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The International Commercial Solicitor: proposing a new legal profession for Japan - and the world

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Introduction

This paper is a sort of "thought experiment" intended to stimulate discussion about the following question: "if we were to design an entirely new pan-national legal profession that both specialized in international business and was not tied to any particular state or country, what would it look like?" In addition to offering some very preliminary answers to this question on topics such as training and qualification, this paper also offers some reasons why such a profession should actually be created. Some of the potential benefits to jurisdictions recognizing this new type of "lawyer" are also considered.

For purposes of this paper, the proposed profession will be referred to as the "International Commercial Solicitor" or "ICS". As the name suggests, the training and professional qualifications of this new type of professional would be focused on the law of international business, trade and finance, rather than litigation. The ICS would be trained and qualified in a different way from lawyers, attorneys, barristers, advocates and other established legal professions of countries around the world. The process of qualifying as an ICS would reflect the realities of international business, rather than courtroom procedures and other jurisdiction-specific training received by existing lawyers.

By its very nature, the ICS concept envisions a qualification that could be – should be- recognized in any jurisdiction, or at least as many jurisdictions as possible. Part of its special character would be that it would be an "open source" professional qualification; the same basic education, training and qualification testing should be obtainable in any country or territory that recognizes the ICS as a licensed legal professional (referred to below as a "Recognizing Jurisdiction"). Furthermore, the validity of an ICS qualification obtained from any Recognizing Jurisdiction should be recognized by all other Recognizing Jurisdictions for employment and practice purposes[1)].

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1) Qualification for residence / employment status under the immigration laws of each

The ICS as a new legal profession for Japan

The author believes that as one of the world's leading economies and a significant actor in international institutions and in the fields of international and comparative law, Japan would be an ideal candidate for becoming an early (even the first) Recognizing Jurisdiction. Admittedly, the many vested interests represented by Japan's existing legal professions and various governmental interests might also render the ICS model unsuccessful in Japan even if attempted. Nonetheless, the author posits that becoming a Recognizing Jurisdiction would bring Japan a number of benefits, including: (i) addressing the imbalance between the degree of involvement in global business of Japanese companies compared to the involvement of the country's lawyers in related activities, (ii) contributing to Japan's efforts to become a global center of education by attracting more students from abroad, and (iii) providing an opportunity to revitalize the country's poorly-executed, deeply troubled law school system. With respect to (iii), the travails of the Japanese law school system are a useful point of reference point for understanding how the ICS would be different from existing national legal professions in Japan and elsewhere.

Japanese law schools as part of a failed "domestic model"

According to the Recommendations of the Japanese government's Justice System Reform Council, "*lawyers should be enabled to offer quality legal services to meet legal demands in a time of internationalization*."[2] Although Japan's new law school system was supposed to play a role in achieving this goal, it is probably safe to say that the system has failed and will continue to do so. The reasons for this failure are well-known to anyone involved in Japanese legal education, so only a brief discussion will be offered here.

The reforms brought about with the introduction of Japan's system of graduate, professional law schools (which first opened their doors to students in 2004) essentially made graduating from one of these institutions a prerequisite for sitting for the national bar exam. Although law schools are licensed by the government, no meaningful limits were imposed on the number of law schools that were licensed, and, more importantly, the number of law graduates sitting for the bar exam every year.

Recognizing Jurisdiction would of course be an entirely different matter outside the scope of the ICS regime.

2) http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html (last accessed November 5, 2012).

Notwithstanding the new law school system, the Japanese government continues to use its control of the National Bar Exam (administered by the Ministry of Justice) to impose what in anti-trust parlance might be called "production quotas" on entry to the legal profession. Thus, although often mistakenly characterized as being "difficult," Japan's bar exam is merely very competitive - its pass rate is and always has been primarily a function of the number of people sitting the exam versus the number of people the government allows to pass.

To slightly oversimplify, the pass rate for the Japanese bar exam is based on a numerator which is regulated (the number of people allowed to pass), but a denominator which initially was not (the number of people graduating from law school and therefore eligible to sit for the exam). The first bar exam under the new system had a pass rate of 48%. Most of the 52% who failed sat the exam again the next year, competing with a new crop of law school graduates on an exam which only a fixed number of people were allowed to pass every year. As a result, pass rates predictably dropped and by 2012 had fallen to 25%. This renders the investment of time and tuition involved in going to a Japanese law school a very risky proposition, particularly since by law graduates are only allowed to sit for the exam three times. As a result, much of what in recent years nominally passes for "educational policy" relating to law schools is actually devoted to regulating the denominator of the pass rate equation as well, by reducing the number of people graduating from law schools.

The effect of this situation has been disastrous, at least in the eyes of those who think law school education should be about something more than just preparing students for a standardized exam. Unfortunately, many law school students and faculty alike are now required to focus almost exclusively on passing the bar exam while at the same time being subject to bizarre regulatory restrictions intended to prevent them from actually doing so.

One result of this that subjects that are not on the bar exam – foreign and comparative law, practical skills, classes taught in English or other foreign languages, even family law, have fallen by the wayside. Professors (such as the author) may want to teach such subjects and students may want to learn them, but devoting too much time to subjects that are not related to the bar exam increases the already significant risk of failure.

The core bar exams subjects are constitutional and administrative law, criminal law and procedure, and civil law and civil procedure. All are exceptionally "domestic" subjects. Furthermore, several of these core subjects involve a heavy

focus on the process of litigation in Japanese courts. Corporate law is also tested but as an entirely domestic subject centered on Japan's Company Act.

Those who do pass the bar exam are admitted to the Supreme Court's Legal Research and Training Institute ("LTRTI") for a one year course of theoretical and practical skills training. Completion of this course represents the final stage in qualifying as a lawyer, yet again the focus of the training and experience received at the LRTI is almost exclusively on courtroom practice and Japanese domestic law.

As the foregoing discussion illustrates, both law school education and the other training involved in passing the bar and qualifying to practice law in Japan is very heavily focused on producing litigation professionals rather than general legal service providers. This may also reflect the oft-neglected reality that Japan has numerous other licensed legal professions who provide non-litigation legal services. With these professions also, however, the training and qualification of these other professions is focused almost exclusively on domestic law and administrative procedures[3].

Thus, those students who do go to a Japanese law school with the goal of becoming an "international business lawyer" are unlikely to receive what might be considered ideal training for this goal even if they succeed in achieving it. The bar exam process requires them to spend an inordinate effort to studying Japanese law and litigation practice. In other words, Japanese law school education in Japan is inherently self-limiting when it comes to international business law, since the whole system is devoted primarily to training domestic litigators. Furthermore, the grim math of the bar exam mean that few law schools or students can devote much time or energy to anything else.

Here it might be argued in defense of the system that all lawyers should have a firm grounding in the basic laws and procedures of the jurisdiction in which they are qualified to practice. Yet this argument begs two questions. The first is a very general "why?" The second is more specific: "Why does a lawyer who intends to practice internationally and has no desire to ever represent clients in court need to know anything about domestic litigation in a particular jurisdiction?"

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3) See, e.g.: Richard Miller, Apples vs. Persimmons: The Legal Profession in Japan and the United States, 39 JOURNAL OF LEGAL EDUCATION 27 (1989). Colin P.A. Jones, A guide to navigating Japan's legal eagle menagerie, The Japan Times (Oct. 9, 2012) http://www.japantimes.co.jp/text/fl20121009zg.html (last accessed November 5, 2012).

Why are so many "international business lawyers" qualified in New York?

For many aspiring lawyers in Japan and certain other countries, becoming a New York lawyer may be an attractive option as either an initial or secondary qualification. Other US jurisdictions and England and Wales may also be options for persons in other countries considering legal qualifications, but for the sake of simplicity (and because the author is himself a New York lawyer) this article will talk mainly about New York.

The New York lawyer qualification is one of the leading "brands" when it comes to international business law. For people in countries such as Japan where entry to the legal profession is tightly regulated, qualifying in New York may even be a surer path to becoming a lawyer *somewhere*, so long as they have the requisite educational background and adequate English language skills. Even for those who do qualify for the bar in a country such as Japan, obtaining a New York license as well is regarded as career-enhancing. Many Japanese lawyers also seek New York bar admissions, and even fairly small Japanese corporate law firms may have a program whereby young associates are sent to the United States for an LL. M. and a try at the New York bar exam.

The fact that many people seek to become New York lawyers despite having no intention of practicing there (and indeed, immigration laws may prevent them from doing so) is an indicator that the qualification has a value largely unrelated to New York as a place in which courtrooms are located. Needless to say, one reason why the New York lawyer qualification has achieved a certain status as an international "brand" is doubtless because of the broad (compared to most other state bar exams) nature of the eligibility requirements which apply to sitting for the New York bar exam. Although there has been some tightening up of these requirements in recent years, the New York bar is still readily accessible to a wide variety of practitioners and other candidates from jurisdictions around the world[4]. According to the National Conference of Bar Examiners, 4,427 people who sat for the New York bar examination in 2011 did so based on a non-U.S. legal

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4) New York is one of the small number of U.S. states that allows candidates whose primary legal education was obtained in a foreign country if they also obtain an LL.M. degree from a law school accredited by the American Bar Association. Alabama, California and New Hampshire also recognize the LL.M. degree for eligibility purposes, but impose additional requirements such as a home-jurisdiction qualification or practice requirement, meaning they are generally not options for a first legal qualification.
http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf (at 14-15) (last accessed November 5, 2012).

education[5]. This openness has been a great boon to the many American law schools which offer LL.M. programs for international students: according to the American Bar Association (ABA), over 50 US law schools did so as of 2012[6].

***Should* so many "international lawyers" be qualified in New York?**

To the extent that many of these New York-qualified lawyers return to their country of origin, the legal community in those countries is presumably enriched by their understanding of US law. Yet one wonders how useful the experience turns out to have been for many of these foreign New York lawyers. If we look at the process of training and qualifying as a New York lawyer, the situation is still similar to Japan, though in much less concentrated form. Passing the bar in New York (or any other US state) requires candidates to demonstrate a foundational knowledge of a number of subjects which are mostly irrelevant to international business, including constitutional law, evidence, civil procedure, criminal law and procedure, even "future interests" and the other arcana of American property law. Those who went through a JD program at an American law school will have had to devote a year of studies to some or all of these subjects. While students in the second and third year of a J.D. program and foreign students in LL.M. programs have a great deal of freedom in choosing courses to match their career goals, everyone sitting for a state bar exam nonetheless has to be able to pass an exam focused very much on very domestic subjects, a number of which are litigation-related.

Here it might be argued that because of federalism, the focus of US legal education and bar exam testing is not (indeed, cannot) be on actual law, but on general legal knowledge and a particular way of thinking that form a foundation for further specific knowledge acquired through practice in any state. It may indeed be true that *Hadley v. Baxendale* and the many other hoary old cases which American law students have to read are valuable not because they are an indicator of what the law is today, but because they are useful mediums for forcing students to think about law in general. Yet if that is the case, a medium that is not so rooted in a particular state or nation's substantive and procedural laws could theoretically be used for the same purpose.

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5) http://www.ncbex.org/assets/media_files/Statistics/2011Statistics.pdf (at page 11) (last accessed November 5, 2012).

6) http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_category.html(last accessed November 5, 2012).

The US legal system may thus provide a useful hint as to how the training and qualification of ICS could work. The US system of "national" law schools effectively requires that subjects that are generally deeply rooted in state law, such as tort, contract and criminal law, be taught in terms of general principles rather than actual law. Similarly, although each state nominally administers its own bar exam, since most rely heavily on one or more of the multi-state bar exam components prepared by the National Conference of Bar Examiners and based again on general principles, the amount of knowledge of actual state law required to qualify in a particular state may be minimal[7]. The end result of this is that lawyers passing the bar exam may know little or nothing of the substantive law (let alone court procedures) in the state in which they have just qualified. This seeming deficiency has not stopped New York-qualified lawyers from spreading around the world. This may because the US system actually generates lawyers who have useful foundational skills which transfer easily within a multi-jurisdictional system. Yet at the same time, it is training which is still based in a single national jurisdiction, and still focused heavily on litigation – not much use if one does not intend to even live or work in the state of qualification, let alone represent clients in its courts.

The International Commercial Solicitor

The foregoing discussion is intended as background for the proposed International Commercial Solicitor. Since this is an initial proposal – a thought experiment – much of what follows is mere supposition and the author's views regarding what should be some of the core features of the ICS profession.

Core features and principles

(1) The ICS as a multi-jurisdictional qualification

The ICS should be recognized in as many jurisdictions as possible. By its very nature, the value and stature of the ICS qualification is likely to be proportional to the number of jurisdictions in which it was recognized, particularly jurisdictions having or seeking to develop a disproportionate influence in international commerce and finance.

At the same time, however, the ICS should be a qualification that is consistent

7) http://www.ncbex.org/multistate-tests/mbe/ (last accessed November 5, 2012).

throughout the world: holders of the qualification should receive the same type of education and pass the same exam demonstrating the same minimum threshold of knowledge and understanding (education and content will be discussed below). The ICS qualifying exam should be the same or essentially the same in every Recognizing Jurisdiction, as should the eligibility requirements to sit for the exam. This means that there should be no jurisdiction-specific waivers or exemptions for retiring bureaucrats or persons already qualified as a lawyer or solicitor (a similarly standardized "attorneys' exam" might be possible, but it would again need to be consistent throughout the Recognizing Jurisdictions). Failure to maintain cross-border standardization would result in complex issues relating to mutual recognition of exemptions.

Similarly, if practical training or job experience of some type (such as an articleship under the English system of qualifying as a solicitor) were to be made a part of the requirement for qualifying, it should be defined in broad enough terms that it can be satisfied with relevant experience in any Recognizing Jurisdiction. Given the business focus of the ICS qualification, if practical training requirements did apply, experience in business (e.g. working for a company) should be given as much credit as experience in law (e.g. interning or articling at a law firm).

The ICS qualification should also be highly portable. A holder of an ICS qualification obtained in Recognizing Jurisdiction A should essentially be able to practice using that qualification in Recognizing Jurisdiction B without being required to satisfy any further testing or training requirements. For regulatory purposes Recognizing Jurisdictions might choose to impose registration requirements on ICS seeking to practice, but such requirements should not serve as a means of excluding or discriminating against ICS from other jurisdictions.

Portability would be a key attraction to prospective holders. It would also enable jurisdictions to compete for ICS education and testing. Small jurisdictions could seek to become world leaders in legal education despite having only a limited domestic demand for legal services. Larger jurisdictions (like Japan) could seek to use ICS training and testing as a way to both further its status as a global center of education.

(2) The ICS as an autonomous, self-regulating legal profession

In order to function as a truly international legal profession, the ICS would need to have a high degree of autonomy in terms of training, discipline,

professional ethics and practice rules. While any given ICS would naturally be subject to the laws of the country in which they operate, it would detract greatly from the cross-border character of the profession if ICS were subject to different qualifying rules in each Recognizing Jurisdiction. If the government of Recognizing Jurisdiction A is able to impose additional educational or qualifying requirements on ICS that only apply in that jurisdiction, there is a danger that the Jurisdiction A ICS could become a substantively different qualification from an ICS in Jurisdiction B, thereby giving rise to mutual-recognition issues and harming portability.

Thus, whatever governing body does regulate the ICS profession (this article will refer to a fictional "ICS Governing Council" for discussion purposes) would need to be both international in character and free from excessive control by any particular Recognizing Jurisdiction. The composition of the ICS Governing Council is something to be left for future discussions, though presumably it should include representatives of the ICS community in each Recognizing Jurisdiction, and might also include internationally-recognized scholars in relevant fields of law, representatives appointed by international treaty regimes or organizations such as the United Nations (UNCITRAL), Unidroit, the Hague Conference on International Private Law, for example. The composition and functioning of the ICS Governing Council might also be informed by the manner in which various international standards-setting bodies are organized and operated.

(3) The ICS as a profession trained in international business law

As with most existing formally-recognized legal qualifications in many jurisdictions, becoming an ICS would involve passing an adequately rigorous set of examinations on a variety of law-related subjects. While a detailed discussion of what those subjects might be is beyond the scope of this initial proposal, a few key principles which the author believes should apply are set forth below for consideration.

(i) *The ICS as a jurisdiction-neutral, comparative and international law-based professional*

As a qualification intended to ensure its holder can add value in any legal system, the subject matter requirements should be jurisdiction-neutral. The American system of legal education at "national" law schools provides a useful

point of reference. American law school and bar exam questions are typically set in a fictional state ("Old York" or "West Carolina", for example). This means that there is no knowable "correct" answer to such questions, but this does not matter since the focus of education and testing is knowledge of general principles and the ability to "issue spot", or identify legal issues lurking in a particular fact pattern so they may be researched appropriately (the actual research typically not being part of the test problem).

Most practitioners who have worked in international business settings are likely to agree that there is rarely a "correct" answer to many of the legal problems encountered. This being the case, the ICS qualifying system should emulate the American multi-state approach in teaching general principles as well as significant exceptions, rather than seeking to get into the specifics of the laws of any jurisdiction, even a "major" one. There could be an argument for understanding some of the important conceptual differences between major legal systems – the doctrine of consideration in Anglo-American law and its absence in the contract law of civil law systems, for example. Again, the point would be that an ICS should understand that the difference exists and may result in different conclusions in some situations, rather than that they be able to identify jurisdiction-specific "correct answers". To use another American example, the tort law portion of the US multi-state bar exam may require test-takers to appreciate the difference between contributory negligence, "pure" comparative negligence and "modified" contributory negligence, without requiring them to know which state uses which approach, or any other state-specific details of the laws of negligence. A similar approach would be appropriate for all of the subject matter learned and tested for the ICS.

Because of its cross-jurisdictional focus, the system of educating and testing ICS candidates could become a leading venue for applied comparative law. The law of real property, for example, tends to be highly jurisdiction-specific, so rather than trying to teach to any particular set of principles a comparative approach would be ideal. The focus would thus likely be on some of the *differences* between real property law in different jurisdictions. The goal, again, would be to ensure that holders of the ICS are sufficiently aware of these differences to be able to identify issues in a cross border transaction where advice from local counsel may be required. A similar educational focus would likely be necessary in subjects such as torts and corporate law.

The jurisdiction-neutral character of the ICS should also help to ensure a certain level of consistency in the level and content of education and testing in all

Recognizing Jurisdictions. To encourage adoption, being a Recognizing Jurisdiction should be a requirement for both qualification testing and offering educational programs that satisfy the testing eligibility requirements. For example, were Japan to become a Recognizing Jurisdiction, it could require that ICS qualifying programs be taught in Japanese law schools (as a means of revitalizing the troubled system). Beyond that, however, ideally an educational program in one Recognizing Jurisdiction should qualify a candidate to sit for the exam anywhere, in much the same way that a JD from an ABA-accredited law school generally qualifies its holder to sit for any American bar exam. This would also mean that there might develop a healthy competition among Recognizing Jurisdictions for ICS qualifying educational programs. This would benefit both law schools in Recognizing Jurisdictions as well as the quality of such programs generally.

At the same time, however, each Recognizing Jurisdiction should have a certain amount of leeway to set special requirements for the ICS training programs offered within that jurisdiction, so long as doing so did not render graduates from other Recognizing Jurisdictions ineligible for ICS testing. Thus Recognizing Jurisdiction A could have educational requirements that apply to ICS education programs in that jurisdiction, but graduates from a program in Recognizing Jurisdiction B would still be able to sit for the test in Recognizing Jurisdiction A (just as graduates of A would be able to sit for the test in B).

To give a more specific example, Japan could require ICS training programs in Japan to include an introductory course on Japanese business law, while the United Arab Emirates could require that such programs include a course on principles of Islamic law relevant to banking and finance. However, graduates from UAE programs should be able to sit for the ICS exam in Japan without any further course requirements and vice versa. The point of the additional course work would be to provide for competitive variations in ICS education and to enable individual jurisdictions to ensure that certain principles they regard as important are at least included in the educational curricula under their jurisdiction.

(ii) *Business law focus*

By this point it should be obvious that the focus of the ICE education and testing would be on subjects relevant to business law. What these subjects should be is a matter for further debate, but the author believes it should be a combination of (a) comparative subjects as already discussed in (i) above, and (b) international private law. While (a) would likely consist of the comparative study

of property, torts, contract and corporate law, the subjects in (b) could encompass a wide variety of training in areas where business lawyers in many jurisdictions are curreutly not required to receive any formal training: admiralty, international arbitration, intellectual property, international letters of credit, rules of international trade, international taxation, international banking and finance and so forth. To the extent that there are international treaties and conventions relevant to these subjects, such conventions could be the core texts for educational purposes. For example, an ICS-focused contract law class might be taught with a primary focus on the United Nations Convention on Contracts for the International Sale of Goods (CISG) or the Unidroit principles of International Commercial Contracts, and a secondary focus on the comparative contract law of major legal systems (common law vs. civil law, etc.).

(iii) *Finance and accounting*

All ICS should be able to read a balance sheet and have an understanding of basic accounting principles. Some jurisdictions (England and Wales, for example) already require their lawyers or solicitors to demonstrate a basic understanding of accounting principles, though this may be more intended to ensure they handle client trust accounts properly rather than understand accounting for business purposes. Holders of the ICS qualification should have a basic understanding of accounting for business purposes. In addition, key principles of corporate finance should also be a part of the ICS foundational knowledge[8)].

(iv) *Little or no procedural or "ideological" content*

As more fully discussed in Section 4 below, the ICS should be a profession focused on providing business-related legal advice, documentation, preparation and other services, with litigation-related matters being left up to lawyers qualified in the jurisdiction of the court in which the litigation is to take place. In this sense

8) The ICS might be an attractive second professional qualification for chartered accountants, given that accounting firms are often called upon to help in the accounting and tax structuring of complex cross-border transactions. The ability to provide the legal-side of the same services would likely be a competitive advantage for some such firms. ICS rules should permit ICS to partner with accounting firms and other experts in business and finance, so long as doing so does not give rise to a conflict of interest or threaten the independence of the advice given by ICS.

ICS could be expected to have a similar relationship with lawyers in any particular jurisdiction as solicitors did to barristers under the English system until recently.

Reflecting the business advisory focus of their activities (as discussed in more detail below), the ICS should not be required to learn very much (if anything) about litigation. Although there might be an argument for requiring an ICS to understand general principles of litigation applicable in most systems, litigation is by its nature a very jurisdiction-specific process so the merits of this approach might be small. The author's view is that the most an ICS should be required to know about is the basics of international commercial mediation and arbitration rather than courtroom litigation (as noted below, international commercial mediation and arbitration would seem natural areas of practice for the ICS).

Unlike most jurisdiction-specific legal qualifications, the ICS should not require any knowledge of constitutional law or principles. These are also by their nature both jurisdiction-specific and have little direct bearing on business. Furthermore, if knowledge of even general constitutional norms were to be a required part of an ICS curriculum, this would involve a certain amount of ideological content that could result in it becoming an overly controversial aspects of the ICS educational system and become a potential hurdle to the widespread recognition of the qualification.

Put simply, the ICS should be a profession that seeks to have a cooperative, rather than an adversarial relationship with the various government interestss that regulate business. Given the politically controversial role played by lawyers in some jurisdictions, minimizing the potentially ideological component of their education and training is likely to be a key factor in achieving widespread acceptance for the ICS qualification.

(v) *The ICS as an ethical profession*

The fact that constitutional principles should not be a part of the ICS curriculum does not mean the profession should be without principles. To the extent that a high degree of autonomy is desirable for the ICS, they should be subject to correspondingly high standards of professional behavior as well as being amenable to sanctions from their governing body for violations of these standards.

Because the legal ethics which apply to lawyers in many jurisdictions are heavily-focused on issues which arise in a litigation-related context (conduct in courtroom, treatment of witnesses, handling of evidence, duty of candor, etc.), they may not provide ideal models for the ICS. At the very least ICS should be subject

to duties of confidentiality, honesty and loyalty to clients and required to avoid conflicts of interest. Whether their communications with clients are entitled to a privilege will probably have to be left up to the procedural rules of individual jurisdictions, since it is would be difficult to accept a system where ICS have a greater privilege in a jurisdiction than what is granted to lawyers qualified specifically in that jurisdiction.

Beyond the duties discussed above, there is a wide range of ethical standards which could be considered for inclusion in the ICS training and testing regime. In fact, the ICS could provide a useful medium for crystallizing some of the much-discussed but oft-elusive notions of "business ethics" and "corporate social responsibility." Many people qualified as ICS could be expected to work in the legal departments of multinational companies and the ethical component of the qualification could be structured so that the ICS is more likely to function as a "corporate conscience." Depending upon the ethical standards developed, ICS could also be expected to play a greater role in corporate governance, an area where the role of lawyers has often tended to be overlooked.

On the related subject of ICS professional liability, this paper will have to limit itself to acknowledging that this is an area where there may be some tricky issues that require further consideration. It seems inevitable that ICS will be subject to malpractice liability based on negligence or other tort claims in various jurisdictions and issues relating to standards of care may have to be resolved on a jurisdiction-by-jurisdiction basis. It also seems likely that there would need to be some sort of requirement that ICS obtain professional liability insurance or make contributions to a compensation fund, but how this would work across jurisdictions is again a matter for future discussions.

Some of the concerns about ICS liability and professional ethics might be lessened by the realization that their clients are likely to be corporations rather than individuals. Indeed, one option for the ICS might be to restrict them to only serving corporate clients.

(vi) *The ICS as a learned profession that keeps learning*

Whether professional ethics are part of the content of the ICS qualifying exams is a matter for further deliveration. Even if they are not, there is an argument for requiring that ongoing education in professional ethics be part of any ongoing educational requirements which apply. Many jurisdictions do require that their

lawyers spend a specified number of hours every year receiving continuing legal/ professional education (including a requirement that some of these hours be devoted to legal ethics). A similar requirement should apply to ICS to ensure that it is a profession whose members are continually required to refresh their knowledge base and consider their ethical role in international business.

A continuing education requirement would also have merits to jurisdictions recognizing the qualification since it would naturally require that educational institutions and training service providers would benefit from a steady demand for courses. This is another area where both the profession and individual jurisdictions would benefit from healthy competition, since ideally continuing education courses offered in any Recognizing Jurisdiction should satisfy the requirement.

(vii) *The ICS as an English-based qualification*

Few would try to deny that English is now the language of international business. While some may debate whether this is appropriate, it is nonetheless reality and the ICS qualification should reflect it. Thus, the ICS training and testing regime should be based exclusively in English. Indeed, this regime should be rigorous enough that, in addition to demonstrating a high level of knowledge of law related to international business, possession of an ICS qualification should be evidence of a competency in English sufficient to function in a business and legal environment (the author believes that currently this is a part of the value associated with a U.S. legal qualification when held by a practitioner in Japan another non-English speaking country).

An English-based ICS qualification would also present an opportunity to a country like Japan, which is seeking to expand the number of students from abroad by offering more courses – in some cases entire degree programs – in English. Unfortunately, such programs may often be hindered by a basic problem: a lack of an identifiable reason for students to go to Japan to study a particular subject in English. The availability of an ICS program would be an obvious attraction, particularly if Japan were an early adopter of the qualification, since this would give it a chance to become one of the "established" program providers.

As an English-based qualification, the ICS would also encourage global competition for scholars and lecturers competent to teach relevant subjects. The fact that more resources of this type are likely to be available for programs based in English would enhance the ability of aggressive jurisdictions to become ICS program leaders by hiring the best talent.

(4) PRACTICE AREAS

The legal professions in most jurisdictions would likely view any actual or even potential increase in competition negatively. In addition, in some countries (Japan, for example) entry to certain sectors of the legal profession is artificially restricted as a matter of policy. For this reason the scope of the areas in which they are permitted to practice is likely to be one of the most controversial aspects of the ICS proposal. The parameters of the ICS practice are also likely to be an area where there will be jurisdictional variations in the scope of activities in which an ICS can engage, since it seems unavoidable that these will be subject to local practice rules which already apply to lawyers and other professionals in each Recognizing Jurisdiction. In Japan, for example, the legal services industry is highly balkanized, with lawyers (bengoshi) being merely one of a number of categories of licensed providers of legal and regulatory services. It is probably unreasonable to expect ICS to be able to practice in exactly the same areas in Japan as in another country which has a unitary legal profession, such as the United States.

Whatever jurisdiction-specific variations in scope of practice do exist, they should apply to all ICS. That is, Recognizing Jurisdiction A should not be able to allow only holders of an ICS qualification obtained in Recognizing Jurisdiction A to engage in activities in that jurisdiction. At the risk of repetition, one of the key features of the ICS should be that it is a globally-recognized, portable qualification subject to minimal discrimination in all Recognizing Jurisdictions.

Minimizing concerns from existing legal professions is one reason for establishing the ICS as a qualification that is not competent to handle or advise on litigation; such activities should remain a monopoly of members of the relevant local bar associations. In some jurisdictions (Japan, for example), concerns about competition could be further allayed by the fact that many of those who seek the ICS qualification would likely do so as a second qualification rather than a primary one. As already noted, a New York (or other US) bar qualification often serves as the mark of an “international lawyer” in Japan and many other countries when held by a lawyer who does not actually practice in New York. The ICS could actually supplant the New York bar qualification in this respect, and would likely be a far better measure of its holder’s competence as an international business practitioner.

The ICS could also supplant the “registered foreign lawyer” qualifications recognized in some jurisdictions (like Japan). Although nominally limiting their

holder to the practice of their home jurisdiction law, in reality such qualifications may in practice simply allow the holder to practice some version of "international business law" in a foreign jurisdiction. The ICS would be a more honest approach to this reality, and to the extent it served as a replacement to registration of foreign lawyers it would again not result in greatly enhanced competition.

Even when the ICS is considered as a primary or sole qualification, concerns in some countries about competition from ICS may be further alleviated by the likelihood that many of those who seek the qualification will work in corporate legal departments rather than private practice. In countries like Japan where most corporate legal departments are staffed by persons having no formal qualifications whatsoever, the fact that some such persons may seek to obtain an ICS qualification does not result in a net loss for any in the practicing legal community. Since persons in such positions may seek to obtain a U.S. LL.M. and bar qualification, the ICS would simply serve as a more relevant alternative.

Although it may be attractive to in-house corporate legal staff, for the ICS to be a truly desirable qualification it must be portable not only geographically, but professionally. This means that holding an ICS license must be able to "hang out a shingle" and sell legal services for money. Career autonomy would be part and parcel with the overall autonomy which should be sought for the profession as a whole. It should also be should be considered as one of the features of the qualification which helps its holder meet high ethical standards. The ability of an ICS to quit over a decision he or she disagrees with and make a living through other means should thus be maximized.

The key question here, of course, is what would the practice of an ICS firm look like? This is difficult to predict, and would likely depend upon the dynamics of the existing legal profession(s) in any particular jurisdiction which allows ICS to practice. That being the case, this paper will limit itself to a few observations as to what ICS should at a minimum be allowed to do and some of the issues involved:

(i) *General corporate advisory services*.

Advising clients on international transactions, preparing contracts and other documentation and representing clients in negotiations relating to such transactions would likely be at the center of the ICS practice. This type of work is already the bread and butter of many "international" business firms, even though the actual legal services are likely to be performed by a lawyer qualified in only one of the

jurisdictions involved in the transaction, or even an unrelated jurisdiction (*e.g.* New York).

Here it is probably worth a brief digression on the subject of governing law clauses in international business contracts. It is of course common that such agreements contain a governing law clause. Often the governing law will be the law of one of the jurisdictions touched by the transactions, but in some it may be that of a jurisdiction which has little if no relationship. Although hard data is not available, most international business practitioners would likely agree that New York law or the laws of England and Wales are commonly used as the governing law of many international contracts, even when there is little or no connection with either jurisdiction.

In the case of New York law a common explanation may be that New York has a well-established body of corporate and business law and a wealth of precedents ensuring predictable interpretation. The fact that New York also has statutes essentially supporting New York law governing law clauses and validating the choice of New York in forum selection clauses is also likely to be part of this explanation.

A more prosaic reason for the choice of New York law, however, may be that the person preparing or commenting on the document is a New York lawyer. Indeed, a New York lawyer may technically be subject to ethical restrictions on signing off on documents that are not governed by New York law, and is also likely to be incompetent (in a formalistic sense) to provide advise regarding the merits of using New York law as opposed to the law of some other jurisdiction unless he or she is qualified to practice law in all other jurisdictions subject to the comparison (and has done the relevant research as well). Choice of a particular law in a contract may me be as much a matter of the interests and convenience of the lawyer drafting it as it is of the interests of the client for whom it is being drafted. Furthermore, if the contract calls for arbitration of disputes rather than litigation, the fact that the contract is governed by New York law may only mean that arbitrators will look to the substantive law of that state as necessary to resolve the dispute, rendering knowledge of how the dispute might be handled procedurally in a New York court largely unnecessary.

Ethical technicalities aside, the reality of international business is that lawyers are routinely involved in drafting, reviewing and negotiating agreements governed by the laws of a jurisdiction in which they are not qualified. In a large-ticket transaction, each party may have counsel qualified in each jurisdiction, and a large multi-national law firm may even be able to provide such counsel on a one-stop

shopping basis. However, smaller cross-border deals may be negotiated between two companies, one in Jurisdiction A and one in Jurisdiction B, with each company simply having a single lawyer qualified in their respective jurisdiction handle the drafting and negotiations. Accordingly, depending upon the governing law of the contract, at least one, possibly both counsel in this type of negotiation are incapable of definitively advising their clients regarding such issues as validity, enforceability and other basic matters relating to the contract which will be affected by laws of the governing law clause. Yet in many cases the agreement may be signed anyways; depending upon the transaction value many companies may simply prefer uncertainty about the risk of the agreement being found unenforceable to the certainty of the costs associated with hiring their own local counsel. Here again, there may be an argument for limiting ICS to representing only corporate clients, since corporations would generally be better able to understand and make an informed judgment as to whether assume the risks associated with legal uncertainties of international business. On one hand, ICS should be able to advise their clients regarding the limits of their advice, particularly their inability to counsel as to interpretation or enforcement in the courts of any particular jurisdiction. On the other hand, corporate clients should be able to accept the associated risks based upon their own cost-benefits calculation of whether to hire local counsel for further clarity (and risk apportionment).

Furthermore, many lawyers (even New York-qualified lawyers) may be inadvertently agreeing to the CISG (which they may never have had to even read) rather than New York state law by putting an unqualified New York governing law clause in a contract between parties in two different countries that are both a party to the CISG (the United States is a party, meaning that unless its application is specifically excluded the CISG *is* New York law for purposes of transactions between a party in the United States and another convention signatory). This being the case, having an ICS who must know about the CISG as part of the qualification process advise on an international contract that is purportedly governed by New York law might actually result in better advice than the current system under which such contracts may be handled by New York lawyers who know nothing about the CISG.

The ICS would of course not be able to give definitive advice regarding how courts in New York have interpreted the CISG in past litigation, but here it is easy to get too caught up in the whole notion of governing law. Contracts are by their very nature an effort by the parties to create their own law. On a certain level, therefore, the contract itself is its own governing law; the governing law clause

merely provides the mandatory and default rules that may apply if there is a dispute that is litigated in the courts of a particular jurisdiction.

However, the contract is first and foremost a jurisdiction-neutral effort to create and define rules and structure governing a business relationship between two or more parties which may be both complex and have implications across many jurisdictions. The internal logic, risk apportionment, defined terms, representations and other aspects of a contract which may require a great deal of attention to get right are essentially unrelated to any specific jurisdiction. This drafting and structuring is at the core of what many international lawyers business lawyers do. Because it is not specific to any jurisdiction, arguably any lawyer can do it, including an ICS. That said, however, there may be certain aspects of a contract – the delivery of formal enforceability opinions, the perfection of security interests, advice on bankruptcy and other areas where local counsel qualified in a specific jurisdiction may be required to prepare specific advice or draft specific documents. This is already true of the US and English-qualified lawyers who practice in third countries at international firms, so there is no reason why the same could not apply to ICS.

Another way of looking at the nature of the ICS contract practice might be to focus not on the governing law but on the type of contract. For example, there might be an argument against allowing ICS to prepare "adhesion" contracts where the party on the other side of the transaction is likely to be an individual consumer unrepresented by counsel and unable to negotiate terms. Since such contracts are much more likely to be subject to jurisdiction-specific protections and consumer protection legislation anyways, this is an area where advice of local counsel is far more likely to be advisable and necessary for other reasons.

In any case, it would be a mistake to think too much of the relationship between ICS and contractual governing law clauses, because the ICS would be expected to provide more than just contractual advice but overall cross-border transaction structuring expertise. To the extent a transaction involved significant jurisdiction-specific components – a mortgage, a securities offering, a share exchange, etc. – the ICS would have to coordinate with local counsel (and possibly accounting and tax advisors) in the relevant jurisdictions. This is already a role performed by multi-national law firms who may be qualified in a jurisdiction that is of particular importance in the financial industry (New York or London (i.e., England and Wales)). Yet as this paper has already sought to argue, there is no reason why firms and lawyers qualified in such jurisdictions are inherently more suited to managing the cross-border component of such

transactions. Ideally the ICS would evolve into a legal profession with a truly global focus, with New York financial firms and their lawyers being relegated to the role of local counsel.

(ii) *Arbitration and mediation*

With the growth of international arbitration and other forms of alternative dispute resolution (ADR) and the designation of such methodologies in contractual dispute resolution provisions, ICS should be able to serve as arbitrators and mediators. In addition, they should be able to represent clients before ADR panels. To the extent under current practice an arbitration clause may result in a New York lawyer representing a client before an arbitral panel in Singapore over an agreement governed by the laws of England and Wales, there would seem to be little reason to exclude ICS from involvement in cross-border arbitration proceedings.

(iii) *Represent clients before international bodies*

There is a growing body of international bodies both governmental and quasi-governmental which are relevant to international business, some relating to international treaties and conventions (the World Trade Organization, for example) others more focused on "soft-law" (standard-setting organizations). To the extent that these bodies may adjudicate disputes on matters within their competence, ICS should be allowed to represent clients before such organizations. Here again, there seems to be no compelling reason why a lawyer qualified in New York (for example) should be more competent than a licensed ICS in dealing with an organization that has no nexus to New York.

(iv) *Other*

In practice, the ICS will likely gravitate to those areas of business where their services are needed and adequately compensated. There may be additional roles where ICS could be permitted to play a role – providing escrow services, acting as a bankruptcy administrator and so forth, though these will just be mentioned as possibilities. This is an area where jurisdiction variations may develop (though again, the general rule should be that an ICS from any jurisdiction should be able to perform whatever services are permitted to ICS in a particular jurisdiction).

(5) BENEFITS TO JAPAN

The potential benefits to Japan of becoming an Recognizing Jurisdiction are hopefully obvious from the above discussion. First, as an early adopter of the ICS, Japan could enhance the standing of its legal community in international business. Second, if it became the first leading economic power to become an Recognizing Jurisdiction, Japan would be in a position to guide the development of the profession in other countries. Third, becoming a center of ICS education would contribute to Japan's goal of becoming a global center of education and would result in Japanese educational institutions being able to offer English-language programs attractive to potential students from other countries. As an early adopter, Japanese law schools could seek to compete with the LL.M. programs offered by their American counterparts. Fourth, as a second qualification the ICS would help those members of the Japanese legal professions wishing to specialize in international business to clearly distinguish themselves from those doing strictly domestic work. Fifth, the ICS qualification could be used to revitalize Japanese law schools in a way unrelated to the politically sensitive question of how many people should pass the national bar exam every year. Japan could require that ICS training courses be offered only in established law schools. While law schools wishing to offer ICS courses would need to hire more English-speaking faculty, they would attract both students from abroad as well as Japanese students wishing to qualify as an ICS at the same time as trying to qualify for the Japanese bar exam. Other benefits could easily be identified, but hopefully these will suffice for preliminary purposes.

(6) CONCLUDING REMARKS

As stated at the outset of this paper, it is primarily a "though experiment", an exercise in legal "science fiction." Although the concept of the ICS may not be achievable in practice, the author hopes it has value as a basis for discussing how the needs of the international business community could or should be met by the global legal profession. Since this is intended to start a dialogue, comments and suggestions are welcome and can be addressed to the author care of this publication.