It's time to open legal doors

VERN KRISHNA | January 25, 2012 8:24 AM ET
More from Vern Krishna

Regulatory bodies shouldn't create artificially high barriers to entry for foreign lawyers under the guise of "public interest," Vern Krishna says.

When it comes to monopolistic protection, no one does it better than the legal profession.

As businesses expand internationally, so also does the demand for transnational legal services. However, although there is a lot of talk of business globalization, law societies are less fervent about importing foreign lawyers on to their turf. Their reluctance is premised on the theory that legal fees are a zero sum game and that monopolies create larger incomes.

On the supply side, the accreditation of foreign trained lawyers to practice is a patchwork of nationalist, monopolistic and regulatory rules. To be sure, regulatory bodies that admit lawyers to practice must protect consumers of legal services. In doing so, however, they should not create artificially high barriers to entry under the guise of "public interest."

There are essentially four basic forms of accreditation systems: statutory regimes; country of origin systems; court controlled admission standards; and competence-based assessments.

Statutory systems are simplest and usually exclusionary. India and Brazil, for example, effectively exclude all foreign lawyers from practicing law in their jurisdictions. Section 24 of the Indian Advocates Act requires lawyers who wish to be enrolled at the bar to be Indian citizens and have a law degree from an Indian law school.

Country of origin systems can be facilitative or restrictive. The United Kingdom uses the country of origin approach for European Union lawyers and allows them to practise in England and Wales under certain conditions. This seemingly liberal approach was not designed by the legal regulator, but imposed on it as an unintended consequence of the Treaty, which provides for the mobility of all

services – from waitressing to hairdressing – within the EU.

The Law Society of England and Wales admits non-EU "foreign" lawyers to practice if they successfully complete a number of examinations. The number of exams depends upon the foreign lawyer's country of origin. For example, an Ontario lawyer can be admitted as a solicitor in England by writing a test in Professional Conduct and Accounts. This is in marked contrast to the admission of U.K. solicitors into Canada, who must write five or more examinations.

Prior to 1977, Canadian provinces used country of origin and citizenship rules to admit lawyers. Lawyers from the white Commonwealth – United Kingdom, South Africa, Australia and New Zealand – could transfer easily into the law societies of most Canadian provinces, except Quebec. Lawyers from other countries faced significant barriers to admission.

Some jurisdictions – for example, New York – control rights of legal practice through their courts. New York requires a degree from an approved American Bar Association (or other approved) law school and successful completion of the state bar examinations. The New York model does not distinguish applicants by their county of origin or citizenship.

It is not entirely coincidental that the most restrictive admission policies for foreign lawyers are in the world's largest and fastest-growing BRIC economies – Brazil, Russia, India and China. China is expected to overtake the United States as the world's largest national economy by 2030. India is expected to replace Japan in third place. Both are magnets for legal services.

Some lawyers overcome the international restrictions by practicing on a "fly in, fly out" – or FIFO – basis. Others set up shop in the foreign country in collaboration with local counsel. However, India prohibits foreign lawyers from setting up shop in the country and it is unclear whether they can operate even on a FIFO basis. Thus, foreign lawyers conduct business in India through their offices in Singapore and Dubai.

A "competence assessment" model evaluates foreign law qualifications to determine whether the person is competent in the laws of the host country. The regulatory body establishes an academic or examination regime to facilitate the requisite transfer of skills in areas of deficiency.

Canada uses a competence-based system to evaluate foreign law degrees and rights of practice. The Federation of Law Societies of Canada (FLSC) evaluates each applicant's foreign legal credentials against the norms of approved Canadian law degrees to determine what further work is required to demonstrate competence in Canadian law.

To be sure, knowledge of the fundamental principles of Canadian law is a reasonable requirement for all foreign trained lawyers seeking to serve the public. Under the guise of public interest, however, the requirements of Canadian law have been set at artificially high levels that create financial and other barriers to entry. For example, in a recent decision, FLSC refused to grant an English law graduate with a first-class law degree (ranking in the top 2%) any credit for her Masters of Law degree from the University of Toronto law school.

Ironically, there appears to be more collaboration amongst legal academics than there is among members of the practicing bar. Cornell Law School, for example, has signed an Agreement of Cooperation and Memorandum of Understanding with Jindal Global Law School (an Indian national law school) committing the two institutions to promoting collaborative initiatives – such as, faculty and student exchanges, and joint teaching and research initiatives. Other U.S. Ivy League schools are racing to sign agreements with the national law schools in India.

The animosity toward foreign lawyers may be cultural, historical or simply money-related protectionism. Regulatory bodies rarely lead innovation, but must have it foisted upon them. As trade expands and multinational corporations demand international legal services, regulators should recognize that opening legal markets to foreign lawyers is not a zero sum game, but good for business, society, the public interest and lawyers incomes.