

Gaiben & Bengoshi LLP: Cross-border Legal Practice in Japan

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In 2005, reforms to Japan's 1986 Foreign Lawyers Law became effective that permitted foreign law firms to fully merge with Japanese law firms. Several major international law firms immediately took advantage of this liberalization in order to provide more seamless and comprehensive service to their clients. Other international law firms chose not to fully merge with Japanese law firms, opting instead to remain in "joint venture" arrangements with Japanese firms or with individual Japanese bengoshi. Still other international law firms with a presence in Japan have decided to remain independent.

After providing the necessary background, this article explains why different international law firms doing business in Japan have decided to either fully merge with Japanese firms, remain involved in joint ventures with Japanese firms, or operate independently.

Table Of Contents

I. Introduction.....	112
II. A Brief History of Foreign Lawyer Regulation in Japan.....	113
A. The Rationale for Restricting Foreign Lawyers.....	113
B. The 1986 Foreign Lawyers Law	115
1. The Background of the 1986 Foreign Lawyers Law	115
2. The Basic Provisions of the Foreign Lawyers Law	115
3. 1994 Amendments to the Foreign Lawyers Law	118
III. Relaxation of Partnership Restrictions and Current Practice Environment.....	121
A. The 2003 Amendment to the Foreign Lawyers Law	121
B. Actions Taken in Light of the 2003 Amendment.....	123

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C. Current Practice Environment.....	126
1. Remaining Independent.....	126
2. Joint Venture Practice.....	127
3. Full Integration.....	129
IV. Conclusion.....	131

I. Introduction

Historically, for the lawyer wishing to practice abroad, Japan has been “the hardest market for outsiders to crack.”¹ Indeed, Tokyo used to be a “sleepy legal market for most US law firms.”² However, over the last twenty or so years, gradual reforms have “encouraged the emergence of a less abnormal market for international legal services in Japan.”³ This paper will focus on 2005 reforms that further liberalized Japan’s regulation of international legal service providers. These reforms have permitted foreign lawyers to hire and form partnerships with Japanese lawyers. Some foreign law firms have chosen to take advantage of the 2005 deregulation. Many, however, have not.

As this article will demonstrate, the formation of foreign/Japanese partnerships has been rare because of a different type of arrangement deemed permissible by the Japanese Parliament in 1994—the joint venture. The joint venture alternative allows foreign law firms to formally associate with Japanese law firms (or members thereof). Starting in 1994, many international law firms have chosen to form joint ventures with Japanese firms. In many cases, the goal for these international law firms has been to provide clients with a “one stop shop,” seamlessly providing clients with advice on both U.S. and Japanese law. Many foreign lawyers practicing in Japan apparently believe that a properly structured joint venture is almost indistinguishable from a full partnership. This, and the “normal inertia of life,”⁴ explains why many foreign law firms with Tokyo operations have not bothered to form partnerships with Japanese firms.

The following discussion will focus in large part on the permissible ways in which members of foreign law firms can associate with Japanese lawyers in Japan (*bengoshi*) to provide services to international and Japanese clients. Part II of this paper, which is divided into two sections, provides a brief historical account of Japan’s regulation of foreign lawyers. Section A suggests some potential reasons for Japan’s conservative regulatory approach to foreign legal service providers. Section B details some of the more salient provisions of the 1986 Foreign Lawyers

1. Symposium, *The Future of the Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 765 (1994).

2. Eric Sibbitt, *The New World of Corporate Lawyering in Japan*, 3 CHI. J. INT’L L. 503, 503 (2002).

3. *Id.* at 504.

4. See *infra* Part III.C.2.

Law, which formally opened Japan's legal services industry to foreign practitioners.⁵ The latter portion of section B explains the major amendments to the Foreign Lawyers Law passed in 1994, the most important of which allowed foreign lawyers and Japanese lawyers to form joint ventures. Part III first focuses on 2005 changes to the Foreign Lawyers Law enabling the formation of full partnerships between international law firms and Japanese firms. The paper closes with a description of three organizational structures adopted by foreign firms operating in Tokyo and the business reasons underlying each organizational choice.

II. A Brief History Of Foreign Lawyer Regulation In Japan

A. The Rationale for Restricting Foreign Lawyers

From 1933 until 1955, Japanese regulations permitted foreign lawyers to practice in Japan.⁶ The National Diet of Japan, the country's legislature, passed a law in 1955 prohibiting foreign lawyers from practicing in Japan.⁷ For over 30 years, that is, until the Foreign Lawyers Law of 1986, foreign law firms could not establish offices in Japan and foreign lawyers could only practice in Japan as inside counsel of corporations or as "trainees" employed by Japanese firms.⁸ What caused this regulatory reversal in 1955 and what factors contributed to the maintenance of this policy for three decades?

During the Japanese occupation after World War II, "the *junkaiin* system of the bar association, permitting foreign lawyers not admitted to the Japanese bar to handle legal matters, was established."⁹ These foreign lawyers, referred to as *junkaiin*, were only permitted to provide legal advice to foreign persons or on foreign laws.¹⁰ Many of these *junkaiin* worked on international transactions.¹¹ Some of the *junkaiin* were highly regarded, but many were not, especially within the *Nichibenren* (Japan Federation of Bar Associations or "JFBA").¹² They were criticized for practicing beyond the scope permitted by Article 7 of the Lawyer's Law of 1949, *i.e.*, providing advice on foreign law other than their home jurisdiction's law and even giving advice on Japanese law.¹³ Some *junkaiin* law firms even

5. See *Foreign Lawyers: Regulation of Foreign Lawyers in Japan*, 28 HARV. INT'L L.J. 123, 123 (1987).

6. See Law No. 53 (1933) (permitting foreign lawyers to practice in Japan as long as there was a guaranty of reciprocity); Law No. 205 (1949) (permitting foreign lawyers to practice in Japan without any requirement of reciprocity). See also Symposium, *supra* note 1, at 765.

7. See Law No. 155 (1955).

8. See SYDNEY M. CONE III, INTERNATIONAL TRADE IN LEGAL SERVICES § 13.1.2 (Little, Brown & Co. 1996).

9. Takeo Kosugi, *Regulation of Practice by Foreign Lawyers*, 27 AM. J. COMP. L. 678, 691 (1979).

10. See *id.* at 692.

11. See *id.*

12. See CONE, *supra* note 8, § 13.1.2.

13. See Kosugi, *supra* note 9, at 692-93.

employed Japanese lawyers to evade criticism that they were offering services on Japanese law without being admitted to practice in Japan.¹⁴ It has been argued that this behavior is what led to the amendment in 1955 that abolished the *junkaiin* category.¹⁵

The rationale for the 1955 law excluding foreign lawyers from Japan may have been to protect the domestic bar from competition: “[T]he repeal of Art. 7 by the 1955 amendment to the *Bengoshiho* can . . . be regarded as opening the way for Japanese attorneys to advance into the international trade field by barring the further influx of foreign lawyers.”¹⁶ Professor Mark Ramseyer has argued that the exclusion of foreign lawyers from the Japanese legal market was just one part of a domestic regulatory framework intended by some parties to discourage competition.¹⁷ Sydney Cone, who spent several years in practice at Cleary Gottlieb Steen & Hamilton’s Tokyo office, has also maintained that the JFBA was primarily concerned with protecting its own. The concentration was on “preserving [the Japanese legal profession’s] monopoly position at home, protecting it especially against the aggressions of purveyors from abroad. . . .”¹⁸

A somewhat weaker argument explaining why the JFBA, which was established in 1949, at first resisted the admission of foreign lawyers focuses on Japan’s unique legal culture. One theory of Japanese legal culture—the Consciousness school—suggests that Japanese law was highly influenced by socio-cultural values.¹⁹ Therefore, despite importation of French, German, and American legal elements, Japanese legal culture remained significantly different from the West.²⁰ Distinct features of the Japanese “legal consciousness” included *wa* (harmony) and *wakai* (compromise).²¹ These core values limited resort to litigation,²² in stark

14. See *id.* at 701.

15. See Kelly C. Crabb, Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1791 n.125 (1983).

16. Kosugi, *supra* note 9, at 693.

17. See Mark Ramseyer, *Lawyers, Foreign Lawyers, and Lawyer-Substitutes: The Market for Regulation in Japan*, 27 HARV. INT’L L.J. 499, 506 (1986).

18. CONE, *supra* note 8, § 13.1.

19. See RENE DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 492-504 (2d ed.).

20. See generally Arthur T. von Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486 (1958); see also Shigeru Kobori, Symposium: *Paris Forum on Transnational Practice for the Legal Profession, Discussion Papers, Presented by the Japan Federation of Bar Associations*, 18 DICK. J. INT’L L. 109, 111-114 (1999) (explaining the JFBA’s emphasis on the social responsibility of lawyers).

21. See Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, 7 LAW IN JAPAN 1 (Charles Stevens trans., 1974).

22. See Mehren, *supra* note 20, at 1493 n.22 (suggesting that the rather unimportant place of law in pre-modern Japan in resolving disputes is in part explained by Confucian teaching, which prefers “smoothness in human relations”).

contrast to the West.²³ Additionally, unlike the West, the “old Japanese system was based on small firms and solo practitioners.”²⁴ Perhaps the JFBA reasoned that maintaining entry barriers to foreign lawyer practice was a way to retain its unique cultural heritage, or resist the “Cravathist” principles inundating other legal markets.²⁵

B. The 1986 Foreign Lawyers Law²⁶

1. The Background of the 1986 Foreign Lawyers Law

At the urging of American law firms wishing to break into the Japanese legal market, the American Bar Association (“ABA”) and the United States Trade Representative (“USTR”) started negotiations with the JFBA in 1982 to open the market to foreign lawyers.²⁷ Negotiations progressed very slowly. Finally, in 1985, the JFBA approved a basic policy for a foreign lawyer system that was almost immediately denounced by the USTR.²⁸ Despite American and European protests, on May 16, 1986, the Japanese Parliament passed a bill that largely adopted the “basic policy” approved by the JFBA.²⁹ The Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers (“Foreign Lawyers Law”) came into effect on April 1, 1987.³⁰

2. The Basic Provisions of the Foreign Lawyers Law

The 1986 Foreign Lawyers Law continues to govern the scope of practice for foreign lawyers in Japan. Under the Foreign Lawyers Law, a “foreign law business lawyer” (*gaikokuho-jimu-bengoshi* or “*gaiben*”), subject to specified exceptions,

23. See Colloquy, *The Brave New World of Lawyers in Japan: Proceedings of a Panel Discussion of the Growth of Corporate Law Firms and the Role of Lawyers in Japan*, 21 COLUM. J. ASIAN L. 45, 47 (2007-2008) (“This supposed lack of law [in Japan] was transformed into a virtue in the 1980s, as Americans decried a ‘litigation explosion’ in the United States and looked enviously at a Japanese system which was perceived to elevate engineers over lawyers.”).

24. Misasaha Suzuki, Note, *The Protectionist Bar Against Foreign Lawyers in Japan, China, and Korea: Domestic Control in the Face of Internationalization*, 16 COLUM. J. ASIAN L. 385, 395 (2003); see also Colloquy, *supra* note 23, at 49.

25. See generally Eric L. Martin, Note, *Liberalism and Cravathism: How Liberalization Triggered the Reorganization of the Legal Profession in Germany and Japan*, 43 STAN J. INT’L L. 169 (2007).

26. Please note that the discussion in this section will focus on the Foreign Lawyers Law in the form existing in March 2011. It is the author’s opinion that while it would be interesting to discuss the law as it was originally enacted, it seems more practical to discuss the law as it presently applies to foreign lawyers practicing in Japan. Furthermore, the original law has only been amended a handful of times and many of those amendments were minor. See Mitsuhiro Kamiya, Partner, Skadden, Arps, Slate, Meagher & Flom LLP (Tokyo), *Development of Foreign Law Firms in Japan*, Remarks at the ABA Section of International Law International Legal Exchange (ILEX) Briefing Trip: Rule of Law and Economic Development (July 10, 2008). The major amendments to the Foreign Lawyers Law will be discussed in Parts II.C and III.A, *infra*.

27. See CONE, *supra* note 8, § 13.1.3.

28. See *id.*

29. See *id.*

30. See *id.*

may counsel clients in Japan on the “law of the country of primary qualification.”³¹ A foreign lawyer can also give advice on the law of a third country if (1) designated to do so by the Minister of Justice³² or (2) after receiving written advice from either a *gaiben* practicing in the third country or a *gaiben* whose country of primary qualification is the law of the third country.³³ A foreign lawyer may not, however, appear in court or before administrative agencies; nor may the lawyer prepare documents to be submitted to such agencies.³⁴ The *gaikokuho-jimu-bengoshi* is also barred from representing criminal defendants and from advising on a transaction the chief purpose of which is to alter the rights of real property in Japan.³⁵ For certain legal matters, foreign lawyers must either work with a *bengoshi* or obtain written advice from a *bengoshi*.³⁶

Qualification to become a *gaiben* is determined by the Japanese Minister of Justice (“Minister”).³⁷ Approval by the Minister is determined according to the following standards:

- (1) the applicant is licensed as a lawyer and has practiced in his or her home jurisdiction for at least three years;³⁸
- (2) the applicant has not been “in trouble”;³⁹
- (3) the applicant has a “plan, residence and financial basis” for performing his or her legal work in Japan and carries proper malpractice insurance.⁴⁰

After becoming qualified as a *gaiben*, an individual must register with a bar association in Japan.⁴¹ The JFBA ultimately decides, through the Foreign Lawyer Screening Board (“Board”), whether a request for registration will be granted.⁴² The Board is composed of a president and 13 members.⁴³ The President of the JFBA chooses the president of the Board from among the Vice Presidents of the JFBA.⁴⁴ The JFBA President also selects the 13 Board members, comprised of eight *bengoshi*, a judge, a prosecutor, a person of “learning and experience,” and two government officials.⁴⁵ After being admitted to a particular bar association,

31. See JAPAN FED’N OF BAR ASSOCIATIONS, ACT ON SPECIAL MEASURES CONCERNING THE HANDLING OF LEGAL SERVICES BY FOREIGN LAWYERS, art. 3.1 (2003), <http://www.cas.go.jp/jp/seisaku/hourei/data/hls.pdf> [hereinafter FOREIGN LAWYERS LAW].

32. See *id.* arts. 5 and 16.

33. See *id.* art. 5-2.

34. See *id.* art. 3(1)(i).

35. See *id.* arts. 3(1)(ii) and 3(1)(vi).

36. See *id.* art. 3(2).

37. See *id.* art. 7.

38. *Id.* art. 10(1)(i).

39. *Id.* art. 10(1)(ii).

40. *Id.* art. 10(1)(iii).

41. See *id.* art. 24.

42. See *id.* arts. 25 and 37.

43. See *id.* art. 38(1).

44. See *id.* art. 38(2).

45. See *id.* art. 38(3).

a *gaiben* may freely change the bar to which he or she belongs.⁴⁶ The JFBA may rescind the registration of a foreign lawyer under certain conditions; for example, where the lawyer has been sentenced to prison.⁴⁷

A foreign lawyer must use the title of *gaikokuho-jimubengoshi* when performing legal business and must append to this title the name of his or her home jurisdiction.⁴⁸ A sign must be displayed within the *gaiben*'s office indicating the law of the country of primary qualification and any secondary qualifications approved by the Minister.⁴⁹ A foreign lawyer cannot establish more than one office in Japan.⁵⁰ This provision would seem to preclude a U.S. or U.K. firm from opening offices in multiple Japanese cities.

A *gaiben* is subject to discipline if he or she violates the Foreign Lawyers Law or any of the applicable provisions in the regulations of the bar association to which the foreign lawyer belongs.⁵¹ Additionally, the attorney may be disciplined if she "misbehaves . . . in a manner impairing the dignity of a [*gaiben*]." ⁵² There are four kinds of disciplinary action:

- 1) Reprimand;
- 2) Suspension for up to 2 years;
- 3) Order to secede from the bar association;
- 4) Disbarment.⁵³

If a complaint is filed against a *gaiben* with his or her Japanese bar association, the bar investigates the matter and, if necessary, requests that the JFBA take disciplinary action.⁵⁴ In certain cases the JFBA may, in the course of its investigation, call upon the *gaiben* to make a statement or submit materials.⁵⁵ The public is informed if any adverse action is taken against a foreign lawyer.⁵⁶

Immediately after the passage of the Foreign Lawyers Law, several American law firms established branch offices in Tokyo.⁵⁷ The high cost of establishing

46. *See id.* art. 28.

47. *See id.* art. 30.

48. *See id.* art. 44. Consider, for example, the signature line of Reiko Sakimura, a partner at Clifford Chance in Tokyo:

Reiko Sakimura Gaikokuho Jimu Bengoshi (England & Wales) Clifford Chance Law Office

The parenthetical describes the types of law that Ms. Sakimura is permitted to practice while in Japan.

49. *See id.* art. 46.

50. *See id.* art. 45(2)(v).

51. *See id.* art. 51

52. *Id.*

53. *Id.* art. 52.

54. *See id.* art. 53(2).

55. *See id.* art. 53(5).

56. *See id.* art. 53(7).

57. *See* Roger Goebel, *The Internationalization of Law and Legal Practice: Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 485 (1989).

an office meant that large law firms were the primary entrants to the market.⁵⁸ The first American firms to move into Japan included, *inter alia*, (1) Davis, Polk & Wardwell; (2) Skadden, Arps, Slate, Meagher & Flom; (3) Sullivan & Cromwell; (4) White & Case; and (5) Morrison & Foerster.⁵⁹ These firms largely sought to serve Japanese interests in operations and investments abroad, which initially meant transactions in the United States.⁶⁰ Firms moving into Tokyo were pleased with the Foreign Lawyers Law because it permitted them to take advantage of “the inevitable growth in the ‘use of Japan as a source of capital.’”⁶¹

One of the shortcomings of the 1986 law, however, was that it did not allow foreign firms to employ or form partnerships with *bengoshi*, which presented market entrants with a competitive disadvantage.⁶² American lawyers wanted to “provide the foreign law expertise and assistance with negotiations and transactions not normally available from *bengoshi* while also having *bengoshi* partners litigating and advising on Japanese law.”⁶³ *Bengoshi* are critical elements in transactions involving Japanese law, as *gaiben* are barred from advising clients on Japanese law.⁶⁴ Many foreign firms wanted to be able to provide clients with a full service experience, rather than, for example, provide advice on those portions of a deal that implicated U.S. law, and then refer the client to an independent Japanese firm to wrestle with the Japanese legal considerations. Therefore, foreign firms were competitively disadvantaged because, while they could not employ *bengoshi*, *bengoshi* could hire foreign lawyers as employees and thus be able to provide a “full service” law firm.⁶⁵

3. 1994 Amendments to the Foreign Lawyers Law

With American lawyers unhappy with some portions of the 1986 Foreign Lawyers Law, the USTR recommenced negotiations with the Japanese government in late 1989.⁶⁶ The major talking points, referred to as the “Five Points,” grew from a 1989 memorandum from the New York City Bar Association to the USTR.⁶⁷ The Five Points, which sought to ease certain restrictions on *gaiben*, were as follows:

- (1) *Gaiben* should be entitled to have *bengoshi* as partners;
- (2) *Gaiben* should be entitled to have *bengoshi* as employees;

58. See Susan S. Kigawa, *Foreign Lawyers in Japan: The Dynamics Behind Law No. 66*, 62 S. CAL. L. REV. 1489, 1507 (1989).

59. See *id.* at 1507 n.85. By 1991, there were 31 U.S. law firms that had established a branch office in Tokyo. See Symposium, *supra* note 1, at 859 (showing a table of all U.S. law firms abroad as of 1991).

60. See Kigawa, *supra* note 58, at 1507.

61. *Id.* at 1508 (quoting Shapiro, *Foreign Lawyers in Japan, Patience Pays*, LEGAL TIMES, April 18, 1988, at 18, col. 1.).

62. See *id.*

63. *Id.* n.95.

64. See *supra* notes 31-33 and accompanying text.

65. See Kigawa, *supra* note 58, at 1508 n.95.

66. See CONE, *supra* note 8, § 13.3.

67. See *id.* at 13.29.

- (3) *Gaiben* should be permitted to practice in Japan under their respective firm names;
- (4) Foreign lawyers should be able to credit nonhome-country time toward the five years required for becoming a *gaiben*;
- (5) *Gaiben* should be able to handle international arbitrations in Japan.⁶⁸

The Japanese engaged in careful and deliberate negotiations for over four years, ultimately deciding to offer only part of what the U.S. and European delegations were seeking.⁶⁹

As a result of the 1994 amendments, only the vestiges of a reciprocity requirement remain in the Foreign Lawyers Law. Article 10(3) precludes the Minister of Justice from granting approval of a foreign lawyer's application to become a *gaiben* unless at least one of two situations exist: (1) a Japanese lawyer (*bengoshi*) can receive in the applicant's home jurisdiction "substantially equivalent treatment" as accorded the applicant by the Foreign Lawyers Law or (2) where a *bengoshi* cannot receive this equivalent treatment, the non-approval of the foreign lawyer's application on this ground "violates the sincere implementation of the treaties or other international agreements."⁷⁰ The first prong—the "reciprocity prong"—was essentially eviscerated by the second prong, which was added in 1994. The "treaties or other international agreements" language in the second prong refers to the General Agreement on Trade in Services ("GATS"). Thus, after the 1994 amendments, "Japan has ceased to invoke reciprocity in respect of nationals of countries that are members of the GATS."⁷¹

With respect to the Five Points, Point One was partially granted, and is discussed in greater detail below. Point Two was denied—the 1994 amendments failed to change the prohibition that a *gaiben* shall not employ a *bengoshi*.⁷² Point Three was granted—*gaiben* are now allowed to use their firm names in Japan.⁷³ Point Four was also granted—now, non-home-country time can be credited toward the three years required for becoming a *gaiben*.⁷⁴ Article 5-3 of the Foreign Lawyers Law, effective as of 1996, reflects Japan's concession to Point Five—a *gaiben* can now "perform representation in regard to the procedures for an international arbitration case."⁷⁵

68. *Id.* §§ 13.3.1, 13.3.2.2.

69. *Id.* § 13.3.1 and 13:29—13:32.

70. See FOREIGN LAWYERS LAW, *supra* note 31, art. 10(3).

71. CONE, *supra* note 8, § 13.3.2.1.

72. *Id.* § 13.3.2.2.

73. See *id.*; see also *supra* note 49 and accompanying text.

74. See *id.*; see also FOREIGN LAWYERS LAW, *supra* note 31, art. 10(2). Also note that the current version of the Foreign Lawyers Law requires three rather than five years of experience in practice as a foreign lawyer in the country of acquisition of qualification. See *supra* note 38 and accompanying text.

75. See FOREIGN LAWYERS LAW, *supra* note 31, art. 5-3; see also Mitsuhiro Kamiya, Partner, Skadden, Arps, Slate, Meagher & Flom LLP (Tokyo), Development of Foreign Law Firms in Japan, Remarks at the ABA Section of International Law International Legal Exchange (ILEX) Briefing Trip: Rule of Law and Economic Development (July 10, 2008).

Although Point One was largely denied, a compromise was reached allowing *gaiben* to establish “joint enterprises” with *bengoshi*. Notice must be given to the JFBA prior to the establishment of a *gaikokuho* joint enterprise.⁷⁶ This notice shall include the name(s) of the *bengoshi* to be “employed,”⁷⁷ name or title and office of the *bengoshi* or corporation running the enterprise,⁷⁸ and the legal business to be performed.⁷⁹ Although its name might suggest otherwise, work done by the lawyers within a joint enterprise cannot be equally divided. Instead, Japanese law and all third-country law must be performed by *bengoshi*, while *gaiben* may advise only on their home-country law (or any “designated law”).⁸⁰ *Bengoshi* “employees” cannot work for a *gaiben* member.⁸¹ Additionally, the 1994 amendments restricted the practice of joint enterprises—they cannot appear before Japanese courts or administrative agencies, prepare notarial documents, or give advice on matters involving only Japanese law (with one exception).⁸²

In responding to the implementation of these new laws, American law firms favored something called “off shore participation,” whereby “a *bengoshi* member of a joint enterprise would be allowed to participate offshore (outside Japan) in a U.S. (or other foreign) law firm by being an offshore partner in the foreign firm and, simultaneously, a partner in the Japanese joint enterprise.”⁸³ It was reasoned that such an arrangement would attract *bengoshi* to joint enterprises by giving them the future ability to share in firm management and profits.⁸⁴ The 1994 amendments were noticeably silent on this important issue.⁸⁵ Some members of the JFBA were opposed to offshore participation and, as a result, there was speculation that the JFBA would challenge the establishment of joint enterprises on this ground.⁸⁶ In any event, several joint ventures were formed, and, in fact, some have grown large enough to compete with the major Japanese firms.⁸⁷ The issue of offshore participation is now moot given the Japanese Parliament’s 2003 passage of a law that allows full integration between foreign and Japanese law firms.⁸⁸ In other words, what American lawyers sought by offshore participation—economic and func-

76. See FOREIGN LAWYERS LAW, *supra* note 31, art. 49-3; see also CONE, *supra* note 8, § 13.3.2.3.

77. See FOREIGN LAWYERS LAW, *supra* note 31, art. 49-3(1)(i).

78. See *id.* art. 49-3(1)(ii).

79. See *id.*

80. See CONE, *supra* note 8, §13.3.2.3.

81. See *id.*

82. See *id.*

83. *Id.*

84. See *id.*

85. See *id.*

86. See *id.*

87. See Bruce E. Aronson, *Elite Law Firm Mergers and Reputational Competition: Is Bigger Really Better? An International Comparison*, 40 VAND. J. TRANSNAT’L L. 763, 820 (2007). See *infra* notes 135-38 for a list of some of the largest Japanese law firms.

88. See *id.* at 821; see also *infra* Part III.

tional incentives for *bengoshi* to enter into joint ventures—can now be realized by firms where foreign (mainly English and American) partners work alongside their Japanese equals.

III. Relaxation of Partnership Restrictions And Current Practice Environment

A. The 2003 Amendment to the Foreign Lawyers Law

In 2003, after several years of lobbying by certain foreign firms with Tokyo offices (and with the application of pressure by the U.S. Department of Justice),⁸⁹ the Japanese Parliament passed laws allowing full integration between foreign and Japanese law firms.⁹⁰ These changes came into effect in 2005.⁹¹ Article 28-2 of the Articles of Association of the JFBA, promulgated in 1949 to provide “guidance, liaison and supervision of practicing attorneys”⁹² specifies that “any necessary matters that relate . . . to the employment of practicing attorneys by *Gaikokuho-jimubengoshi* shall be stipulated in the Rules of this Federation.”⁹³ Pursuant to this requirement, the JFBA published draft rules on employment (“Draft Rules”), consisting of eleven articles, which govern the employment relationships of foreign and Japanese law firms.⁹⁴ The Draft Rules became effective on April 1, 2005.⁹⁵ While the Draft Rules specify the rights and duties of *gaiben* employers and their *bengoshi* employees, other rules cover the rights and duties of *gaiben* partners and their *bengoshi* partners. Collectively, these rules serve to instruct the foreign lawyer contemplating a business partnership with a Japanese law firm on the “rules of the road.”

The Draft Rules effectively reversed the regulatory position held by the JFBA for at least several decades. The JFBA had maintained that merely by employing *bengoshi*, a *gaiben* would be engaging in the unauthorized practice of Japanese law “through” the *bengoshi* employee.⁹⁶ The Draft Rules, however, which have

89. Telephone Interview with Hideo Norikoshi, Partner, Linklaters (April 7, 2009) [hereinafter Norikoshi Interview].

90. See Martin, *supra* note 25, at 193.

91. See *id.*

92. JAPAN FED’N OF BAR ASSOCIATIONS, ARTICLES OF ASSOCIATION OF JAPAN FEDERATION OF BAR ASSOCIATIONS, art. 3 (2004), <http://www.nichibenren.or.jp/en/about/pdf/articles.pdf>.

93. *Id.* art. 28-2.

94. See JAPAN FED’N OF BAR ASSOCIATIONS, RULES ON EMPLOYMENT OF BENGOSHI AND GAIKOKUHO-JIMU-BENGOSHI BY GAIKOKUHO-JIMU-BENGOSHI (DRAFT) (2004), http://www.nichibenren.or.jp/en/about/data/gaiben11_en.pdf [hereinafter DRAFT RULES ON EMPLOYMENT]. The employment rules have been incorporated into the Foreign Lawyers Law. See FOREIGN LAWYERS LAW, *supra* note 31, art. 49. However, for purposes of this discussion, I will refer only to the Draft Rules. I believe that this will maintain clarity, as the Draft Rules are free standing. In contrast, in the Foreign Lawyers Law, the employment rules have been weaved into those provisions governing joint venture arrangements.

95. See *id.*

96. See CONE, *supra* note 8, § 13.3.2.2.

now been incorporated into the Foreign Lawyers Law, explicitly permit *gaiben* to employ *bengoshi* and, of course, other *gaiben*. Yet, while liberalizing its previous position with respect to foreign/domestic employment relationships, the JFBA still sought to maintain the restricted scope of practice for foreign lawyers, that is, as previously mentioned, that *gaiben* may practice only the law of the country of primary qualification or the law of a third country if designated by the Minister of Justice (the so-called “scope of competence”).⁹⁷ Accordingly, a major focus of the Draft Rules is to ensure that *gaiben* do not engage in the unauthorized practice of Japanese law by somehow controlling the actions of their *bengoshi* employees.

Various provisions of the Draft Rules outline the rights and responsibilities of the *gaiben* employer and *bengoshi* employee when the *bengoshi* “undertakes legal business outside the scope of competence of his employer.”⁹⁸ Here, “*gaiben* employer” means, for example, a partner at a U.K. firm that employs a Japanese *bengoshi*. When that *bengoshi* is retained by a client to provide advice on Japanese law, he or she must do so “independently from the employer and on his [or her] own account.”⁹⁹ In order to prevent any misunderstanding, the *bengoshi* must explain to the client that it is the *bengoshi* him or herself, not the employer, that is taking the client’s case.¹⁰⁰ To ensure that the *bengoshi* is able to remain independent from his or her *gaiben* employer, the Draft Rules specify that the employer “shall not give a business order, based on employment relations, to [the] employed *bengoshi*. . . .”¹⁰¹ If, however, the employer nevertheless does instruct the *bengoshi* to take or not take a particular course of action and the *bengoshi* fails to comply, the employer cannot take adverse employment action against the *bengoshi*.¹⁰²

The remaining Draft Rules largely pertain to the notification responsibilities of a *gaiben* wishing to employ a *bengoshi*. A *gaikokuho-jimu-bengoshi* employer must provide notice to the JFBA in advance of hiring any *bengoshi* or *gaiben* of the following:

- (1) Names and registration numbers of the prospective employee(s);
- (2) Period of employment, if applicable;
- (3) Scope of legal business conducted by the employer; and
- (4) Scope of legal business conducted by the prospective employee(s).¹⁰³

Under Article 10 of the Draft Rules, a *gaiben* employer must retain a list of employed *bengoshi*, employment contracts, and other employment-related documents for at least three years after the termination of a particular *bengoshi*’s employment

97. See *supra* notes 31-32 and accompanying text.

98. DRAFT RULES ON EMPLOYMENT, *supra* note 94, art. 4.

99. *Id.*

100. See *id.* art. 5.

101. *Id.* art. 6(1).

102. See *id.* art 6(2).

103. *Id.* art. 7(1).

contract.¹⁰⁴ The JFBA may request such documentation from the employer or employee if it suspects a breach of those provisions related to the maintenance of a *bengoshi* employee's independence when handling matters beyond the scope of competence of their *gaiben* employer.¹⁰⁵

In addition to the Draft Rules that govern the *gaiben/bengoshi* employment relationship, changes made to Japanese rules in 2005 pertaining to the regulation of foreign lawyers are particularly notable because they allow Japanese partners to become equity partners of a foreign law firm.¹⁰⁶ More specifically, *bengoshi* and *gaiben* may now share profits, but profit sharing between *bengoshi* and non-*gaiben* foreign lawyers is not permitted.¹⁰⁷ So, for example, while a *bengoshi* partner at Linklaters' Tokyo office may share profits with an English *gaiben* partner working in the same office, the *bengoshi* partner may not share profits with a Linklaters partner working in New York. In addition to sharing profits, *gaiben* partners and *bengoshi* partners also share liability for matters handled by the Japanese office.¹⁰⁸

Even though current Japanese regulations place limits on a *bengoshi* partner's profit and liability sharing, it is understood at some firms that Japanese partners should enjoy all of the other benefits of partnership:

[T]here is concrete understanding throughout the global partnership (LLP) that Japanese partners should enjoy the same benefit and responsibility as partners in other jurisdictions as much as possible. Every partner (including *bengoshi* partner) is elected through the same, global partnership election process and on the same criteria.¹⁰⁹

However, *bengoshi* partners are currently unable to be a part of an international firm's "global LLP," and, therefore, *bengoshi* partners cannot be members of regional or global management.¹¹⁰

While 2005 reforms to the Foreign Lawyers Law are further steps toward liberalizing the regulation of foreign lawyers in Japan, the above analysis of the Draft Rules and partnership rules tends to suggest that foreign/Japanese partnerships will be rigorously supervised by the JFBA. The JFBA is chiefly concerned with ensuring that *gaiben* do not engage in the unauthorized practice of Japanese law, as the *junkaiin* were purported to have done after World War II.¹¹¹

B. Actions Taken in Light of the 2003 Amendment

There has been a fair amount of press coverage and academic commentary dedicated to the full integration of foreign and Japanese law firms. Perhaps the

104. *Id.* art. 10.

105. *See id.* art. 11(1).

106. *See* Aronson, *supra* note 87, at 820 n.158.

107. *See* Norikoshi Interview, *supra* note 89.

108. *See id.*

109. *Id.*

110. *Id.*

111. *See supra* notes 12-15 and accompanying text. *See also* Heather Smith, *Made in Japan*, THE AMERICAN LAWYER, NOV. 2003 ("Kimitoshi Yabuki, the director of the Office of International

most widely discussed international merger occurred between the global law firm Linklaters and a group of lawyers from the Japanese firm Mitsui, Yasuda, Wani & Maeda. In July of 2004, Linklaters announced its plans to merge with a group from Mitsui Yasuda.¹¹² The merger occurred on April 1, 2005—the same day the 2005 legislative changes became effective.¹¹³ The combination expanded the size of Linklaters' Tokyo office from 30 to 60 lawyers and bolstered the firm's preexisting strength in the area of capital markets.¹¹⁴ The new firm had the capacity to provide advice on U.S., English, and Japanese law.¹¹⁵

As described in 2007 by Akihiro Wani, co-head of Linklaters' Tokyo office, the merger was motivated by two factors.¹¹⁶ First, Mr. Wani commented that Mitsui Yasuda had begun to receive a higher volume of work from its foreign clients and those clients wanted to “use their London lawyers' affiliates rather than local Tokyo lawyers in regard to Japanese matters.”¹¹⁷ Mr. Wani further opined:

The Big Four Japanese firms shifted to domestic work, but we wanted to stay on the cross-border transaction side. To choose that area of practice, we needed to accept internationalization.¹¹⁸

Second, Mr. Wani stated that the management of international firms was superior to that of Japanese firms: “[While] the management of [Japanese] firms is doing quite well, I regret to say that the domestic law firms are still five or six years behind the international ones.”¹¹⁹ Those parties involved in the Linklaters/Mitsui Yasuda merger commented on the various benefits flowing from the decision to integrate the two firms. Anthony Cann, a Linklaters senior partner in London, suggested that the merger was consistent with the firm's global strategy to offer international and domestic advice in major financial centers.¹²⁰ Tony Grundy, formerly the joint managing partner of Linklaters in Tokyo, suggested that several international firms would follow Linklaters in partnering with Japanese firms:

Affairs of the Japan Federation of Bar Associations . . . will be spending the next two years drafting rules to implement reforms . . . allowing foreign firms to directly hire bengoshi and merge with their joint ventures. But he worries the bar won't be able to enforce the existing laws preventing foreign employers from telling bengoshi how to practice Japanese law.”)

112. *Japan's Lawyers Discover Globalisation*, THE ECONOMIST, July 17, 2004 [hereinafter THE ECONOMIST].

113. See Press Release, Linklaters, Linklaters Launches Japan's First International and Domestic Law Firm (April 1, 2005) [hereinafter Linklaters Press Release], <http://www.linklaters.com/locations/Japan/english/newsanddeals/newsdetail.asp?newsid=2274&localnavigationID=4523&keywords=Japan's%20first%20international&localpracticeareaid=&localofficeid=6&newstypeid=1>.

114. See *id.*; see also THE ECONOMIST, *supra* note 112; Aronson, *supra* note 88, at 817.

115. See Linklaters Press Release, *supra* note 113.

116. See Colloquy, *supra* note 23, at 70.

117. *Id.*

118. *Id.*

119. *Id.*

120. See Linklaters Press Release, *supra* note 113.

Clients ask us for this service all over the world. We think both Japanese and international firms will seek to provide domestic and international advice given the increasing cross-border activity of businesses operating in Japan.¹²¹

Additionally, on the date of the merger, Akihiro Wani stated his belief that the new firm would attract many *bengoshi*.¹²² Casper Lawson, formerly a partner with Linklaters Tokyo (now at Linklaters London), spoke of a certain client's delight in hearing news of the merger, given that the client, a global investment bank, had previously been receiving independent advice from both

Linklaters and Mitsui Yasuda.¹²³ The Tokyo office of Los Angeles-based Paul, Hastings, Janofsky & Walker, LLP ("Paul Hastings") also combined with a Japanese firm in 2005. In the mid-1990s, Paul Hastings entered into a joint venture arrangement with the Taiyo Law Office ("Taiyo").¹²⁴ Several months after the 2005 reforms, Paul Hastings announced that it would fully merge with Taiyo.¹²⁵ As a result of the merger, four Taiyo attorneys became Paul Hastings partners.¹²⁶ On the date of the announcement, Kooki Suzuki, former chair of Paul Hastings' Tokyo office, commented that:

Our full integration with Taiyo's tremendous team of *bengoshi* is the culmination of a successful partnership in which the two firms have grown together to offer both Japanese and foreign clients a unique and seamless combination of global practice standards and Japanese law and business knowledge in banking and finance, M&A, capital markets, litigation and real estate areas.¹²⁷

Today, Paul Hastings Tokyo is comprised of 16 lawyers, only three of whom are registered *gaiben*.¹²⁸ The firm touts its ability to provide its clients with not only unified "one stop shopping" but also with advice on a wide variety of international business transactions.¹²⁹

Interestingly, some of the largest joint ventures between foreign and Japanese law firms, including White & Case, Morrison & Foerster, and Baker & McKenzie GJB Tokyo Aoyama Aoki Koma Law Office (Gaikokuho Joint Enterprise), have not yet taken advantage of the 2005 deregulation.¹³⁰ Given that the 2005 changes

121. *Id.* Mr. Grundy is currently with Morrison Foerster in Tokyo.

122. *Id.*

123. *See* THE ECONOMIST, *supra* note 112.

124. *See* Press Release, Paul Hastings, Paul Hastings Announces Integration with Taiyo Law Office in Tokyo (Sept. 12, 2005), <http://www.paulhastings.com/NewsDetail.aspx?NewsId=65>.

125. *See id.*

126. *See id.*

127. *Id.*

128. *See* Paul Hastings website: http://www.paulhastings.com/offices_Tokyo_professionals.aspx.

129. *See* Paul Hastings website: http://www.paulhastings.com/offices_Tokyo.aspx.

130. *See* White & Case website: <http://www.whitecase.com/tokyo/>; *see also* Baker & McKenzie website: <http://www.bakermckenzie.com/Japan/Tokyo/>; Morrison & Foerster website: <http://www.mofo.com/japan-services/>.

were described by some as a “seismic,”¹³¹ the natural question is why so few foreign firms have chosen to pursue partnership arrangements and have instead remained in joint venture relationships or fully independent. This question will be explored in the following subsection by describing the perspectives of three lawyers practicing in Tokyo.

C. Current Practice Environment

1. *Remaining Independent*¹³²

Some foreign firms with an office in Japan have decided to stick to a particular practice focus and remain independent. For example, Simpson Thacher & Bartlett LLP, an American law firm, established a Tokyo office in 1990 and has remained independent ever since.¹³³ Simpson Thacher’s Tokyo office is currently staffed by eleven lawyers, almost all of whom are U.S. citizens with American legal educations.¹³⁴ The Simpson Thacher model for Japanese practice is essentially to maintain its character as a New York transactional firm—there is no interest in recruiting *bengoshi* in an attempt to hold themselves out as a Japanese firm.

Simpson Thacher seems to have remained independent for two interrelated reasons: (1) the firm believes that foreign clients wishing to do business in Japan are still best served by involving a leading Japanese firm for major transactional work and (2) cross-border activity in Japan is still surprising low. First, the largest Japanese firms—Nishimura & Asahi (471 lawyers),¹³⁵ Nagashima Ohno & Tsunematsu (347 lawyers),¹³⁶ Mori Hamada & Matsumoto (approximately 300 lawyers),¹³⁷ and Anderson Mori & Tomotsune (approximately 300 lawyers)¹³⁸—offer high quality service; many of their attorneys have completed LLM degrees at

U.S. law schools and have practiced as international associates at major U.S. or U.K. law firms.

The second reason why Simpson Thacher’s Tokyo office has chosen to remain independent is that there has not been the critical mass of true cross-border deals or foreign direct investment in Japan as was initially anticipated. For example, on the M&A front, the majority of transactional activity remains between domestic par-

131. See Jill Schachner Chanen, *Konnichiwa Bengoshi! Japan is Set to Relax Foreign Partnership Rules, and Competition for Mergers is On*, ABA J., Jan. 2005 at 19.

132. Unless otherwise noted, information in this section (III.C.1) was derived from a March 19, 2009 telephone interview with Alan Cannon, Partner, Simpson Thacher & Bartlett LLP (Tokyo office).

133. See Simpson Thacher website: http://www.stblaw.com/offices_tokyo.htm.

134. See Simpson Thacher website: <http://www.stblaw.com/officeContent.cfm?itemID=90&focusI=6>.

135. See Nishimura & Asahi website: <http://www.jurists.co.jp/en/firm/outline.html>.

136. See Nagashima Ohno & Tsunematsu website: <http://www.noandt.com/en/summary/firmprofile.html>.

137. See Mori Hamada & Matsumoto website: <http://www.mhmjapan.com/en/firm/outline.html>.

138. See Anderson Mori & Tomotsune website: <http://www.amt-law.com/en/office1.html>.

ties. Joint venture arrangements may have a hard time competing against the major domestic Japanese firms for this kind of work, to the extent the joint ventures have raised the rate scale for their *bengoshi* up to the international rate scale. Therefore, while some of the joint ventures may perhaps be lacking in depth as compared to the largest Japanese firms, they are endeavoring to charge significantly higher rates.

Even though Simpson Thacher's Tokyo office has chosen not to pursue a joint venture or partnership, Mr. Cannon, a partner in the firm's corporate department in Tokyo, understands why some firms have taken these approaches. One benefit of associating with a Japanese firm is the potential for a foreign firm to cultivate legal work based on relationships that the Japanese firm has developed with Japanese businesses. Morrison & Foerster ("MoFo") is a good example. MoFo's Tokyo office, associated with the Japanese firm Ito & Mitomi,¹³⁹ has a very large general corporate practice, which includes, *inter alia*, patent work and litigation. Many of the firm's clients include Japanese technology companies. As previously mentioned, *gaiben* cannot partake in litigation before Japanese courts, appear before administrative agencies, or prepare documents to be submitted to such agencies.¹⁴⁰ Because of this restriction, for their litigation needs, for example, major Japanese technology companies must turn to MoFo's Japanese *bengoshi*. However, relationships built in this capacity have helped position MoFo to assist these companies when they have done acquisitions or other projects outside of Japan.

For those firms with the ambition of truly unified foreign/Japanese practices, a joint venture arrangement is quite onerous and artificial. For example, firms in a joint venture must strictly maintain separate records, and must pay heed to an administrative regime under which, while the two affiliated entities could be held out as cooperating, foreign lawyers could not be seen as directly supervising *bengoshi*. Thus, the 2005 regulatory changes have been perceived favorably by those firms that want to be able, through a single client contact, to offer advice on the law of multiple jurisdictions.

2. Joint Venture Practice¹⁴¹

Many foreign firms with offices in Japan have been quite content associating with Japanese law firms or individual Japanese *bengoshi*. Based on the comments of some Japanese practitioners, few firms have chosen to take advantage of the 2005 deregulation because a joint venture is virtually indistinguishable from a partnership. Peter Kilner, Managing Partner of Clifford Chance's Tokyo office, has stressed the closeness of that firm's relationship with its Japanese colleagues—"I sit in with one of the *bengoshi* associates, or he sits in with me." In addition,

139. See Morrison & Foerster website: <http://www.mofo.com/japan-services/>.

140. See *supra* note 34 and accompanying text.

141. Unless otherwise noted, information in this section (III.C.2) was derived from an April 3, 2009 telephone interview with Peter Kilner, Office Managing Partner, Clifford Chance (Tokyo office).

Professor Bruce Aronson, commenting on his visit to Jones Day's Tokyo office, stated:

I know you had two separate firms that were in a joint venture relationship, with separate books and administration. But when I walked down the hall, it looked like one law firm to me. Japanese and American attorneys had offices next to each other; there were just two firm names at the main entrance.¹⁴²

As a final example, MoFo suggests that Ito & Mitomi attorneys are “work closely with Morrison Foerster in providing seamless, quality legal services for the joint enterprise's clients.”¹⁴³

Interestingly, Clifford Chance is associated not with one single Japanese law firm, but with partners from three firms. The original intent behind forming these relationships was to offer international clients a “one stop shop.” Previously, clients had often shared with Clifford Chance attorneys their frustration about how a particular transaction was being handled. For example, a client would be unable to get in contact with a particular *bengoshi* at one of the independent Japanese firms. Mr. Kilner has said that now, under their joint venture arrangement, if a foreign client happens to be having an issue with a particular *sensei*—perhaps a misunderstanding arising from cultural differences—it is quite easy for a *gaiben* to walk down to the *bengoshi*'s office and discuss the matter directly. Moreover, Mr. Kilner stresses the flexibility of a joint venture, both in terms of remunerating Japanese partners and in shielding *bengoshi* from those rules governing foreign law firms.

According to Mr. Kilner, Clifford Chance has not engaged in a full merger with its Japanese partners merely because of the “normal inertia of life.” The joint venture structure works reasonably well and, as a result, there is no urgency to change it. Professor Aronson's research has yielded a similar conclusion:

It is true that pending liberalization acted as an impetus for English (and U.S.) firms to begin a new round of approaches to Japanese firms. It also marked the first time that foreign firms could reward partners in their Japanese counterpart firms with full equity partnership positions in the acquiring firm. However, it is not entirely clear whether liberalization of the activities of foreign lawyers had a decisive impact on alliance/merger prospects. Over the last few years the foreign affiliated venture firms have grown substantially, function fairly well on a daily basis utilizing both U.S. and Japanese attorneys, and have learned to reduce the expense and inconvenience resulting from their joint venture structure to a bare minimum.¹⁴⁴

142. Colloquy, *supra* note 23, at 69.

143. See <http://www.ilslaw.co.jp/directory2008/japan/Ito%20&%20Mitomi.pdf>.

144. Aronson, *supra* note 87, at 122 n.160. See also E-mail from Robert Grondine, Partner, White & Case (Tokyo) to Author (April 23, 2009) (on file with author) (“[T]here is no clear evidence of such a direct connection positive or negative from the 2005 changes to the Gaiben law. Creative lawyers were effective in working around the limitations before 2005.”).

However, even though Clifford Chance is comfortable with its current arrangement, it plans to “undoubtedly move toward a full merger.” Why? First, the firm has opted to form partnerships in almost every other foreign jurisdiction in which it operates where full mergers are permitted. “Why should Japan be any different,” asks Mr. Kilner. Second, while its overall importance is debatable, there is a psychological downside to a joint venture in that the *bengoshi* partners are not full members of the firm, even though on a day-to-day basis, everything operates as one firm.

3. Full Integration¹⁴⁵

Adding to the previous discussion in Part III.B, some Japanese practitioners are of the opinion that a single partnership comprising both *gaiben* and *bengoshi* is superior to the alternatives. Before the 2005 legislative changes, Linklaters had been considering whether to have Japanese law capability. The consensus among management was that acquiring this capability would only be desirable if a single organization comprising both *bengoshi* and *gaiben* could be achieved. The firm wanted to be able to provide clients with integrated legal advice:

We did not want to say to clients, “the structure works under English and U.S. laws, if there is no issue under Japanese law” but we wanted to say, “the structure works, full stop.” For that to be achieved, we believed it would be necessary for the economic interests and liability positions of the *bengoshi* practice and the *gaiben* practice to be completely aligned and that it would not be sufficient for two separate practices to form a joint venture. With a single organisation and a lockstep, I believe there is an inherent incentive between *bengoshi* partners and international partners to share clients and know-how and to train lawyers together, so that consistent approach to transactions can be developed throughout the Linklaters network.

Although the 2005 deregulation permitted Linklaters to develop a Japanese law capability in the way it had envisioned, Mr. Norikoshi notes that the current regulatory environment is not ideal, as it does not allow profit sharing between *bengoshi* and non-*gaiben* foreign lawyers. In other words, current Japanese regulations do not permit profit sharing between *bengoshi* and, for example, a Linklaters partner in New York or London.

In addition to superior client service, fully integrated firms like Linklaters may also be better able than their competitors to recruit and retain highly qualified *bengoshi*. There are a number of reasons why this might be the case. First, an international firm can offer newly qualified *bengoshi* the ability to work on high-profile cross-border transactions. Second, young Japanese lawyers might welcome

145. Unless otherwise noted, information in this section (III.C.3) was derived from an April 7, 2009 telephone interview with Hideo Norikoshi, Partner, Linklaters (Tokyo office).

the opportunity to work abroad, in one of the firm's European offices, for example. Third, particularly for those *bengoshi* with more insatiable ambitions, an international firm like Linklaters offers *bengoshi* the potential to become a partner in a firm with an international reputation. The predominant recruitment challenge for the major international firms is market recognition. For individuals interested in commercial work, the major domestic Japanese firms perhaps appear to be a safer choice. Those firms are substantially larger than many of the international firms with Tokyo offices—the largest domestic firms have 300 to 470 lawyers,¹⁴⁶ compared to 60 to 70 lawyers in the largest foreign firms. Additionally, attaining partnership at domestic Japanese firms tends to be easier than doing so at the major international firms.

In a nutshell, the best argument for why a fully merged law firm in Japan may be superior to its alternatives seems to be that it can offer seamless advice to clients. And while this might also be achievable with a closely-knit joint venture arrangement, a full partnership arrangement may be better able to serve clients because *gaiben* and *bengoshi* (1) share profits, (2) share liability, (3) are part of the same structured training programs, and (4) have developed, through practicing together, a similar work ethic.

Domestic Japanese law firms have also taken advantage of the 2005 deregulation. Atsumi & Sakai (“Atsumi”) is a Japanese firm that focuses on finance and securitization practices.¹⁴⁷ In 2005, the firm began hiring foreign lawyers and promoting them to partner. This “enable[d] [Atsumi] to provide comprehensive, highly sophisticated drafting, research and other legal services seamlessly across multiple jurisdictions.”¹⁴⁸ Bonnie Dixon, an American lawyer, was the first foreign lawyer to become a partner of a Japanese law firm.¹⁴⁹ Ms. Dixon has explained that the 2005 regulatory changes were seen as an opportunity for her firm:

[Atsumi] had historically, like many Japanese law firms, hired clerks to check the English in documents, but those folks only stay for a couple of years, do not make any relationship with the clients and leave for career track jobs just as they are getting to know the office and the clients and our document forms. We wanted long term people who would be able to help grow the business and also who could help us grow our international practice. We also wanted senior people to lend better quality to our drafting and advice, but senior people will not come on a two year clerk type of contract, so a partner track position is needed. The new law provided this format.¹⁵⁰

146. See *supra* notes 135-38 and accompanying text.

147. See Atsumi & Sakai website: <http://www.aplaw.jp/en/firm/>.

148. *Id.*

149. E-mail from Bonnie Dixon, Partner, Atsumi & Partners (firm name was changed to Atsumi & Sakai on November 1, 2010), to Author (Nov. 4, 2009) (on file with author).

150. *Id.*

From Ms. Dixon's perspective, while the regulatory changes made foreign firms more significant competitors in terms of recruitment of *bengoshi*, the changes did not alter the lack of competition between foreign and domestic firms for business. Atsumi did not take on foreign partners in order to compete with foreign firms: "We do not consider the foreign firms to be competitors. In fact, many foreign firms do not have large numbers of *bengoshi* so when a large scale deal such as merger or securitization comes to the firm they often farm out some of the work to us. We regularly work on large due diligence projects for foreign firms in Tokyo."¹⁵¹

IV. Conclusion

As demonstrated by the discussion of the 1986 Foreign Lawyers Law and the 1994 and 2005 amendments thereto, Japan has taken significant steps in recent years to liberalize its regulation of foreign lawyers. This process continues. In 2008, the Ministry of Justice and the JFBA began formulating recommendations on measures to allow *gaiben* to establish professional corporations and branch offices on the same basis as Japanese lawyers.¹⁵²

Today, many foreign law firms have a Tokyo office and are able, based on the gradual reforms enacted over the years, to organize their practices in a variety of ways. Some, like Simpson Thacher, have chosen to remain independent.¹⁵³ Others, like Clifford Chance, have opted to formally associate with *bengoshi* partners in joint venture arrangements.¹⁵⁴ And a few foreign firms, like Linklaters, have decided to enter into full partnerships with Japanese firms.¹⁵⁵ Many firms will likely continue in their joint venture relationships and not take advantage of the 2005 deregulation, reasoning that their current arrangement is virtually indistinguishable from a full partnership. Other international firms, however, may slowly move toward full partnership.

In 2002, while an associate at Sullivan & Cromwell's Tokyo office, Eric Sibbitt stated: "Prominent [*gaiben*] in Tokyo seeking 'unrestricted freedom of association' between foreign and Japanese lawyers continue to go head-to-head with protectionist elements within the [JFBA]."¹⁵⁶ This protectionism, albeit in diluted form, continues to be a reality in Japan. As suggested at several points in the above

151. *Id.*

152. See UNITED STATES TRADE REPRESENTATIVE, 2009 TRADE POLICY AGENDA AND 2008 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 168-69, http://www.ustr.gov/.../asset_upload_file422_15403.pdf.

153. See *supra* Part III.C.1.

154. See *supra* Part III.C.2.

155. See *supra* Part III.C.3.

156. Sibbitt, *supra* note 2, at 504.

discussion, the JFBA continues, at times, to be a thorn in the side of foreign lawyers. Therefore, while this paper is primarily meant to illustrate regulatory changes that have provided foreign lawyers greater freedom in Japan, the reader should nevertheless understand that the practice of law in Japan by “purveyors from abroad”¹⁵⁷ is still highly regulated.

157. *See supra* note 18 and accompanying text