

The Role and Problems of Corporate Legal Departments in Japan

Introduction by

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The comment printed below was presented by Mr. Akihiko Tada at a conference held in Osaka on May 19, 1988, as part of the ILEX delegation's visit to Japan and South Korea. The program consisted of a number of presentations by House Counsel for leading Japanese multinational corporations. Mr. Tada had agreed to give an opening overview of Japanese corporate legal departments. Although the views stated below are his personal opinions, all of Mr. Tada's colleagues agreed that his opinions are accurate comments concerning Japanese legal departments.

Remarks by

Akihiko Tada

I am very happy to have the opportunity to meet with the members of the International Law and Practice Section of the ABA to talk about the problems of corporate legal departments in Japan. I would like to make a brief, general presentation as to the role of and problems related to corporate legal departments in Japan.

In your country, companies have established legal departments especially for taking care of legal matters. Since the 1970s, conditions similar to those in your country have also noticeably appeared in Japan, making it necessary for Japanese companies also to have legal departments.

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Traditionally, in Japanese companies, legal matters had been taken care of by outside certified attorneys retained by the company as legal advisors. The outside certified attorneys had been used mostly for handling litigation involving the companies and for incidentally consulting and advising on contracts and other such legal matters. In other words, legal matters in a general sense seemed to have been considered to be of minor importance; at most only important enough to merit care by outside legal advisors.

Accordingly, before the 1970s, Japanese companies rarely had legal departments particularly for taking care of legal matters. Instead, such legal matters had been handled as general affairs, together with such other matters as preparation for shareholders' meetings, and establishment of the company's rules. Moreover, because the role of the general affairs staff members handling legal matters was mainly to be a kind of liaison with outside certified attorneys, special knowledge or understanding of law was not required of them.

To more fully understand this former situation, one must realize that lying in the background was what I would like to call the "legal circumstances." The legal circumstances were related to the traditional attitudes and characteristics of Japanese people and Japanese companies. In addition, the legal circumstances of those days were related to the size of the Japanese economy which, being small, meant transactions were mostly domestic. Under such influences, the legal circumstances included: first, the desire to avoid litigation; second, even if in litigation, to seek for settlement through mutual consultation; and, third, in the negotiation of a contract, not to consider the other party to be an opponent and, in turn, always to seek for settlement through compromise. Because of such circumstances, Japanese companies were unable to handle legal matters through the above discussed system and method.

However, since the latter half of the 1960s, and especially in the 1970s, developments in the Japanese economy compelled the above legal circumstances to change. One new phenomenon was that many citizens began to seek to make companies responsible for eliminating the social problems and nuisances caused by the companies' production activity. For instance, citizens began to seek to make companies liable for air and water pollution as well as for product liability in drug cases. The result, in any case, was that many big suits began to be brought against companies. Perhaps one may ponder whether this new activism by our citizens was somehow influenced by the efforts of Mr. Ralph Nader in your country.

At the same time, the internationalization of the Japanese economy caused many new international legal problems, especially in transactions between Japanese companies and companies of your country. In order to prevent such legal troubles, Japanese companies participating in such international transactions had to exert much care, starting even from the

negotiation level. Particularly, this was the case in transactions with companies of your country, since your country was and is often said to be a "litigious society."

The above two conspicuous changes in the legal circumstances made Japanese companies realize that legal matters should be handled in ways other than traditional ones. For instance, it was necessary to supplement the services provided by certified attorneys. I regret to say that the number of certified attorneys in Japan is extremely small, only about 13,000. It is very difficult for a company to obtain competent certified attorneys to defend increasing numbers of litigations. Also, there are only a limited number of these attorneys who may properly handle international legal matters.

The companies which strongly felt the change in the legal circumstances, mostly big companies, started to establish separate legal departments or sections as a kind of self-defense. Such companies allocated to such departments or sections staff who, though not qualified as certified attorneys, were capable of handling legal matters themselves or with the outside counsels (in keeping with that cooperative relationship). Such companies also often tried to establish on-the-job training systems for legal staff and sometimes, at the companies' expense, dispatched staff members to law schools in the United States. Indeed, some of you may have had the experience of training such legal staff members when they were employed in your firms as trainees or summer clerks.

The foregoing methods have been commonly used since the 1970s in those situations in which Japanese companies have established legal departments. In the coming discussions, perhaps you will find yourselves believing, as I do, that the role and function of Japanese companies' legal departments are the same as their counterpart departments in the United States. There are, of course, some differences. Unlike in the United States, except for some cases, Japanese legal staff members are not qualified as certified attorneys (though most of them are graduates of a law department and have the degree of LL.B.). But, Japanese legal staffs' role and function are nevertheless the same as those of the in-house counsels of American companies. Taking advantage of positioning as internal organizations of their companies, legal departments of Japanese companies fulfill three major functions, usually with the cooperation and advice of outside counsels. Such functions include, first, a clinical function such as management of suits, second, a preventive function such as review of the terms and conditions of transactions in order to prevent possible trouble in the future, third, a strategic function such as assistance, from the legal point of view, in preparing effective measures of management for the company.

As an aside, please allow me now to relate briefly a relevant personal experience. I went to the United States in autumn of 1979 as a member

of a group visiting with the legal departments of several American companies. In the course of the visit, the group exchanged information with the companies' general counsels in meetings at the headquarters of the American Bar Association in Chicago. My understanding that the role and function of the legal departments of Japanese companies are essentially the same as those of American companies is based largely upon my personal experience in that visit.

Continuing, I said before that Japanese legal staff, with a few exceptions, are not certified attorneys. In Japan, a totally different system from that of the U.S. is employed for educating and training judges, public prosecutors, and attorneys. I understand many of you may have already heard of it, and if so, bear with me while I summarize it for the others' benefit.

The legal education system in Japan is equivalent to the undergraduate level in the United States and is not a specialized education for professional lawyers. The legal education system only provides students with a basic legal education and an intermediate education for further specific education towards becoming professional lawyers. While or after they receive such basic legal education, students studying law at university may challenge the bar examination. Moreover, the bar examination itself is extremely difficult with a success rate of less than two percent. Therefore, most law students decide not to challenge the bar examination (or abandon such challenge after a number of unsuccessful attempts) and elect to become officials of a governmental agency or to join private companies.

Finally, I would like to mention a challenge which many legal departments of Japanese companies now face. I referred before to the cooperative relationship between the outside counsels and the corporate legal staff. In light of the relationship, it is most important to determine how to effectively and efficiently share the workload between the outside counsels and the legal staff of the company. An illustration is worthwhile. The legal departments of companies have accumulated wide and deep information about specific areas of law relevant to each company and have the capacity to make legal decisions necessary for management based upon such accumulated information. Whether or not such judgment made by the legal department is particularly appropriate and legally supported is checked by outside counsel and such check system is a crucial point of the cooperative relationship as I mentioned before. Thus, it is most important to establish the grounds for well-balanced sharing of work between the legal staff and outside counsels, like two front wheels on an automobile.

Thank you very much for your warm reception of my presentation.