Amendments to Japan's Foreign Lawyers Act Clarify and Broaden the Scope of Party Representation by Foreign Counsel in International Arbitration

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Arbitration in Japan recently received a domestic boost when two Japanese industry titans agreed to arbitrate their dispute over a South African coal plant, with claims worth several billion US dollars, before the JCAA. However domestic arbitration in Japan tends to be used sparingly and this is often cited as a reason for many Japanese companies' relative unfamiliarity with arbitration.

Japan has made no secret of its desire to attract a larger share of the international arbitration market. The Japanese government, with support from an increasingly world-class international arbitration community in Japan, has worked to shore up the legal foundations necessary to support a robust international arbitration scene.

Those efforts have resulted in the opening of a new mediation center in Kyoto in 2018 and new hearing facilities in Osaka and Tokyo in 2018 and 2020,

respectively. Further the Japan Commercial Arbitration Association ("**JCAA**") made some significant upgrades to its online resources, public relations approach, and roster of arbitrators. The JCAA also updated its commercial rules. These rules were and remain in line with international standards.

Amendment of the Foreign Lawyers Act

Recently, the Japanese Diet amended the Foreign Lawyers Act (the "**Act**")[fn]Unofficial English translation.[/fn] to, among others, expand the scope of services that foreign lawyers can render in international arbitration proceedings (the "**Amendments**"). The Amendments will become effective on 29 August 2020.

The Amendments consist of the following three pillars:

> (1) Expansion of the scope of representation in international arbitration and introduction of provisions on representation in international mediation by Registered Foreign Lawyers and Foreign Lawyers (as defined in the amended Act);
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> (2) Easing of the requirement of professional experience to become a Registered Foreign Lawyer; and
>
> (3) Establishment of a system for joint co-operation between local attorneys and Registered Foreign Lawyers.

Below, we focus on the expansion of the scope of representation in international arbitration by Registered Foreign Lawyers and Foreign Lawyers.

Prior to the Amendments, an "International Arbitration Case", in which Registered Foreign Lawyers and Foreign Lawyers may represent the parties, was more narrowly defined as a civil arbitration case with the seat of the arbitration as Japan, and in which all or some of the parties are persons who have an address or a principal office or head office in a foreign jurisdiction.

Under the amended Act, Foreign Registered Lawyers and qualified Foreign Lawyers are permitted to represent parties in arbitrations considered "international." An arbitration is an "International Arbitration" if it falls within the following circumstances:

- any party to the case has an address (individuals) or a principal office or a head office (corporate entities) in a foreign jurisdiction, including the case where a person or company that is not a party holds a majority of the issued shares (with voting rights) of a party to the case and has an address (individuals) or a principal office or a head office (corporate entities) in a foreign country;
- those in which the governing law that the parties have established by agreement is anything other than Japanese law; or
- those in which the place of arbitration is a foreign jurisdiction (if, for example, the proceeding for an examination of witnesses takes place in Japan).

Potential Impact

The hope is that this will boost Japan's ability to compete with other successful international arbitration hubs in the region. Parties' freedom to choose their counsel is often seen as one of the drivers of agreements to arbitrate. Because of this, successful international arbitration hubs in Asia, particularly Singapore and Hong Kong, tend not to unduly restrict foreign counsel representation. Japan's current system is not overly restrictive with respect to foreign counsel representation of parties in international arbitrations. However, it fails to compete with other more "open" jurisdictions.

The amended Act does several things in terms of broadening who may represent parties in international arbitration in Japan. First, a Japanese subsidiary that is more than 50% owned by a foreign company or individual is effectively considered a foreign company for the purposes of deeming an arbitration "international" and permitting foreign counsel representation. There are no ownership exceptions in the current law and companies incorporated under the laws of Japan, even if wholly foreign-owned, are considered domestic companies for arbitration purposes. The rationale for amending this provision is that a foreign-owned domestic corporation likely has decision makers and witnesses in the foreign jurisdiction, making the character of the dispute international.

Second, the amended Act makes clear that if the governing law is other than Japanese law, foreign counsels may act for any party regardless of their ownership

or domicile. Where foreign law applies, the amended Act treats the arbitration as sufficiently international for the purposes of permitting foreign counsel representation. While the likelihood of two domestic Japanese companies electing foreign law to govern their dispute seems remote, should they do so, they will have the option of selecting counsel from those foreign jurisdictions.

Finally, the amended Act makes two changes with respect to the place/seat of arbitration. An arbitration is no longer required to have its place in Japan to be handled by foreign lawyers. If the parties designate a place of arbitration outside of Japan, the arbitration is also considered international for the purposes of party representation by foreign counsel. This development is welcome. The current law only applies to arbitrations with a place/seat in Japan. However, many international arbitrations are not unified in terms of the place/seat and the location of physical hearings. Moreover, because the place or seat provides the legal framework as to what jurisdiction’s arbitration law applies, the amended Act recognizes the ability of even purely domestic parties to elect to establish a foreign law nexus sufficient to deem their disputes international.