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How not to get Lost in Translation: A Beginners Guide to In-House Lawyers Setting up Legal Functions in Japan

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*Challenger's **Head of Legal, Product - Andrew Goldstein** and **Senior Legal Counsel, Jarrod Brooks** discuss some of the legal and other challenges they faced in connection with expanding beyond borders with the recent launch of Challenger's Tokyo office.*

In the 2003 comedy-drama film, "*Lost in translation"* it is clear that Bill Murray's character, the aging actor Bob Harris, is completely confused by his experiences in filming a commercial for Suntory whisky, and being directed to supply "more intensity".

Over the past 12 months, our task has been to support Challenger in opening an office in Tokyo working within the Japanese legal and regulatory framework and making it ready for business. At times we have felt as confused as Bill Murray's character, though ultimately, our lasting sentiment is that dealing in Japan is like drinking Japanese rice wine, or *sake,* in that the more you experience it, the more pleasurable it becomes!

Established in 1985 and listed on the Australian Securities Exchange (ASX: CGF) in 1987, Challenger Limited (**Challenger**) is an Australian investment management company managing in excess of A$76.5 billion in assets (as at 31 December 2017), and is regulated by the Australian Prudential Regulation Authority (**APRA**), being the Australian banking, superannuation, general insurance and life insurance regulator. Challenger's vision is to provide its customers with financial security for retirement, and to that end, operates two core business units – the life business which targets the retirement spending phase of superannuation by providing investment products that convert savings into safe and secure retirement income, and the funds management business which targets the retirement savings (accumulation) phase of superannuation by providing investment products seeking to deliver superior investment returns to help build those savings. Challenger has offices in Australia, London, Tokyo, New York and Stockholm.

The primary focus of Challenger's new office in Japan has been to increase our offshore real estate investment and management capability (having already an established portfolio of retail properties in Japan), with the plan to extend our capacity and capability into funds management more broadly.

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Scope of this article

In this article, we share our experiences as Australian lawyers setting up the legal service function for the Tokyo office.

As lawyers' love disclaimers, please note that neither of us had extensive prior experience in Japan or dealing with Japanese regulators or counterparties, hence the aim of this article is to share some of our first-hand experience with our in-house colleagues from Australia and further abroad. This paper examines some of the practical considerations which we encountered and unravelled along our journey to successfully establish an office in Japan, including:

- identifying suitable external local legal counsel to best guide us through the myriad of local laws, regulations and procedures;
- formulating an appropriate legal servicing model (in the absence of local Japanese in-house counsel) to advance and execute key strategic commercial initiatives while effectively managing legal and operational risk within acceptable risk appetite parameters;
- referring to some specific differences in the legal systems between our home jurisdiction (Australia) and Japan, in particular, the difference between common and civil legal traditions;
- striking an appropriate governance balance between the wants and needs of the Australian parent entity and the need for local decision making within a regulated Japanese business; and
- identifying some cultural and language factors which, if underestimated or unmanaged, can cause confusion, offence, delay or create risks.

Identifying suitable local external legal counsel

Having the right external legal counsel on the ground who know and understand the local laws, regulations and legal process is essential to the success of any transaction, and the successful venture into a foreign jurisdiction is no exception.

Identifying the right external legal suppliers in a new market can pose substantial difficulties, and failure to do so can lead to unnecessary legal risk, inefficient structures, poor commercial outcomes, unhelpful advice and significant cost overruns. It was our role, as in-house legal counsel, to appropriately select, appoint and manage local external counsel in Japan to procure sound, pragmatic and cost efficient legal advice.

For several years prior to the opening of the Japan office, Challenger's primary legal servicing model involved the appointment of Australian firms with offices (or an affiliated office) in Japan and via multi-national firms. Our interface was typically with one or more ex-pat Australian lawyers with onshore familiarity with Japan's regulatory hurdles and cultural factors (but not necessarily having the full mastery of all local legal principles) who "stewarded" the matters locally, including by briefing local Japanese law firms for certain aspects of transactions including detailed due diligence and tax advice.

In the process of setting up an office we recognised the need to adapt our processes to build strong direct relationships with selected local law firms mindful of the fact that we would now have sophisticated Japanese business people running our matters locally, and that some of the "stewarding" function described above would no longer be necessary. Accordingly, we embarked on a talent identification process, interviewing Japanese firms and practitioners who had the necessary breadth of industry and sector expertise we were looking for and with whom we felt we could work on a more direct basis.

We commenced our process through pre-existing relationships by taking referrals from business colleagues and referring to prior transactions and dealings with Japanese

lawyers where possible. We also consulted the various "who's who" guides to identify a list of firms with the necessary expertise we needed. We sent a brief to those firms to help narrow the list of suitable firms, requesting the information that we thought would be the most determinative, for example:

- breadth or industry/sector expertise (examples of previous transactions);
- commerciality and prior experience working with foreign clients (in particular, Australian clients);
- availability of bilingual staff and the availability of translation services;
- depth of team and accessibility to deliver timely and cost-efficient advice;
- cost certainty, flexible fee structure arrangements (if requested), value added benefits and charge out rates for partners and associates;
- scope of the legal certification process, including the provision of opinions, material document summaries or abstracts;
- firm policies in relation to managing conflicts;
- availability of secondees for certain matters or transactions;
- professional liability limits;

  and

- overall relationship management, including the appointment of a designated relationship partner to facilitate open dialogue in terms of the escalation of matters such as potential litigation or matters that could potentially lead to reputational risk.

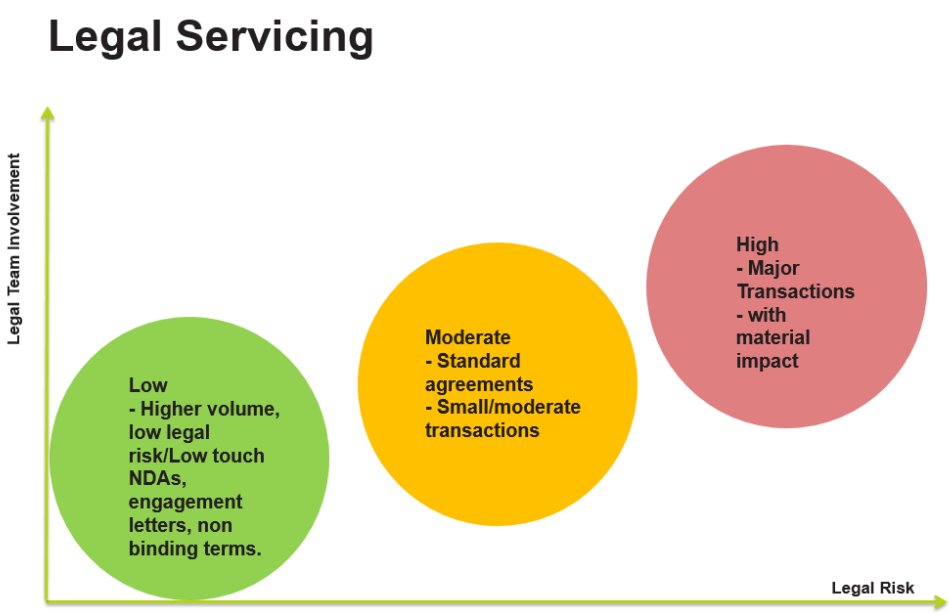
Following the completion of our initial screening process, we then invited selected firms to participate in interviews via video conference so that we could share our vision, objectives and perceived challenges, acquire a deeper understanding of the service delivery and culture of each firm, and to obtain a sense of the ease of doing business together before proceeding to formal engagement.

These steps proved critical in the ultimate decision-making process of appointing those professionals whom we felt would be most able to meet our longer-term external legal servicing needs as our initial assumption that "biggest is best" did not always prove to be correct.

Adopting the right legal servicing model

Failure to arrive at an appropriate legal servicing model can result in unnecessary bureaucracy and costs. For example, does every contract need to be fully translated? Does that translation need to be provided by a top tier law firm? Does every confidentiality agreement need partner and chief executive sign-off?

At the same time as considering the right fit for external legal service providers, we developed internal procedures to help distinguish between those matters where extensive legal review was warranted, and those where either a light or moderate touch was more appropriate. This resulted in a form of traffic light system, where the degree of involvement was aligned to the assumed legal risk.



In developing the legal servicing model, we had to resolve the following items to arrive at the right approach:

- scoping out the particular documents and matters for each category;
- considering the likely volumes of each;
- whether or not one or all of the relevant documents would need to be translated, and in the absence of a full translation, whether and what kind of summary would suffice;
- identifying those matters where external legal involvement is warranted or not (as the case may be);
- the governance and internal approval process applicable to each of the various categories of documents;
- extraction and recording of key contractual obligations; and
- filing and records management of the final documents.

Naturally each type of business will have its own requirements and preferences (depending on in-house legal resourcing and risk appetite) in relation to legal servicing, but it struck us that this model could have broad application for those looking for a place to start. In addition, new businesses should check with their local counsel in relation to data sharing and privacy to ensure compliance with local requirements.

Points of legal distinction

As lawyers know, legal systems in countries around the world generally fall into one of two main categories: common law systems (e.g. Australia, the United Kingdom and the United States) and civil law systems (e.g. Japan, China, Germany and France). The main difference between the two systems is that in common law countries, case law — in the form of published judicial opinions — is of primary importance, whereas in civil law systems, codified statutes predominate. In reality, many systems are now a mixture of the two traditions which helps to recognise certain legal concepts, however having a keen appreciation of the intricacies of the laws (including where certain legal doctrines may have different meanings or implications), procedures and the traditions of a particular jurisdiction cannot be underestimated to the art of effective “cross-border” lawyering.

We identified many aspects where the law and procedures in Japan differed substantially from the Australian system within which we generally operate, including the formalities for corporate establishment (choice of business vehicle and formation process), governance, the role and status of a Representative Director of a *Kabushiki Kaisha* ("**KK**"), the role of the Statutory Auditor, approach to drafting contracts, the prescriptive nature of Japanese labour laws and other administrative matters. . These few noteworthy aspects are discussed below.

Formalities of establishing a business vehicle

Under the Japanese Companies Act, there are four types of business vehicles: (1) a joint-stock company (*Kabushiki Kaisha or KK*) (2) a limited liability company (*Godo Kaisha or GK*) (3) a general partnership company (*Gomei Kaisha*) and (4) a limited partnership company (*Goshi Kaisha*). To avoid unlimited liability, new entrants typically choose a *Kabushiki Kaisha* or KK, or a *Godo Kaisha or GK*, as the preferred business vehicle.

While the actual formation of a KK need not take more than a few weeks, many integral administrative formalities (such as the appointments referred to below on incorporation, the notarisation of the articles of incorporation and other constituent documents by a notary public and the strict protocols involved in conducting Board meetings) need to be resolved up-front. If not, then delays will likely occur. New entrants to Japan will need to carefully plan for these aspects and also ensure that their insurance arrangements (such as public liability and director and officer insurance) deal with them appropriately.

Representative Director

The Representative Director of a KK has the company's highest authority and is able to bind and represent the company in all forums and circumstances that we came across. If the KK is formed with a board, which is not mandatory but is expected for regulated businesses in Japan, then at least one director is appointed as the Representative Director, and other directors cannot bind the KK without the authority of the Representative Director. If the signatory is not the Representative Director, documents certifying the signatory's authority are commonly requested to confirm its authorisation. In March 2015, the Japanese Companies Act was revised by lifting a requirement which provided that at least one Representative Director had to reside in Japan. This change in law now affords foreign entrants greater flexibility in arranging their board structures. The actual and implicit authority of individual Representative Directors' to bind the company requires careful consideration by foreign entrants within their own governance models.

The Japanese Companies Act also prescribes that certain important matters (for example, changing the articles of incorporation, major transactions and restructures) are reserved for shareholders' approval.

Statutory Auditor

The role of the Statutory Auditor is to ensure that the directors comply with all relevant laws and the articles of incorporation. For public companies, this obligation is far broader than financial auditing, which is also expected, but those two functions are separate and are unlikely to be able to be met by one person or firm. The Statutory Auditor prepares a business audit report at least annually, and has powers to investigate the activities of the company. Statutory Auditors cannot be either directors or employees of the KK to help ensure independence.

Company seal

The company seal system is a unique system in Japan. The seal impression of the company seal must be registered at the local legal bureau at the time of applying for the company's incorporation. If the company seal is affixed to a contract, it will be deemed to be executed by the Representative Director of the company (i.e. no signature is required).

It is also customary practice for counterparties to require a certificate of the company seal impression, to confirm the authenticity of the seal impression affixed to a document.

Contract law

As noted above, the laws of Japan follow a civil law system whereby there is less freedom of contract and many provisions are implied into a contract by law, such as the Civil Code (so contracts can be quite short). Conversely, the common law system provides for extensive freedom of contract with few provisions implied into a contract by law, hence the importance to set out all terms governing the relationship between the parties to a contract in the contract itself. This difference in approach, notably the brevity of contracts in Japan, marked a substantial departure to the form of contracts we are accustomed to, and required quite a balancing act between the local legal rules and managing expectations internally in terms of perceived transaction risk.

Labour laws

It is also worth pointing out that Japanese labour laws are highly prescriptive with many elements unfamiliar to most foreigners, and are widely considered as employee friendly. While employment laws apply mandatorily to companies operating in Japan (as they do in Australia), there are many key differences in various aspects, including wages, working hours, leave, personnel transfer (*shukko*), job rotation (*haiten*) and termination of employment (such as limitations on a company's right to dismiss employees or officers at will). For larger organisations, terms and conditions of employment are captured in formal "Work Rules" which are filed with the local branch of the Ministry of Health, Labour and Welfare, after those rules have been provided to a representative organ of employees. Distinction is made between managerial level staff and regular staff. A labour management agreement is required if regular staff are expected to work overtime.[1]

Achieving the right governance balance

While every corporate group is formed and organised differently, and with different processes, policies and rules, the key points of our learnings from our experience in terms of governance are likely to be bordering on universal!

Any multi-national organisation is looking to maintain its own personality to some degree when it opens its doors in a foreign jurisdiction. That personality is reflected in the governance of the organisation. Relevant examples might include things as basic as colour schemes, trade-marks, mast heads, logos, business cards, and style guides, but for most international organisations, this is more far-reaching, and extends deep into its decision-making and internal approval processes. Questions arise around aspects like reporting lines, consent or veto rights, shareholder controls, funding, policy formation and corporate structure. Those questions become more difficult to resolve when overlaid with the wishes of local regulatory authorities who require Japan based decision making in relation to any regulated activities, and of course, tax considerations, which may well be seeking the same result as the local authorities.

The art then, as commercial lawyers, is to construct the operating rules and policies of the local subsidiary in such a way as to comply with all local legal and regulatory requirements, but not to fully exclude the exercise of group control. A further challenge is to arrive at governance processes which are able to be easily followed and executed. There is elevated risk where a governance process is engineered in a way that only its architect truly understands. A truly excellent governance framework is, in our view, one that is capable of simple documentation in the relevant languages (in our case, in Japanese and in English), and readily comprehensible to all parties who will need to refer to it, or be bound by it. While there may not be any universal consensus, as we see it, if

[1] Labour Standards Act

external and internal legal counsel are the only stakeholders who can logically follow the documents governing an organisation, then we simply have not delivered value to our commercial stakeholders.

Some governance elements will clearly need Japanese legal and tax advice, but in many cases the lawyers who understand international group governance are the experienced in-house practitioners who can identify the material points in the decision-making process which can tolerate a degree of head office influence.

We were ultimately able to arrive at a simple governance document articulating those matters which:

- could be authorised and executed by the Representative Director on his/her own;
- required authorisation of a majority of the board of directors; and
- required approval of the shareholders of the company.

Culture and language

Movies like "Lost in translation" which we have referred to above, can overplay the differences in culture between (in that film) the US and Japan, for cinematic effect.

It is, however, essential, to appreciate, the cultural forces at work beyond the stereotypical ceremonial occasion of exchanging business cards. From the outset of engaging with local consultants, any preconceived notions of how business in Japan should or ought to be done (based on Australian practices) rapidly evaporated. The importance of being adaptive, humble and to learn the cultural sophistication of Japanese practices cannot be underestimated as such factors significantly facilitate the smooth closing of transactions (or not so smooth closing if ignored). In particular, the role of building strong relationships (and the patience to cultivate them) is deeply entrenched in Japanese tradition, and the ability to take a realistic approach to the necessary time commitment to grasp the complexities of the Japanese market is fundamental.

There are, in our view, personal and behavioural factors that Australians tend to feel at ease with. Descriptors which are commonly applied to the Australian approach include directness, informality, familiarity, candidness and open exchange of ideas (sometimes before those ideas are fully formed or approved).

To assist with upskilling our culture awareness, we engaged a private firm to provide training for all staff involved in the setting up of the Japan office with some context in their Japanese business dealings. In that training, Japanese cultural factors were highlighted such as preference for harmony, hierarchy, tradition and respect which clearly differ from the Australian list.

Other Japanese cultural elements identified were:

- *"tatemae"* is "smoothing the waters" or paraphrased as delivering a message that people are ready to hear;
  We have seen this play out in our dealings with Japanese law firms, where there is a strong tendency to soften a negative message. We found that we achieved more in having smaller one on one meetings with our external counsel, rather than seeking their thoughts in larger group meetings where there was little opportunity to contradict without risk of causing offence or loss of face.
- *"honne"* refers to a course of behaviour that the underlying truth might be fully shared only when trust is well established". Similar to the above example, in our dealings in legal and business matters, there is preference for negative messages to be conveyed in private, rather than in a conference or meeting.

- *"HoRenso"* which is an expression which involves several steps in a decision-making process taking in:
    - "reporting back" exactly what the current position is;
    - "confirming" in detail the agreed process and next steps; and
    - "consultation" to ensure that decisions are made transparently and with the input of many layers of the Japanese company, linked to another concept of "Nemawashi".

Management styles for Australian businesses can often feature a top down management style, where the Chief Executive or the executive leadership team has significant discretion to make business and policy decisions with variable degrees of broader organisational consultation.

This clashes with the features of *"HoRenso"* where a high degree of organisational transparency is evident. At a practical level, we have seen this come into play in that cross-border organisational relationships can take many years to form, but once established, operate with a high degree of openness, collaboration and trust.

Final thoughts

In any collaborative endeavour, success of the endeavour is not about the individual, it is about the collective achievement.

The purpose of this article was to provide some helpful insights for those embarking on cross-border matters, in particular, doing business in Japan, to set up an in-house legal servicing approach and help establish legal operations on an appropriate footing. Commencing operations in a new jurisdiction is never going to go exactly according to plan in every respect, but with a talented team, good planning, engagement of local expert advisers, an open-mind and being alert to diverse cultural issues, then no doubt the Japanese saying will be proved true!

"Failure is the stepping stone to success"
失敗は成功のもと

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