more experienced corporations such as the oil companies, legal departments of sufficient talent and size are practical, but this will not usually be the case.

Some of the larger independent law firms may take on specialists to serve the home office needs of their clients in coordinating both their domestic and foreign operations. Very likely, smaller companies whose corporate counsel and outside counsel are both unacquainted with foreign legal problems, will find the answer in a firm specializing in foreign operations and able to service a number of such corporations economically.

Up to this point the focus has been on the coordinating role at the home office. We cannot overlook the possibility that more of our metropolitan law firms will combine both the roles of generalist and foreign specialist by maintaining branch offices staffed by foreign lawyers in the leading foreign countries. Such an arrangement would enable the same firm to supply and coordinate all of the legal information necessary to rationalize both the domestic and foreign operations of its corporate clients; it may well be that the closer working arrangements and accumulated experience of such a trans-national firm would enable it to perform the same service more efficiently and economically than the looser arrangements with correspondents, which generally have been relied upon heretofore by the more orthodox firms. However, the legal, organizational and professional problems involved in branch law office operations are formidable. Yet legal services with coverage commensurate with corporate operations have an undeniable logic; with business units increasingly overlapping national boundaries, the potential legal conflicts caused thereby can be avoided best perhaps by law firms big enough to see the total picture.

25 Id., at 216 shows that of 286 companies polled by the National Industrial Conference Board (1959), the largest ones (over 50,000 employees) are the ones which employed outside counsel least frequently in general corporate work.

26 Of course bar associations of different countries have different rules for admission and scopes of practice. See Ohira and Stevens supra note 3; and Escobedo (Reporter), Qualifications to Practice Law in Foreign and International Field in INTERNATIONAL BAR ASS’N, SEVENTH CONF. REP. 412 (1958).
THE ROLE OF LAWYERS

QUALIFICATIONS AND SPECIAL SKILLS OF THE LIAISON LAWYER

We start with the assumption that the liaison lawyer is a good lawyer—competent draftsman, negotiator, advocate, and analyst. In addition he needs two other kinds of qualifications: (1) general area background and (2) certain specific legal skills.

General Background Required of a Liaison Lawyer. The specialist should be bilingual in English and Japanese. It often has been said that foreigners never master written Japanese; they only achieve lesser degrees of ignorance in it. Be that as it may, using translated statutes to solve concrete legal problems is like scratching one’s leg with the boot on, and the few foreign lawyers—and there are four or five of them—who can pick up the code and read it in Japanese of course bring a different order of competence to their work than those who cannot. Second, the liaison practice in Japan requires the briefing of clients in a much broader area of social, political, economic, and cultural matters than is generally true in domestic practice where the context for legal opinions can be taken for granted. Third, Japan is a remarkably organized and bureaucratic country and a sense of the locus of authority, timing and procedures of official decision-making is a very valuable quality of the business lawyer. Fourth, the overlapping of legal and business decisions is endemic in this sort of practice, and the lawyer who learns his client’s business problems thoroughly and is able and willing to offer his own best-guess on business questions affected by legal contingencies is a much more valuable man than he who limits himself to quoting chapter and verse.27 Surprisingly often in Japan, a contract which will stand up to all contingencies in court would prove to be an operational monstrosity, besides spoiling the whole tone of the relationship. Similarly, clever tax arrangements often have a negative operational value. Staff investigation and horse-sense in picking a local joint venture partner is often more important than exegetical lawyering. Fifth, the liaison lawyer must know how to handle xenophobia.28 He will be a better counsellor if he happens to be one of those persons who enjoys the novelty of foreigners and appreciates that there are proper foreign ways of doing things, even if they take longer. At the same time he must understand the client’s frustrations borne of inability to communicate or to do simply what he thinks are simple things.

27 Massey, op. cit. supra note 4, at 6.
Sixth, in the highly controlled Japanese trade and investment field administrative policy may vary from day to day, and the practitioner must keep current. This requires more than a daily reading habit; it poses a difficult library problem requiring continual attention. It has been well said that "tomorrow's law is today's newspaper." Seventh, Japan is a country of strong and distinctive traditions, an understanding of which is vital to sound advice, especially in joint ventures where, hopefully, pleasant and durable as well as profitable relationships are being established. These traditions run deep, and their essence is illusive to the short-timer. Traditional attitudes toward contracts and litigation29 and the status and function of lawyers30 are some of the more obvious examples important to U.S.-Japanese business planning.

Special Legal Skills. Of all the specific legal qualifications required of a liaison lawyer in U.S.-Japanese transactions three seem especially worthy of mention here: Bar membership, understanding of the Japanese legal system, especially the lawyer's role, and a facility in the rules of conflicts of law.

Japanese Bar Membership for Foreigners. Specialists in the United States need not be members of the Japanese bar to advise on Japanese law in this country, so long as they are admitted in their own state31; on the other hand of course, it is necessary for all alien lawyers in Japan, whether they are practicing Japanese law or foreign law, to be members of the bar in Japan.32

There is enough mythology associated with the status of the Ameri-
can practitioners in Tokyo to warrant some clarification. Up to 1949, the Japanese Lawyers Law provided unequivocally that Japanese citizenship was a necessary qualification for the practice of law in Japan. But in the post-war Lawyers Law of 1959 no citizenship qualification was stipulated. Instead article 7 provides that foreign lawyers may be admitted by the Supreme Court to practice law in Japan without even undergoing the rigors of the regular examination and training required of Japanese applicants.

Two categories of foreign admittees were provided for: first, foreign lawyers with "a proper knowledge of the laws of Japan" were admitted under article 7 (1) to full practice of law without restrictions; second, foreign lawyers, with approval of the Supreme Court, could practice law under article 7 (2) relating to foreigners or foreign law, without displaying any "proper knowledge" of Japanese law. In the first category apparently only one special examination for foreigners was given. In the second category, the Supreme Court approvals were

"Persons who violate the provisions of Article 2, Article 72 or Article 73 shall be punished with penal servitude for less than two years or a fine under ¥50,000."

Quaere whether an American lawyer resident in Tokyo could render advice to, or be employed by a Japanese lawyer without violating the Japanese law. Cf. In re Roel, 3 N.Y. 2d 224, 144 N.E.2d 24 (1957); Note, 3 N.Y.L.F. 438 at 442 (1952); Note, 9 SYRACUSE L. REV. 275 (1958); Comment, Aliens Rights, the Public Interest, and the Practice of Foreign Law, 10 STAN. L. REV. 777 (1958); Note, 70 HARV. L. REV. 1112 (1957); Note, 36 TEXAS L. REV. 356 (1957). See also Offenbacker, Unauthorized Practice of Law in Washington, 30 WASH. L. REV. 249 (1955); and Note, 36 WASH. L. REV. 222 (1961).


33 Lawyers Law, art. 2 (1933).
34 Lawyers Law, art. 7 (1949).
35 (Exceptions for Persons Qualified as Lawyers of a Foreign Country)
1. A person who is a qualified lawyer of a foreign country and has a proper knowledge about the laws of Japan may perform those matters specified in Article 3 under the approval of the Supreme Court, excepting persons mentioned in the preceding article.
2. A person who is a qualified lawyer of a foreign country may perform those matters mentioned in Article 3 relating to a foreign national or laws of foreign countries, under the approval of the Supreme Court, excepting persons mentioned in the preceding article.
3. The Supreme Court may conduct an examination or selection in giving the approval provided for in the preceding two paragraphs.
4. To a person who has received the approval provided for in paragraph 1 or 2 of this Article, the provisions of Articles 1, 2, Article 20, paragraph 3, and Articles 23 to 29, shall apply mutatis mutandis.
5. The Supreme Court may not cancel its approval as provided in paragraph 1 or 2 of this Article, when it may be deemed necessary.
6. The Supreme Court cannot give or cancel the approval provided for in Paragraph 1 or 2 without giving a hearing to the Japan Federation of Bar Associations.
36 Lawyers Law, art. 7 (1) (1949).
37 Lawyers Law, art. 7 (2) (1949).
left largely within the Court's discretion, and in fact the Court stipulated, in the approval certificates, what foreign nationals and what foreign law each admitted alien attorney could handle. This meant that those admitted to practice in this second category could advise the stipulated foreign nationals on Japanese or any other law and represent them in any Japanese court. Furthermore they could also advise Japanese clients on the foreign law stipulated in their Supreme Court approval. The Supreme Court provided that approvals in this category would be based on documents submitted and on oral interviews conducted in English, except for the relatively few foreign lawyer applicants who knew Japanese.

Between 1949 and August, 1955, two foreigners (one American and one expatriate Japanese) were admitted to full practice under article 7 (1) and apparently slightly over seventy were certified by the Supreme Court as qualified under article 7 (2). However, several foreign lawyers apparently did not take the further required step of registering with the bar association, because number 57 seems to have been the last registration number assigned to any foreign lawyer who is still active in the Japanese Bar Association. Several of those admitted have since deceased or have dropped out of the bar, and the present count of foreign lawyers with active bar memberships is forty-six, broken down as follows:

Article 7 (1):

1 American
1 Japanese

Article 7 (2):

36 Americans
4 Chinese
3 Germans
1 English

Of the 36 American attorneys still listed in good standing, all but two (one in Kobe and one Yokokama) are in one or another of the

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37 *E.g.*, the writer's admission was under article 7 (2), and United States and English law (*beiei kokuho*) and United States and English citizens (*beiei kokujin*) were stipulated as covered by the approval. *Quaere*: does *beiei* in this certificate cover Scotsman or British as well as English?

38 The writer was one of the last to be admitted (Mar. 1954) with a Certificate, No. 71.

39 *Nihon bengoshi Rengokai, Kain meibo* (Japanese Bar Ass'n, Membership Register) 83, 121, 156, 169, 258 (1962).
three bar associations in Tokyo. There are roughly twenty of the thirty-six listed American lawyers who are now actually practicing law in Tokyo. Of the twenty, not more than a half dozen are bilingual enough to work with legal material in Japanese with any facility. There are also several other American lawyers in Tokyo law offices who are not admitted to practice in Japan. There are at least six American members of the Japanese bar who are more or less active in U.S.-Japanese matters in the United States. The remaining American members of the Japanese bar are apparently retired or otherwise inactive in this area of practice.

In August of 1955 the Japanese Diet amended the Lawyers Law by deleting article 7, and by adding a supplemental provision to the Lawyers Law which preserved the status of previously admitted foreign lawyers but made them subject to the law as it had existed prior to deletion of article 7. Thus the vested interest of the admitted foreign lawyers was recognized, but there has been some Japanese criticism of them which could grow into legislative action, especially if serious misbehaviors should occur among any of them or their colleagues. In accordance with article 7 (4) of the Lawyers Law, the foreign members are still subject to the following articles of the Lawyers Law: article 1 (mission of lawyer), 2 (standards of lawyers duty), 20(3) (prohibition against maintaining more than one office), 23 (privilege of client's communication), 23-2 (right to request official information), 24 (duty to perform certain acts when requested), 25 (conflict of interests cases), 26 (bribery), 27 (prohibition against accepting referrals from non-lawyers), 28 (prohibition against taking a claim assignment), 29 (prompt notice of refusal to handle cases).

Since the above listed articles of the Lawyers Law are specifically

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40 These three bar associations, Tokyo Bengoshikai, Daiichi Tokyo Bengoshikai and Daini Tokyo Bengoshikai were organized originally because of historical factionalism, and they were specifically allowed to remain separate, Lawyers Law, art. 89 (1) (1949). In each of the other District Court jurisdictions in Japan (49 in all) there is only one bar association. Admission to the bar entitles a lawyer to practice in any court in Japan without further examinations, but he must be registered in the bar association where he maintains his office. In this sense Japan has an "integrated bar," but the term is sometimes used in Japan to indicate a bar from which the judges must be appointed. Japan has so-called "career judges," and the Japanese bar is not integrated in this latter sense.

41 Bengoshi Ho (Lawyers Law), Law No. 155 (August 10, 1955).


43 Nojima Atsushi, Gaikokujin no bengonin wa nihon no hotei ni tateru ka (Can foreign lawyers appear in Japanese courts?), 10 Horitsu no Hirona (No.9) 14 at 16 (1957). See also Seno Akira, Zainichi beijin bengoshi no gyomu seigen mondai (The problem of limiting the practice of American lawyers resident in Japan), 5 Jiru to Seizo 12 (1954).

44 Lawyers Law, art. 7 (4) (1949); Law No. 155 (August 10, 1955).
made applicable to foreign lawyers by article 7 (4), presumably the remainder of the Lawyers Law would not be applicable to them. Rather, in the law, the approved foreign lawyers are left to be regulated directly by the Supreme Court, apparently based on its blanket power to approve or to cancel approval of their memberships.\textsuperscript{45} However, by virtue of Supreme Court regulations prescribing that approved foreign lawyers must join the local bars in the District Court jurisdictions where they maintain an office,\textsuperscript{46} as well as the Japanese Federation of Bar Associations,\textsuperscript{47} and then by the virtue of the rules prescribed specifically for foreign lawyers by these bar associations,\textsuperscript{48} actually much of the regulation of the Lawyers Law which had been excluded by article 7 (4) is made applicable to the foreign bar members. But note that the Supreme Court has provided specifically that foreign lawyers are to be subjected only to rules made specifically for them.\textsuperscript{49}

With the deletion of article 7, the unadmitted foreign lawyer is no longer accorded the privilege of becoming a member of the Japanese bar by procedures different and less difficult than the Japanese applicant. Now all foreigners are apparently admissible on terms identical to those for Japanese graduates from the four year bachelor courses of the university law department: either (1) they must pass the legal examination\textsuperscript{50} (for judge and procurator, as well as lawyer, candidates) and then graduate from the two-year course at the Legal Research and Training Institute (Shihō kenshujo) in Tokyo;\textsuperscript{51} or (2) they might become law professors\textsuperscript{52} or assistant professors for five years

\textsuperscript{45} Lawyers Law, art. 7 (1), 7 (2), 7 (5) (1949).

\textsuperscript{46} Gaikoku bengoshi shikakusaka shouin to kisoku (Regulations on qualified lawyers from foreign countries, etc.), art. 8 (2) in GAIJI-HOKI SORAN (Compendium of regulations on foreign matters) 339.

\textsuperscript{47} Id., Article 8 (3), in id. 339.

\textsuperscript{48} E.g., Nihon bengoshi rengokai kaisoku, (Japanese Bar Ass'n Regulations) art. 98 in Nihon bengoshi rengokai, Kankei kisoku (Related regulations) 29 (undated) provides that foreign lawyers must be members of the local bar and of the Federation and that they will be known as "associate members" (jun-kain). Then see detailed Federation rules for foreign members covering most of the ground covered by the excluded provisions of the Lawyers Law; Jun-kain kisoku (Rules for associate members) (Regulation No. 11) in id. at 57-60. For an example of the treatment of this problem by the local bars by delegation from the Supreme Court (Regulations on Qualified Lawyers from Foreign Countries, art. 8 (4) and (5)), see Tokyo bengoshikai jun-kain kaii (Regulations of the Tokyo Bar Association for Associate Members), Regulation No. 9, March 19, 1960, art. 6 paraphrasing art. 30 of the Lawyers Law as amended to 1961, which article was excluded from those made applicable to foreign lawyers by article 7 (4) of the Lawyers Law.

\textsuperscript{49} Regulation on Qualified Lawyers from Foreign Countries, art. 8 (5) in 1 GAIJI KOKI SORAN 339.

\textsuperscript{50} Shihō shiken-hō (Legal examination law) Law No. 140 (1949). Note that about sixty percent of the graduates from law departments in the various universities take the examination and only about 4 percent of those who take it pass.

\textsuperscript{51} Lawyers Law, art. 4, as amended to 1961.

\textsuperscript{52} Lawyers Law, art. 5 (3), as amended to 1961.
at one of certain designated universities with graduate law departments. The first route to Japanese bar membership for alien lawyers is at best extremely arduous. In the only case where a foreigner (Formosan, 1957) has passed the legal examination since 1955, he was not permitted to enter the Legal Research and Training Institute. It has been suggested that the reason was his nationality. Even though other decisions might be made in the future by the Supreme Court on a case-by-case basis, still this avenue to admittance is too difficult and too uncertain to be of any practical significance to anyone whose native language is not Japanese. Also the foreigner's chances for appointment to a tenure position on a Japanese law faculty are negligible, although perhaps not impossible. One Japanese bar applicant who held a nominal assistant professorship for the required five years was rejected when he applied for registration with the bar.

However, in perspective, even the meagre chances still available to foreign lawyers to be admitted to practice in Japan are more lenient than the reciprocal rights extended to Japanese by our states, most of which require citizenship. Also the Japanese law provides more opportunity for Americans to practice law than the United States Treaty of Friendship, Commerce and Navigation with Japan requires the United States or Japan to extend to citizens of the other. The treaty, Article VIII, paragraph 2 provides:

Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding

63 But see Nojima Atsushi, Gaikokujin no bengonin wa nihon no hotei ni tateru ka (Can foreign lawyers appear in the Japanese Court?), 10 Hoitsu No Hiroba (No. 9) 14 (1957) to the effect that the Supreme Court has issued rules under the Saibansho hō (Court Law), Law No. 59 (1957), art. 66 which would justify denying the applications of non-Japanese. Quaere whether the court can require citizenship when the law is silent.

64 Ohira and Stevens, supra note 3.

65 The job remains to be done of checking the statutes and regulations of all fifty states and the District of Columbia to see specifically whether all states either as a matter of statute or discretion require candidates for the practice of law to be a citizen of the State or the United States. However, it is clear enough that nearly all states exclude aliens, whether student or attorney applicant, and the admission of aliens, who have not yet even applied for citizenship, is very exceptional. See West Publishing Co., Rules for Admission to the Bar (1961), which unfortunately leaves this narrow question on the admissibility of aliens ambiguous with regard to several states. For example, some states admit attorney applicants who have had a certain period of practice in another “state” without specifying that United States citizenship is required. Would practice for the prescribed period in a foreign state suffice? See also Farley, Admission of Attorneys from Other Jurisdictions, 19 Bar Exam. 227, 242 (1950), which is now outdated.

66 4 T.I.A.S. (Pt. 2) 2065 at 2070 (1953).
qualifications, residence and competence that are applicable to nationals of such other Party.

However, in recognition of State rights in these matters the following reservation\textsuperscript{57} was made by the United States before ratification:

Article VIII, paragraph 2, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions. . . .

The Japanese then made a corresponding reservation:\textsuperscript{58}

Japan reserves the right to impose prohibitions or restrictions on nationals of the United States of America with respect to practicing the professions referred to in Article VIII, paragraph 2, to the same extent as States, Territories or possessions of the United States of America, including the District of Columbia, to which such nationals belong impose prohibitions or restrictions on nationals of Japan with respect to practicing such professions. . . .

In summary then the Japanese have been, in law, more lenient to foreign attorneys than reciprocity with most of the state statutes or with the treaty might require.

\textit{The Legal System and Japanese Lawyers.} The comparativist role of the liaison lawyer is of course quite different from that of the comparative legal scholar or even that of the corporate counsel, quarter-backing several foreign operations for a client in San Francisco, Chicago or New York. The scholar's comparisons are systematic; they are ends in themselves. The corporate counsel, turned comparativist, is a cosmopolitan connoisseur of foreign lawyers; but he knows only the bottles and has no time for the wine. The Tokyo liaison lawyer, foreigner or Japanese, is a full time, problem solving comparativist on the run; he complements the usual Japanese lawyer by interpolating between different traditions, languages and legal systems; he supplements the Japanese lawyer by doing the planning, drafting, counselling and arranging which U.S. clients expect of lawyers and which Japanese lawyers are not accustomed to doing. For example, the Japanese lawyer is not ordinarily a tax advisor,\textsuperscript{59} but the tax pattern is one of the

\textsuperscript{57} 4 T.I.A.S. (Pt. 2) 2065 at 2132 (1953).
\textsuperscript{58} 4 T.I.A.S. (Pt. 2) 2065 at 2132 (1953).
\textsuperscript{59} Way, The New Japanese Approach to the Taxation of Foreign Individuals and Enterprise, supra note 8.
first things the United States client wants to know from his Japan lawyer. If the tax answers are right the next thing he may want is a corporation; Japanese lawyers ordinarily do not do the paper work for incorporation, especially in English; it is ordinarily done only in Japanese by company employees or judicial scriveners.  

This professional symbiosis of the usual Japanese and the liaison lawyer in the U.S.-Japanese practice requires mutual understanding and tolerance of a high order. Specifically the American liaison lawyer must understand well his Japanese colleagues’ legal training,61 library tools,62 relationship to other jurists, professional organization and ethics, social status and usual scope of services, scale of fees and relationships with other experts—accountants,63 patent attorneys, tax agents.64 The details of these differences between the Japanese and our own legal system and the roles of lawyers therein65 need not concern us here, except to say that their magnitude goes considerably beyond the common law-civil law differences which would normally flow from the strong German influence in the Japanese codes. Japanese tradition has had persistent influence on the operation of these alien codes. The size and function of the Japanese bar is a key example.

Prior to the Meiji Restoration (1868) the tradition of legal experts

60 Judicial scriveners (gunnō noson) are a separate profession who are licensed (Shiho Shoshi-ho [Legal Scrivener Law] Law No. 197 (1950) art. 4) to draft certain legal documents. Legal Scrivener Law, art. 1.


62 With his Roppo zensho, (a collection of codes and related laws) a few commentaries and a set of cases (organized by code sections), the Japanese lawyer can ordinarily get an answer to routine questions of law in only a fraction of the time required by a common-law lawyer. This same point is noted with regard to German lawyers. Cohn, The German Attorney, 9 INT. & COMP. L.Q. (4th Series) 580, 587 (1960).

63 Hattori Sadao, Konin kaikeshi to bengoshi to no kenkyu nado itsutsuite (Concerning the overlap of C.P.A. and lawyer business, etc.), 10 Jiyu to Seigi (No. 3) 16-18 (1959). But the Japanese have no such organized tension between lawyers and accountants as we have in this country. See Anderson, The Tax Practice Controversy in Historical Perspective, 1 Wm. & Mary L. Rev. 18 (1956).

64 Nakajo, Bengoshi-gyo to seirisshi-gyo to no kenkyo no rigai tokushitsu nurabid ni gensai ni okeru sono jittai-jissai ni tsuite (Concerning present practice and actual conditions, and advantages and disadvantages of the overlap of lawyer business and tax agents business), 10 Jiyu to Seigi (No. 3) 19 (1959).

65 For a recent outline of the lawyers legal position in Japan, see Kaneko, Saibanho (Law of trials) 246-56 (1959). Also see the rather full discussion, Kaino, Nihon no bengoshi (Japan's lawyers), 32 Horitsu Jihō (No. 5) 432 (1960).
in Japan was coupled with inn-keeping, and their legal ethics were often affected by these earthy beginnings. For example, delay in court meant a higher hotel bill. "Courts" were indistinct from the bureaucracy; civil litigation was a matter of grace, and not of right. Understandably it has required strenuous efforts and dedicated guidance by the few who understood the rule of law to organize and nurture an independent bar in such a setting during the ensuing century. There has been steady progress from 1868 until now, and Japan does enjoy a very encouraging quality of constitutionalism today.

Meanwhile, large Japanese industrial companies have emerged, but instead of relying on qualified members of the bar for legal advice, they have established the practice of hiring law graduates who perform work similar to that of our office lawyer. Government positions requiring legal training similarly are filled by law graduates, not by members of the bar. Only in the most recent years have some members of the metropolitan bars, begun to develop a business counselor's role. Notaries, public registry officials and judicial scriveners do much of the paper work in conveyancing, probate, family relations and corporate matters. Accountants (konin kaikeishi) and tax agents (zeirishi) do nearly all of the tax work. The result is that a diminutive but generally very competent bar of 6,800 lawyers, who are essentially trial lawyers, serves a nation of 95 million people.

66 Takigawa, Kujyado no kenkyu (Research of the Lawyers Inn) 66-96 (1959).
67 Nakuda Kaoru, Tokugawa jidai no minji saiban futsuoku (Actual records of civil trials in the Tokugawa period), in 3 Hoseishi Ronshu 753 (1943). Through the diary of a litigant, Nakuda is able to show the traditional attitudes on the judge and litigants in the Tokugawa "court" in the early 1800's.
68 Nihon bengoshi rengokai, Nihon bengoshi enkaku-shi (Historical development of the Japanese bar) 434 pp. (1959); and for an interesting short analytical treatment, Rabinowitz, The Historical Development of the Japanese Bar, 70 Harv. L. Rev. 61 (1956).
69 Terada, Bengoshi gyomu no hatten hosoku (A plan for the development of the lawyer's business), 10 Jimu to Seikou (No. 3) 21 (1959).
70 See the query whether the administration of the Japanese legal examination is too restrictive in Woodruff, The Japanese Lawyer, 35 Neb. L. Rev. 432 and 455 (1956); Rounded figures for lawyers per capita show:

<table>
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<tr>
<th>Population</th>
<th>Lawyers</th>
<th>Persons per lawyer</th>
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<tbody>
<tr>
<td>Japan</td>
<td>95,000,000</td>
<td>6,800</td>
</tr>
<tr>
<td>Germany</td>
<td>55,000,000</td>
<td>18,700</td>
</tr>
<tr>
<td>United States</td>
<td>180,000,000</td>
<td>217,000</td>
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Retired and government lawyers (33,801) in the United States have been excluded because in Japan and Germany bar members as such seldom work as government employees. For German figures see 12 Anwaltsblatt 115 (May 1962); for the Japanese figures, see Nihon bengoshi rengokai, Kaiin meibo (Japanese Bar Ass'n, Membership Register) (1961); for U.S. see American Bar Foundation, The 1961 Lawyer Statistical Report 62, 77 (1961).
The amount of the Japanese lawyers' court work in turn is limited by deep-rooted inclinations of the populace to compromise disputes instead of litigate. Traditionally the Japanese have tended to think, in Confucian fashion, that it is better to be harmonious than right, or that harmony and right are the same thing. Also, serious delay in court probably reinforces this tendency to settle, as it has in this country. We will eschew the interesting question as to why "right consciousness" has been so undeveloped, but the consequence is that the man-in-the-street has tended to settle his disputes by conciliatory techniques, usually without the aid of a lawyer.

Post-war legal reforms and legal education in Japan are no doubt slowly weakening these traditions against legal professionalism. Still this historical legacy and the civilian code characteristics make the total legal environment of Japan difficult to grasp without a career study of it; and the same is true, of course, for Japanese students of our legal system. Therein lies the justification for the foreign liaison lawyers in Japan, at least during a transition period. Hopefully the Japanese bar will be able to develop a broader scope of professional activity and train lawyers more skilled in liaison work who can assist with the almost intolerable volume of work presently thrust upon the more competent foreign lawyers in Tokyo now. Eventually, the Japanese bar must provide Japanese replacements for those few foreign lawyers left in the Tokyo practice, for they provide an indispensable service to international relations.

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72 See Warren, Delay and Congestion in the Federal Courts, 42 J. Am. Jud. Soc'y. (No. 1) 9 (1958) for a poignant reminder of the relationship between court delay and the settlement ratio. Also see Sawa Eizo, Sosho Chien to koso jinko (Delay of lawsuits and lawyer population), SHOJI HOKU RENKYO (No. 94) 2 (1958).
73 Kawashima, Shakai koso to saiban (Social Structure and litigation) SHISO (No. 432) 1 (1960).
74 E.g., in 1959 the ratio of civil disputes which were compromised in court to those which were disposed of by court judgments or orders is shown by the following figures:

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<tbody>
<tr>
<td>Litigated to conclusion</td>
<td>109,945</td>
</tr>
<tr>
<td>Compromised in court</td>
<td>171,882</td>
</tr>
<tr>
<td>(Wakai or chotei)</td>
<td></td>
</tr>
<tr>
<td>Total of ordinary civil disputes</td>
<td>281,827</td>
</tr>
</tbody>
</table>

These computations were made by use of the statistics in 1 SHISO TOKEI NEMPO [for 1959] 136-37, 382-83, 348, 322, 433 (1960) and 3 id. [for 1959] 44 (1960). Note that out-of-court compromises not covered by these statistics may be even more numerous. E.g., over 90% (68,514 out of 75,267) of all divorces in Japan for 1955 were "divorce by agreement" (Kyogi rikon) and they never reached the courts. Tanabe and Kume, Kyogi rikon no jittai chosa (An empirical study of divorce by agreement), 30 HOKUSU KEIO 182-183 (1956).
75 Good liaison advocacy may be appreciated from reading Nippon Hodô Co. v. U.S., 285 F.2d 766 (1961), handled for the prevailing side by the late Ben Bruce Blakeney. Also see BLAKENEY, Legal aspects of Private Investment in Japan, in 3 S. W. LEGAL FOUNDATION, INSTITUTE OF PRIVATE INVESTMENT ABROAD 263-310 (1961).
Conflicts of Law. The law of treaties, foreign exchange, taxation of foreign income, customs, immigration, patent, trademark and maritime matters are all rather marginal subjects in a law school curriculum, but everyday tools of the U.S.-Japan practitioner. Perhaps no subject is quite so pivotal, however, to the liaison lawyer as conflicts of law, or as the Japanese call it, private international law. He requires a ready command of conflicts rules much as a domestic trial lawyer here must have a facility with evidence. In the field of conflicts avoidance,\(^\text{76}\) he needs to know to what extent party autonomy is recognized in Japan\(^\text{77}\) and in the several states of this country with respect to governing law clauses, or with respect to fixing the forum. He needs to know whether and how arbitration clauses and awards are enforced in all of the convenient jurisdictions related to the transaction.\(^\text{78}\)

Unfortunately, as often as not the liaison lawyer enters on the scene too late to avoid conflicts of law; often a dispute has already arisen. In conflicts solution, the lawyer must know the conflicts rules of both countries, which is not always easy, particularly in post-war Japan. Because of the political, social and commercial changes of the last fifteen years, many occasions have arisen requiring novel applications of the Japanese rules by the courts. These decisions have then been subjected to much scholarly analysis with little uniformity in the results.\(^\text{79}\) The significance of this diversity to the practitioner is of course that he needs to know all of the respectable schools of thought on various points so that he can present the theory which designates the most favorable governing law for his specific client. The many state jurisdictions of our federal system can make this a rich menu in Japanese-American transactions.

In addition, several of the problems, including the fundamental lex patriae principle for most personal relations, have become the subject of much discussion looking toward future amendments of the Japanese


\(^{77}\) Generally Japan recognizes party autonomy. *Horoi* (Law concerning the application of Laws in general) Law No. 10 (1898) art. 7; for English translation, see 1 EHS Law Bulletin Series, Japan (No. 1001). However, Japanese courts will apply *Horoi*, art. 30 (public policy) and refuse to apply foreign law which is against Japanese public policy. For illustrative public policy problems in recent cases see Ikehara, Yamada, & Sawaki, Post-war Studies in Private International Law in Japan, 6 Japanese Annual of International Law 95, 99-100 (1962).

\(^{78}\) *Supra* note 7.

\(^{79}\) E.g., see Ikehara *et al*, *supra* note 77, at 101 (1962).
law.\textsuperscript{80} With the judicial and scholarly opinion in ferment and these basic changes in the offing, the practitioner will have to make a special effort to keep current, as well as facile, in the private international law field.

**CONCLUSION**

We have seen that legal planning for the more complex ventures in Japan implies teamwork among a group of lawyers and that their working arrangements vary with the type and scope of the transaction with the clients, and with the clients' prior relationship with lawyers in their other operations, both domestic and foreign. A key role for the Japan venture is a liaison lawyer whose base is usually Japan. He is normally a member of the Japanese bar and an actively practicing comparativist who knows how to make the legal requirements of one of the countries understandable in a functioning way to persons from the other country; he knows the characteristics of lawyers and other experts of both jurisdictions. In addition, he is particularly knowledgeable in a number of pertinent fields such as foreign exchange and tax, but particularly he knows how to avoid or solve conflicts problems.

To date this liaison role has been largely filled by a small group of foreign lawyers and their Japanese partners and associates. But bar admission requirements are now such that for practical purpose foreigners can no longer be admitted. Thus, it is a challenge to the Japanese bar to produce some lawyers well enough acquainted with our system to carry on this important work bilaterally and bilingually.