

Law Society of England and Wales – Written Evidence (JTN0005)

Summary

1. It is vital for our trade negotiators to put legal and other professional services at the forefront of forthcoming trade discussions due to the economic importance of the sector, both in its own right and in its role as a facilitator of all international business transactions.
2. Generally regarding UK trade negotiations, the Law Society recommends:
 - That legal and other professional services be at the forefront of the Japan and all other forthcoming trade discussions, in order to ensure that the UK is negotiating on its areas of strength and securing ambitious deals for its leading sectors.
 - That trade negotiations on legal services should seek the ability for UK legal professionals¹ to do the following:
 - Advise clients on UK laws (England and Wales, Scotland, Northern Ireland) under home state title (solicitor, barrister/advocate) and public and private international law to the extent that they are entitled to practise in their home jurisdiction;
 - Provide advice through commercial presence for firms, temporary practice (fly-in fly-out), establishment rights for individuals, as well as digital provision;
 - Have a clear, transparent and proportionate path to requalification into the host state profession;
 - Represent their clients in arbitration, conciliation and mediation in international proceedings; and
 - Establish firms, to partner with, employ and be employed by local lawyers.

¹ While the Law Society of England & Wales is the representative body for England & Wales, these asks are applicable across the entire legal profession of the United Kingdom.

- That all negotiations should be complemented with market access discussions. Trade negotiations may provide a catalyst for change outside of the text of a free trade agreement (FTA), particularly if both governments give impetus to relevant authorities to progress these.
 - That the UK Government continue to recognise that trade goes hand in hand with respect for the rule of law and so consider human rights clauses in line with previously negotiated FTAs.
3. Japan has been moving towards a more open legal services market over the last 30 years and many of the obstacles facing foreign lawyers have been removed. However, more can be achieved to help foreign and domestic lawyers work together and benefit both the Japanese and UK market.
 4. In the context of FTA discussions with Japan, ideal outcomes are:
 - reciprocal recognition of legal qualifications, specifically for the purpose of registration as a foreign lawyer;
 - a streamlined registration process for foreign lawyers; and
 - mutual acceptance of a wider variety of business structures through which lawyers can operate, in particular the UK limited liability partnership (LLP) structure.
 5. This would allow firms to:
 - practise to the same extent as permitted in their qualifying jurisdictions;
 - employ lawyers who are appropriately qualified in relevant home jurisdictions without imposing additional requirements to prove competency;
 - streamline the process of bringing international lawyers into Japan (including between offices in global firms); and
 - establish in Japan under the existing foreign entity structures (including limited liability).
 6. Addressing these issues is consistent with the rights currently afforded to Japanese lawyers in England & Wales. The regime in England & Wales allows foreign lawyers to practise in the

jurisdiction, contribute to the economy and increase trade with foreign countries while retaining certain rights for locally qualified lawyers.

7. An FTA would undoubtedly bring benefits to both countries. While an FTA can sometimes be a blunt instrument in achieving liberalisation, as dealing with domestic regulations is not as simple as seeking to lower tariffs on goods, the Law Society sees an FTA as a platform for future profession to profession discussion to further enhance the relationship between the Japan and the UK.

Introduction

8. The Law Society of England and Wales (The Law Society) is the independent professional body that works globally to support and represent 200,000 solicitors, promoting the highest professional standards and the rule of law.
9. Services, and in particular legal services, play an important role in facilitating the globalised market, both directly and indirectly. Nearly all international commercial transactions require the services of lawyers from two or more jurisdictions and this can be done most effectively where foreign and local firms can work together.
10. According to an analysis by KPMG, legal services contributed £60bn to the economy in 2018 and supports around 552,000 full time employees in the UK. The legal services sector also has a significant impact on wider economic growth in the UK through the enabling role it plays.
11. In addition, the legal sector contributes to the effective interpretation and implementation of the rule of law, creating certainty and further facilitating investment and economic growth.

Does the Department for International Trade (DIT)'s Strategic Approach, published on 13 May 2020, set out the right objectives for negotiations? How effectively does that Strategic Approach represent the interests of different groups and regions across the country, including the devolved nations, businesses, civil society, and individuals?

Legal services in trade discussions

12. The Law Society believes that it is vital for our trade negotiators to put legal and other professional services at the

forefront of forthcoming trade discussions due to the economic importance of the sector, both in its own right and in its role as a facilitator of all international business transactions. The UK should ensure that it is negotiating on its areas of strength and so secure ambitious deals for its leading sectors.

13. This is particularly important in this negotiation – considered in the Strategic Approach as “an FTA to underpin the UK’s strategy for Asia Pacific”.
14. The Law Society recommends that trade negotiations on legal services seek the ability for UK legal professionals to do the following:
 - a. Advise clients on UK laws (England and Wales, Scotland, Northern Ireland) under home state title (solicitor, barrister/advocate) and public and private international law to the extent that they are entitled to practise in their home jurisdiction;
 - b. Provide advice through commercial presence for firms, temporary practice (fly-in fly-out), establishment rights for individuals, as well as digital provision;
 - c. Have a clear, transparent and proportionate path to requalification into the host state profession;
 - d. Represent their clients in arbitration, conciliation and mediation in international proceedings; and
 - e. Establish firms, to partner with, employ and be employed by local lawyers.

Current difficulties for trade in legal services with Japan

15. The DIT’s Strategic Approach seeks an FTA that will “allow professionals to move more easily and support recognition of professional qualifications, for example in accountancy and the legal profession.” The Law Society agrees that further support is required to address the current regulatory difficulties for those wishing to enter the market.
16. Half of all UK exports to Japan are services. There has been an expansion of outbound M&A activities by Japanese firms in

recent years and a growing appetite in investing in overseas energy projects, creating strong demand for international legal services. At the same time, Japan's fintech market is growing, with both domestic and international fintech firms establishing

17. While Japan is relatively open for foreign legal services, remaining procedural issues make it difficult for firms and lawyers wishing to enter the market. These increase costs for clients in Japan; limit international opportunities for local lawyers; and prevent international talent from contributing to the local market, particularly those without the support of larger organisations.
18. The difficulties, in order of priority, are:
 - a. experience requirements and procedural burdens for registration as a foreign lawyer;
 - b. limited availability of permitted law firm structures;
 - c. The 180-day rule (see paragraphs 35-36 below)
19. Other difficulties faced by firms include restrictions in opening subsequent offices and uncertainty for foreign lawyers in the ability to conduct international arbitration. However, the Law Society understands that legislation that has recently passed the Japanese Diet will significantly reduce these hurdles. The Amendments to the *Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers* (Foreign Lawyers Act) will come into effect in August 2020, with final changes to opening offices taking place in two years' time. The Law Society supports the speedy implementation of these changes.
20. The Law Society of England & Wales strongly supports the amendments to the *Foreign Lawyers Act*. However, further support is required to address the current regulatory difficulties for those wishing to enter the market.
21. Open dialogue between Law Society, the UK Government and Japanese counterparts could further assist in these matters in order to raise awareness of the practicalities of doing international business.
22. Additionally, exploring whether reciprocal recognition of legal qualifications (especially recognition of solicitor traineeships as valid

experience for the purposes of registration), firm-wide registration, and mutual acceptance of a wider variety of business structures are issues that may be suitable for bilateral trade talks or future market access discussions.

23. The Law Society welcomes calls in the Strategic Approach for an FTA with Japan that could allow professionals to move more easily and support recognition of professional qualifications.

Registration as a foreign lawyer (experience requirements)

24. Under Japanese law, only foreign registered lawyers (*gaikokuho jimusho bengoshi* or '*gaiben*') may give advice on foreign law in Japan. In order to qualify as a *gaiben*, an applicant must have three years' post qualified experience, with two of those years of practice gained outside of Japan (the "two-year rule").
25. No equivalent requirement is imposed on local Japanese lawyers (*bengoshi*) in relation to Japanese law. *Bengoshi* are competent to practise as soon as they have qualified.
26. The Law Society notes that Amendments to *Foreign Lawyers Act* that reduce the "two-year rule" to one year will come into effect from August this year. While a great improvement to the previous situation, this will still require foreign lawyers to have one year of overseas experience and hold three years of post-qualification experience to register as *gaiben* in Japan, therefore depriving the Japanese legal market of the full benefits of a global legal services sector.
27. In England and Wales there is no requirement for foreign lawyers to register or be approved if they are only practising the law of their home jurisdiction, except where they are entering into partnership with solicitor or solicitors of England and Wales
28. The Law Society supports greater recognition of the experience gained during the process of becoming a solicitor of England & Wales through the reduction or waiving of the experience requirements for registration as a foreign lawyer in Japan. This is reflective of the similarities in the route to becoming a solicitor of England & Wales to the Japanese system.
29. The UK Government should seek removal of any work experience requirement (to be gained either within or outside of

Japan) imposed on solicitors of England and Wales in order to register as foreign registered lawyers in Japan.

30. However, if such a requirement is necessary, the UK Government should push for this to be based on experience in home jurisdiction law itself rather than where the experience is obtained.

Registration as a foreign lawyer (procedural burdens)

31. In addition to the experience requirements (including the "two-year rule") for registration as a foreign lawyer, the process for registration can be difficult.
32. The documents required for registration are not always consistent across applications and the process typically takes around six months. It has been reported that this has taken anywhere between three to eight months. This is in contrast with other markets in the region such as Hong Kong, where registration as a foreign lawyer takes around two weeks. This results in a number of documents becoming "stale" (such as the extract from the roll) which then need to be updated and resubmitted if an application is questioned.
33. Currently, foreign registered lawyer application and registration can only be carried out on an individual basis. Streamlining this process is an important objective for foreign lawyers in Japan. Several regulatory burdens could be reduced if registration as a foreign lawyer could be administered instead at a firm level, as is the situation in a number of other Asian legal services markets including Hong Kong.
34. In England and Wales, there are no requirements for individual lawyers to register, except where a foreign lawyer is entering into a partnership with a locally regulated entity.
35. The UK Government should encourage alternatives to this process, for example, registration on a firm basis. This could involve the firm providing information on a biannual basis and therefore allowing for a reduced process for approving individuals.

Permitted law firm structures

36. Japan does not allow firms (either foreign or local or combinations thereof) to operate under limited liability structures in

practice. While the Japanese Corporates Code permits limited liability structures, the Law Society understands that this does not treat companies as separate legal entities and is not an option open to foreign law firms.

37. The limited liability partnership (LLP) structure has become a common and preferred business structure in many countries including in England and Wales. These structures combine the benefits of limited liability with the flexibility of partnerships and are widely regarded as supporting growth and investment. Its unavailability in Japan makes joining in the market for both small and larger firms less attractive and is a deterrent for foreign lawyers considering coming to Japan. This is counterproductive to initiatives to make Tokyo a hub for professional services.
38. Further, international UK-headquartered firms carry global professional indemnity insurance cover (£100m+ per claim), and would take out additional "top-up" cover for any work with a value exceeding their minimum indemnity limit, implying that there is no real risk with allowing them to operate as LLPs.
39. Permitting these structures would greatly increase the attractiveness of doing legal business in Japan and would equally benefit *bengoshi*. The UK Government should continue to promote the benefits and encourage the adoption of a structure similar to the UK LLP in Japan.

180-day rule

40. The requirement for international foreign companies and lawyers to be resident in Japan for 180 days per year is also an issue for foreign lawyers.
41. The 180-day rule negatively impacts on the amount of fly-in fly-out work being done by foreign lawyers, reducing the attractiveness of using Japan as a hub for North Asia. This is especially difficult for foreign lawyers who are required to maintain residence, whereas Japanese lawyers can keep their lawyer status even if they are not resident in Japan.

How reliable do you find the DIT's assessment of the potential impacts of the proposed agreement with Japan, either as set out in the Strategic Approach or elsewhere?

42. The UK Government should raise awareness of the practical implications of this rule.

Market access in legal services

43. A challenge for trade in legal services is that many of the barriers are “behind the border”. In this respect, an FTA can sometimes be a blunt instrument in achieving liberalisation, as dealing with domestic regulations is not as simple as seeking to lower tariffs on goods. The extent that an FTA will impact on private market activities in this respect is ultimately dependent on its interaction with government regulation.
44. The DIT have provided a comprehensive assessment of the potential impacts of the proposed FTA but must also consider the additional benefits that come from these discussion as well as their limitations. As a result, the Law Society notes that all key asks in these negotiations should be complemented by continued market access discussions.
45. An FTA would undoubtedly bring benefits to both countries. In addition, the Law Society does not see an FTA as an end in itself, but as a platform for future discussions and negotiations to further enhance the relationship between the Japan and the UK.
46. Certainly, as the UK seeks an FTA with Japan, the Law Society would seek to use this as an opportunity to deepen discussions on market access with key Japanese stakeholders. It also welcomes any mechanism that may be included for the Law Society and the Japan Federation of Bar Associations to engage with the view to addressing these barriers and promoting two-way professional mobility of lawyers between Japan and the UK.

Benefits of legal services liberalisation²

47. Legal services have a wider impact on the economy than purely economic benefit and positively affects sectors beyond the legal services industry.

² For more information see David Collins, *The Public International Law of Trade in Legal Services* (CUP, 2018) and Carolyn Thurston Smith and Nankunda Katangaza, “Lawyers Without Borders” (*International Trade Law and Regulation Journal*) 2014.

48. **Benefit to the Economy:** An open legal services market facilitates cross-border trade, makes doing international business easier, and contributes to economic growth. The Japanese Ministry of Justice has itself noted that demand for foreign law services is expanding in line with an increase in international business transactions.
49. Greater connectivity with the global legal services market helps local companies realise their international ambitions at a lower cost and become more internationally competitive. International law firms are well placed and possess the expertise and global network to advise clients investing abroad.
50. The legal services industry plays a vital facilitating role in sustaining and growing other parts of the economy, including manufacturing, construction, agriculture and mining, as well as other service sectors.
51. **Benefit to Japanese lawyers:** Addressing the above barriers would lead to an upskilling of the local legal profession as more local lawyers gain experience in international matters.
52. The establishment of foreign law firms in Japan would provide opportunities for young legal professionals to develop globally competitive skills without needing to leave their country for another international hub. Additionally, the ability to work for a foreign firm and progress their legal career in an international firm creates greater choices for lawyers while remaining in Japan.
53. **Benefit to Japanese law firms:** Exposure to competition makes domestic law firms stronger, better, and more resilient, contributing to the growth of a more dynamic, experienced and capable legal profession in Japan.
54. The size of the domestic market grows substantially as the liberalisation process progresses, as work previously offshored to international law firms is completed locally.
55. The current requirements reduce the international expertise joining the Japanese market and the ability of international firms (Japanese or foreign) to retain the best practitioners. Internationally experienced lawyers are deterred from entering the market due to the long and difficult processes. Japanese firms operating

internationally agree that the “two-year rule” hampers their recruitment processes, as they are unable to offer registration for foreign lawyers to otherwise talented lawyers from overseas who do not meet the experience requirements.

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