Report of the Review Committee for Representation in International Arbitration, etc. by Registered Foreign Lawyers or Foreign Lawyers

September 25, 2018
Review Committee for Representation in International Arbitration, etc. by Registered Foreign Lawyers or Foreign Lawyers

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I. Introduction

1. Background to the Establishment of the Committee

With respect to Representation in International Arbitration by Registered Foreign Lawyers and Foreign Lawyers other than Registered Foreign Lawyers (hereinafter collectively referred to as "Registered Foreign Lawyer(s), etc."), the relevant provisions were developed by the 1996 amendment of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (hereinafter referred to as the "Foreign Lawyers Act"). And thereby, such representation has become permissible within a certain scope and the international arbitration system has been operated in accordance with such provisions.

On the other hand, the Conceivable Measures for Activation of International Arbitration compiled in April 2018 by the Liaison Conference of the Relevant Ministries for the International Arbitration, which has been held since September 2017, indicates that "we should further clarify the scope within which Registered Foreign Lawyers, etc. may be involved in arbitration proceedings and should examine whether an overhaul of such scope is necessary." As can be seen from this, recently, the necessity of an overhaul of the system concerning representation in international arbitration by Registered Foreign Lawyers, etc. has been pointed out as part of an effort to form an infrastructure for the activation of international arbitration in Japan.[1] Under these circumstances, our Committee was established to consider the ideal form of international arbitration by Registered Foreign Lawyers, etc.

2. Necessity to Overhaul the Current System and Other Related Matters

Generally, international arbitration proceedings include cases where one of the parties is what is called a foreign company and cases of third-country arbitration where both parties are foreign companies. Because these foreign companies often retain Registered Foreign Lawyers, etc. who have enough knowledge on the laws of the foreign country concerned to represent them in international arbitration cases, when selecting the place of arbitration or place where the arbitration procedure is carried out, parties to arbitration are considered to be inclined to select countries where regulations on representation in international arbitration by Registered Foreign Lawyers, etc. are looser.

Looking at systems of foreign countries on the premise of the above, we find that, particularly in Singapore and Hong Kong, which boast a high number of petitions for international arbitration in Asia, no qualification restriction is imposed with regard to representation in arbitration. The same is true of Australia with respect to international commercial arbitration cases. With regard to the U.S., in the State of New York, for example, foreign lawyers who are not approved to provide legal

[1] According to statistics from each organization, 452 arbitration cases were filed with SIAC of Singapore (in 2017) and 262 arbitration cases were filed with HKIAC of Hong Kong (in 2016), whereas the annual number of arbitration cases filed with JCAA of Japan was 16 (in 2016). (All of the above numbers include both international and domestic arbitration.)

services in the State but are subject to effective regulation and discipline or otherwise satisfy other requirements are permitted to represent their clients in arbitration proceedings. Also, in the State of California, a bill was recently enacted to permit foreign attorneys to represent their clients in international commercial arbitration by allowing foreign attorneys to provide prescribed legal services such as those arising out of or reasonably related to a matter that has a substantial connection to a jurisdiction in which the foreign attorney is approved or otherwise authorized to practice.

As seen above, in countries where international arbitration proceedings are actively used, regulations on representation in arbitration by foreign lawyers have been significantly eased. In light of this fact, it is now considered necessary to look into further easing of regulations on representation in international arbitration by Registered Foreign Lawyers, etc. in order to provide motivation for more people to use Japan's international arbitration proceedings and to activate Japan's international arbitration.

II. Scope of the International Arbitration Case

1. Premises

Pursuant to the Foreign Lawyers Act, the International Arbitration Case, in which Registered Foreign Lawyers, etc. may represent their clients, is defined as follows:(i) a civil arbitration case, the place of arbitration of which is in Japan (element (i)); and(ii) "all or some of the parties are persons who have an address or a principal office or head office (hereinafter referred to as "Address(es), etc.") in a foreign jurisdiction (element (ii))(Article 2, item (xi) of the Foreign Lawyers Act).

One of the reasons why, in element (ii) among the above, only the Addresses, etc. of parties is taken as a criterion for the International Arbitration Case is that the scope of the International Arbitration Case needs to be clarified, for this concept also serves to make clear the scope of exemption from disciplinary action on the grounds of a violation of Article 3 through 5 of the Foreign Lawyers Act or criminal punishment on the grounds of a violation of Article 72 of the Attorney Act. As seen above, the scope of the International Arbitration Case under the existing law is rated as a clear criterion that may give high predictability to parties thereto.

On the other hand, with respect to this element, it is pointed out that foreign companies that desire to retain Registered Foreign Lawyers, etc. tend to avoid selecting Japan as a place of arbitration because this element prevents such lawyers from dealing with disputes between Japanese subsidiary companies of foreign companies. In this way, the rule concerning representation in international arbitration under the Foreign Lawyers Act is identified as one of the reasons why parties are disinclined to select Japan as a place of arbitration or a place where arbitration procedures are carried out.

In light of the above, in order to turn Japan into a country that is easily selected as a place of international arbitration or a place where international arbitration procedures are carried out, our Committee discussed an overhaul of element (i) and element (ii) in accordance with the purpose of the Attorney Act and other

related statutes.

2. Element (i) (Element of "a Civil Arbitration Case, the Place of Arbitration of which is in Japan")

To fall under International Arbitration Case under the existing law, the case must be an arbitration case, the place of arbitration of which is in Japan. However, legally, a place of arbitration is not necessarily required to be the same place as that where arbitration procedures are carried out (i.e. a place where procedures for hearings and other related procedures are actually conducted) (Article 28, paragraph (3) of the Arbitration Act). And practically, it is not rare to see procedures for hearings of an arbitration case, the place of arbitration of which is in Singapore, being conducted in a country other than Singapore, or to see procedures for hearings being conducted online among multiple countries.

The current system does not cover such cases where procedures for hearings of an arbitration case, the place of arbitration of which is in foreign countries, are conducted in Japan. Under the existing law, when the parties to a dispute, both of which are foreign companies, have agreed that the place of arbitration shall be in a foreign country and intend to conduct a part of the procedures for hearings of the arbitration case in Japan, such case does not fall under the International Arbitration Case and thus Registered Foreign Lawyers, etc. cannot represent such parties in the arbitration proceedings. The vast majority agreed to overhaul this aspect of the system for the reason that the above result was apparently unreasonable or other related reasons. On the basis of these discussions, our Committee arrived at the conclusion that we should proceed with the discussion with the goal of abolishing the element requiring that the place of arbitration be in Japan.

3. Element (ii) ("All or Some of the Parties are Persons who have an Address, etc. in a Foreign Jurisdiction")

(1) Even when a party to arbitration is a Japanese company having its principal office or head office in Japan, in cases where its parent company is a foreign company or other similar cases, there is typically a high possibility that such Japanese subsidiary company's decision-making in matters such as execution of agreements is under the control of the will of such parent company. The majority opinion from a practical viewpoint was that we should allow Registered Foreign Lawyers, etc. to represent such Japanese subsidiary company in these cases. Therefore, the need for overhaul of this aspect is considered high.

On the other hand, at our Committee a skeptical opinion was expressed that not every transaction conducted by a Japanese subsidiary company whose parent company is a foreign company is of an international nature and it is doubtful whether it is appropriate to treat a dispute regarding a transaction of a purely domestic nature as an International Arbitration Case just because a party's parent company is a foreign company. However, as seen above, a subsidiary company's decision-making is typically assumed to be affected by the will of its parent company and many of the witnesses or other related persons are often likely to be in the foreign country in such cases. Therefore, the majority agreed to include the

type of case where all or some of the parties are subsidiaries of foreign parent companies in an International Arbitration Case, whether the substantive aspect of the dispute is of an international nature or not, as in the case of parties who have an Address, etc. in a foreign jurisdiction.

Although our Committee conducted deliberations with the cases where a party to arbitration is a Japanese company whose parent company have its principal office or head office in a foreign jurisdiction in mind, it concluded that the cases where an individual who have his/her address in a foreign jurisdiction owns a majority of the shares or equity interests in a Japanese company that is a party to arbitration or other related cases can be treated in the same way.

(2) With respect to the concrete cases that fall under the aforementioned type, no one in our Committee disputed that the cases where a party to arbitration is a Japanese company whose wholly owning parent company is a foreign company should be treated as an International Arbitration Case because such Japanese company can be equated with the foreign parent company. However, an opinion was expressed that there appeared no need to limit the scope of foreign parent companies to wholly owning parent companies. On the other hand, from the point of view that this provision served to make clear the scope of application of Article 72 of the Attorney Act, an opinion was expressed that the criterion should be set clearly and concretely.

In light of these opinions, our Committee decided to regard a case where a sole owner of a majority of the issued voting shares or equity interests in a party to arbitration has an Address, etc. in a foreign jurisdiction as a leading example of a case that should be treated as an International Arbitration Case because such party's decision-making can be typically assumed to be affected by the will of such owner who has an Address, etc. in a foreign jurisdiction.

On the other hand, various cases similar to this were suggested at our Committee. For example, an opinion was expressed that we should treat, in the same way, cases where a parent company of a party to arbitration and such parent company's wholly owning parent company jointly own shares in the party and the aggregated total number of such jointly owned shares is over half of the issued shares in the party. However, an opinion was also expressed that it is desirable to specify some cases in a Cabinet Order or a Ministerial Order because it enables us to take realistic and flexible approaches in view of needs of each moment, as well as because it is difficult to specify each of these cases exhaustively in law.

Based on these discussions, on the premise that the criterion needs to be clear and concrete, our Committee, taking fully into consideration the opinions expressed at our Committee, concluded that it is appropriate to have relevant organizations take proper measures on this point, including delegation to Cabinet Orders or Ministerial Ordinances in respect of a case where an owner of a majority of the issued voting shares or equity interests in a party to arbitration has an Address, etc. in a foreign jurisdiction or other similar cases.

4. Other Elements

At our Committee, in addition to the elements described in 2 and 3 above, we discussed how to provide for elements of the International Arbitration Case from the following viewpoint.

(1) Cases where Substantive Legal Relations Are of an International Nature

Taking a look at international rules, we find that, in the UNCITRAL Model Law on International Commercial Arbitration, one of the criteria to determine whether a case is an international arbitration case is defined as whether “any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected” is situated outside the State in which the parties have their places of business. Here, whether or not substantive rights and obligations or substantive legal relationships are most closely connected with a foreign country and other related factors are taken as the criterion. In view of activation of international arbitration, it is considered desirable to make sure the meaning of the International Arbitration Case conforms to international criteria like these.

At our Committee, there was, for example, an opinion that a case where the place of performance of the obligations or the location of the real property is in a foreign country or other similar cases can be considered as an example of a case where substantive legal relationships are closely connected with a foreign country, and an opinion, expressed by reference to a foreign country’s rules on representation in international arbitration, that there will be no harm in allowing a Registered Foreign Lawyer, etc. to represent his/her client in international arbitration in a case that has a substantial connection to the Jurisdiction of Primary Qualification of the Registered Foreign Lawyer, etc. who intends to represent the client or other similar cases.

On the other hand, although cases that fall under neither the element described in 3 above (cases where the parties have an Address, etc. in a foreign jurisdiction) nor the element described in (2) below (cases where the place of arbitration is in a foreign country) are usually considered as purely domestic disputes, there are certain cases where foreign laws are set forth as their substantive governing laws. For example, in a case where multiple companies are involved in a foreign project and agreed that the whole project is to be governed by the laws of a foreign country, a dispute will be governed by such foreign law even if such dispute happens to arise between or among Japanese companies. While treating such case as an International Arbitration Case is highly necessary, a question was raised whether cases where the respective Addresses, etc. of both parties to a dispute are in Japan and Japan is selected as the place of arbitration but the governing law is not agreed upon should be treated as an International Arbitration Case.

In light of the above, we determined to include in the International Arbitration Case cases where parties agreed to designate the laws of a foreign country as the substantive governing law of an arbitral award, as a leading example, from among cases where substantive rights and obligations or substantive legal relationships

are of an international nature. From the viewpoint that the criteria should be set clearly and concretely because it would serve to make clear the scope of application of Article 72 of the Attorney Act and other related provisions, we determined that further careful consideration should be given to other factors proposed at our Committee.

In addition, a question was raised at our Committee on how we should think about cases where only a portion of the issues is governed by the laws of a foreign country. This cannot be categorically determined because this is a matter of whether such cases fall under the “parties agree to designate the laws of a foreign country as the governing law” that requires decisions on a case-by-case basis. However, no particular objection was voiced against the view that usually the element will be satisfied in cases where the principal issue is governed by the laws of a foreign country that were designated by the parties.

(2) Cases where the Place of Arbitration Is in a Foreign Country

At our Committee, as an issue in connection with and evolved from element (i) described in 2 above, we also discussed whether to treat a case where the place of arbitration is in a foreign country as an International Arbitration Case without any exception just because of such place of arbitration.

While an opinion was expressed that we should carefully consider the appropriateness of treating purely domestic disputes where all parties thereto and all substantive legal relationships thereof exist exclusively in Japan as the International Arbitration Case only by situating the place of arbitration in a foreign country, the majority of the members supported the opinion that such type of cases should be treated as an International Arbitration Case because such cases are procedurally of an international nature, as can be seen by the fact that, when the place of arbitration is in a foreign country, the arbitration act of such foreign country are applied, and by the fact that, after an arbitral award is rendered, the petition to set aside the award is subject to the jurisdiction of courts in such foreign country. Ultimately, we decided to treat a case where the place of arbitration was in a foreign country as an International Arbitration Case. As a result, with respect to cases where the place of arbitration is in a foreign country and hearings and other arbitration procedures are conducted in Japan, or other related cases, we decided to allow Registered Foreign Lawyers, etc. to represent their clients in such procedures without exception.

5. Other Considerations

At our Committee, some questions were raised regarding the point in time at which the elements of International Arbitration Case are required to be satisfied, such as at which stage of arbitration procedures the elements are required to be satisfied, and, in particular, how we should treat a case where the substantive governing law is changed by agreement of the parties after commencement of the arbitration procedure because such change may have a retroactive effect. The majority opinion was that, in general, the elements are required to be satisfied at the time when each individual act of representation is performed, and ex-post change of governing law to the laws of Japan will not be construed to make past

acts of representation illegal or invalid retroactively.

6. Summary

In light of the above, in order to expand the scope of the International Arbitration Case, our Committee decided to request relevant organizations to delete the element requiring that the place of arbitration be in Japan and to develop necessary provisions in line with the description in 3 and 4, on the premise that a case will fall under International Arbitration Case when either of the elements required by the developed provisions is satisfied.

III. Representation in International Mediation

1. Premises

There are no provisions concerning representation in international mediation by Registered Foreign Lawyers, etc. in the Foreign Lawyers Act. Thus, at our Committee, we discussed whether to make provisions for representation in international mediation by Registered Foreign Lawyers, etc.

2. Development of Provisions on Representation in International Mediation

(1) The vast majority of our Committee members were of the opinion that explicit provisions should be made to allow Registered Foreign Lawyers, etc. to represent their client in international mediation on such grounds as that it is unreasonable that while Registered Foreign Lawyers, etc. are allowed to represent their clients in international arbitration, they are not allowed to represent their client in mediation, which is also a form of alternative dispute resolution as with arbitration and is a softer procedure than arbitration, or that the activation of international mediation is an international trend as is the case with the activation of international arbitration.

With respect to this issue, some international mediation institutions submitted to the Minister of Justice of Japan a written statement requiring prompt development of provisions concerning representation in international mediation by Registered Foreign Lawyers, etc. on the grounds that international mediation bears a complementary relationship to international arbitration and other related grounds. In addition, according to the results of the interview survey conducted by the secretariat of our Committee targeted at implementing organizations of international mediation, some opinions stated that, in practice, multi-step dispute resolution clauses which require a petition for mediation to be filed prior to arbitration proceedings are often utilized, and in cases where such dispute resolution clauses are provided for, Japan would be excluded from candidate locations for the places of arbitration or places where arbitration procedures would be carried out because it does not allow Registered Foreign Lawyers, etc. to represent their clients in international mediation. These opinions demonstrated that it is highly necessary to develop provisions concerning representation in international mediation by Registered Foreign Lawyers, etc. also for the purpose of activation of international arbitration in Japan.

In light of these opinions or other related matters, our Committee reached a

consensus that provisions concerning representation in international mediation by Registered Foreign Lawyers, etc. should be developed.

(2) Concrete Policy on Development of Provisions

(a) Under the existing law, Article 5-3 of the Foreign Lawyers Act provides that a Registered Foreign Lawyer, etc. may represent his/her client in “the procedures for an International Arbitration Case (including the procedures for settlement resulting from an International Arbitration Case).” This wording means that representation in mediation proceedings after the dispute concerned is referred to arbitration proceedings is permitted but representation in mediation proceedings before the dispute concerned is referred to arbitration proceedings is not permitted. There is an imbalance here. An opinion was expressed that we should equalize such imbalance and no particular objections were voiced against this opinion.

Additionally, to take disputes in connection with contracts as an example, a considerable number of contracts contain dispute resolution clauses that choose litigation as a means of resolving disputes, and many contracts do not contain any dispute resolution clause. Among them, there must be a lot of cases where mediation is an appropriate means to resolve the dispute. Therefore, we offered a direction aimed at allowing Registered Foreign Lawyers, etc. to represent their clients not only in international mediation cases subject to an arbitration agreement but also in those not subject to any arbitration agreement.

(b) As a concrete direction for the development of the provisions, basically, the idea considered appropriate is that provisions concerning the criteria for the “internationality” of an international mediation case should be developed in a way consistent with the definition of “International Arbitration Case” (note, however, that there is no concept of “place of mediation” unlike arbitration).

However, at our Committee, we conducted discussions particularly on the scope of cases subject to international mediation because, unlike arbitration cases, various types of mediation cases have already been dealt with by various institutions in Japan.

With respect to this issue, some opinions were expressed that, although an International Arbitration Case is required to be a civil arbitration case under the existing law, actually, arbitration proceedings are conducted only in cases of corporate transactional disputes because arbitration proceedings are premised on the existence of an arbitration agreement, and international trends show that, while in mediation of commercial disputes such as corporate transactional disputes, foreign lawyers tend to be allowed to represent their clients in general, certain types of disputes such as family disputes, employment disputes or consumer disputes among civil disputes are not necessarily treated in the same way, and preferably, we need to give special consideration to these types of disputes because mandatory provisions of the laws of Japan might apply to such disputes even if the laws of a foreign country are designated as the governing law (Article 11 and Article 12 of the Act on General Rules for Application of Laws) and sufficient knowledge on the laws of Japan would be required for such disputes. In

light of these opinions, we reached the conclusion that provisions concerning representation in international mediation should be developed basically applied to commercial disputes such as corporate transactional disputes.

Moreover, an opinion was expressed that the term “commercial disputes” referred to here should be defined broadly as including not only typical commercial contractual disputes but also disputes arising in the process of commercial trade negotiations or other wide-ranging disputes that are considered suitable for being covered by the definition in view of the recent situation of international commercial disputes.

Based on the above discussions, with regard to the scope of international mediation cases, our Committee decided to request relevant ministries and organizations to first give active consideration to the development of provisions concerning representation in the international mediation of commercial disputes by Registered Foreign Lawyers, etc., while also pointing out the necessity to continuously consider whether to include family disputes or other types of disputes other than commercial disputes in the scope.

IV. Other Matters

In addition to the above, we also discussed the elements required for Foreign Lawyers other than Registered Foreign Lawyers to represent their clients in international arbitration. Under the existing law, Foreign Lawyers other than Registered Foreign Lawyers may represent their clients in international arbitration if both of the following conditions are met:
(i) the person is engaged in legal services on the basis of being qualified to become a Foreign Lawyer in a foreign jurisdiction (excluding a person who is employed in and is providing services in Japan, based on their knowledge concerning foreign laws); and
(ii) the person has been requested to undertake or undertook the case in the foreign jurisdiction (Article 58-2 of the Foreign Lawyers Act).

One of the purposes of element (ii) above has been said to be to prevent Foreign Lawyers other than Registered Foreign Lawyers from establishing offices in Japan to attract clients and representing the clients in international arbitration in Japan.

At our Committee, some members expressed opinions that it seems unlikely that the situation of Foreign Lawyers establishing offices in Japan and trying to attract clients to undertake international arbitration cases would actually arise, that the purpose of preventing the attraction of clients is not consistent with the content of the provision, or that it is doubtful whether it is reasonable to keep this element as it is under the circumstances where development of information and communication technology has enabled Japanese companies to easily contact Foreign Lawyers, or other related opinions.

On the other hand, an opinion was also expressed that we should be wary of deleting this existing element because the purpose of this element is none other than to prevent Foreign Lawyers who are not registered as Registered Foreign

Lawyers from establishing offices in Japan to attract clients and representing the clients in international arbitration in Japan and the necessity to prevent such acts still exist.

In addition, an opinion was expressed that this element is, as seen above, intended to prohibit Foreign Lawyers who are not registered as Registered Foreign Lawyers from establishing offices in Japan to attract clients and being requested to undertake or undertaking such clients' cases, and there seems to be no obstacle posed by this element because making a request in certain ways or undertaking a case in certain ways is not prohibited. For example, the provisions did not prohibit anyone in Japan from requesting a Foreign Lawyer who is practicing in a foreign country to undertake a case by e-mail or mail or otherwise, and the Foreign Lawyer to whom such request is made is not prohibited from undertaking such case in the foreign country; or the provisions do not prohibit anyone in Japan from requesting a Foreign Lawyer who happens to be visiting Japan to undertake a case, and the Foreign Lawyer to whom the request is made is not prohibited from undertaking such case in the foreign country. On the other hand, an opinion was also expressed that companies see the work of checking whether a specific way of making a request or undertaking a case satisfies the elements as costly and a risk factor.

As seen above, both positive and negative opinions were expressed about abolition of this element. Our Committee decided to request relevant ministries and organizations to consider closely whether this element should be abolished or not based on the above discussions and to take necessary measures.

V. Conclusion

In light of the above, our Committee decided to request relevant ministries and organizations to continuously give serious consideration to the issue described in IV above and other related issues, and to make efforts to promptly develop provisions concerning expansion of the scope of the International Arbitration Case described in II above and provisions concerning representation in international mediation of commercial disputes described in III above, in line with the description contained in this report.

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Appendix 1

Members of the Committee

* Japanese syllabary order; titles omitted.

Chairperson: Junichi Matsushita (Professor at the University of Tokyo, Graduate Schools for Law and Politics)
Member: Naoki Idei (Attorney at Law)
Member: Shusuke Kakiuchi (Professor at the University of Tokyo, Graduate Schools for Law and Politics)
Member: Yuko Kato (Deputy Manager of the Compliance Administration Office of the Legal Department of Mitsubishi Corporation)
Member: Masahiro Kamei (Senior Expert of the Legal, Compliance & IP Unit of FUJITSU LIMITED)
Member: Keisuke Takeshita (Associate Professor at the Hitotsubashi University, Graduate School of Law)
Member: David Case (Registered Foreign Lawyer)
Member: Hiroyuki Tezuka (Attorney at Law)
Member: Masato Dogauchi (Director, Chief Arbitration and Mediation officer of the Japan Commercial Arbitration Association)
Member: Peter Coney (Registered Foreign Lawyer)

(Observers)
International Affairs Division of the Minister's Secretariat of the Ministry of Justice
Civil Affairs Bureau of the Ministry of Justice
Services Trade Division of the International Trade Division of the Economic Affairs Bureau of the Ministry of Foreign Affairs

(Secretariat)
Judicial System Department of the Minister's Secretariat of the Ministry of Justice
Japan Federation of Bar Associations

Appendix 2

Holding of Meetings of the Committee

First Meeting (August 31, 2018):
- Member introduction
- Explanation of how to run the Meetings
- Explanation on topics and Meeting schedule
- Exchange of views on the scope of the International Arbitration Case, the element requiring that the case be undertaken in foreign countries and other related matters

Second Meeting (September 11, 2018):
- Progress Report on the Interview Survey
- Explanation of the Reference Materials
- Exchange of views on the scope of the International Arbitration Case, the element requiring that the case be undertaken in foreign countries and representation in international mediation

Third Meeting (September 25, 2018):
- Exchange of views on draft of the Report of the “Review Committee for Representation in International Arbitration, etc. by Registered Foreign Lawyers or Foreign Lawyers”
- Compilation of the Report

General Description of Systems of Other Countries

• Singapore

The Singapore International Arbitration Centre (SIAC) has been established in Singapore. The Center has dealt with the largest number of petitions for international arbitration in Asia (according to statistics published by SIAC, 452 arbitration cases were filed in 2017).

In Singapore, a person who is not licensed as a lawyer is prohibited from providing legal services, and any person who violates this rule is subject to criminal punishment or other penalties (Sections 32 and 33 of the Legal Profession Act (Cap. 161), hereinafter referred to as the “Provisions to Prohibit Non-lawyers from Practicing Law”).

On the other hand, the Provisions to Prohibit Non-lawyers from Practicing Law do not apply to any person representing any party in arbitration proceedings.

In addition, with respect to mediation procedures, the Provisions to Prohibit Non-lawyers from Practicing Law do not apply to any foreign lawyer representing any party in any of the following cases of mediation that:

(i) mediation conducted by a certified mediator or administered by a designated mediation service provider; and

(ii) mediation that relates to a dispute involving a cross-border agreement (Note 1) where Singapore is the venue for the mediation.

(Note 1)

“Cross-border agreement” means an agreement in respect of which any one or more of the following circumstances exist:

- at least one party to the agreement is incorporated, resident or has its place of business outside Singapore;
- the subject matter of the agreement —
  (i) is most closely connected to a place located outside Singapore; or
  (ii) has no physical connection to Singapore;
- the obligations under the agreement are to be performed entirely outside Singapore.

• Hong Kong

The Hong Kong International Arbitration Centre (HKIAC) has been established in Hong Kong. The Center has dealt with the second largest number of petitions for international arbitration after Singapore (according to statistics published by HKIAC, 262 arbitration cases were filed in 2016).

In Hong Kong, a person who is not licensed as a lawyer is prohibited from providing legal services, and any person who violates this rule is subject to criminal punishment or other penalties (Sections 44, 45, 47, etc. of the Legal Practitioners Ordinance (Cap. 159), hereinafter referred to as the “Provisions to Prohibit Non-lawyers from Practicing Law”).

On the other hand, the Provisions to Prohibit Non-lawyers from Practicing Law do not apply to arbitral proceedings (Section 63 of the Arbitration Ordinance (Cap. 609).

In addition, the Provisions to Prohibit Non-lawyers from Practicing Law do not apply to the provision of assistance or support to a party to mediation in the course of the mediation (Section 7 of the Mediation Ordinance (Cap. 620)).

• Korea

The Korean Commercial Arbitration Board (KCAB) has been established in Korea (according to statistics published by KCAB, 62 arbitration cases were filed in 2016).
In Korea, a person who is not licensed as a lawyer is prohibited from providing legal services, and any person who violates this rule is subject to criminal punishment or other penalties (Article 3, Article 34, Article 109 and Article 102 of the Attorney-at-Law Act).
On the other hand, "Foreign Legal Consultant" corresponding to Registered Foreign Lawyer in Japan and "Foreign Licensed Lawyer" corresponding to Foreign Lawyer may represent his/her client in an International Arbitration Case (Article 24 and paragraph 1 of Article 24-2 of the Foreign Legal Consultant Act). However, in principle, a Foreign Licensed Lawyer shall not stay in the Republic of Korea for more than ninety days a year (paragraph 2 of Article 24-2 of the same Act).
"International Arbitration Case" is defined as a civil or commercial arbitration case for which the Republic of Korea is the place of arbitration and to which statutes of a country other than the Republic of Korea, a treaty concluded between the Republic of Korea and a foreign country, a treaty among countries other than the Republic of Korea or generally-accepted customary international law is or can be applied (Article 2, paragraph 7 of the same Act).

• Australia (State of New South Wales)

The Australian Centre for International Commercial Arbitration has been established in Australia.
In the State of New South Wales, where Sydney is located, a person who is not licensed as a lawyer is prohibited from providing legal services, and any person who violates this rule is subject to criminal punishment or other penalties (Section 10 and other related sections of the Legal Profession Uniform Law (NSW) No 16a).
With respect to arbitration, the Commercial Arbitration Act 2010 applies to domestic arbitration and the International Commercial Arbitration Act 1979, which is a federal law, applies to international arbitration respectively. Whether each case is an International Arbitration Case or not depends on whether the UNCITRAL Model Law on International Commercial Arbitration applies to the case and other related matters (Note 2) (Section 1 (3) of the Commercial Arbitration Act 2010).
In international commercial arbitration, a party may be represented by a duly qualified legal practitioner from any legal jurisdiction or any other person of that party's choice (Section 29 of the International Commercial Arbitration Act 1979).

(Note 2)
An arbitration is domestic in the following cases:
(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in Australia, and
(b) the parties have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled by arbitration, and
(c) it is not an arbitration to which the UNCITRAL Model Law applies.

• U.S.A. (State of New York)

The International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA) has been established in the State of New York.
In the State of New York, the Rules of the Court of Appeals for the Temporary Practice

of Law in New York (hereinafter, the “Rules”) prohibit a lawyer who is not admitted to practice from establishing an office for the practice of law and conducting other related acts (523.1 of the Rules).
On the other hand, a lawyer who is not admitted to practice in the State of New York may, subject to fulfillment of prescribed requirements (Note 3), provide temporary legal services (Note 4) in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction (523.1 of the Rules).

(Note 3)
To provide temporary legal services, a lawyer is required to meet the following requirements:
(1) the lawyer is admitted or authorized to practice law in a state or territory of the United States or in the District of Columbia, or is a member of a recognized legal profession in a non-United States jurisdiction, the members of which are approved or authorized to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority; and
(2) the lawyer is required to be in good standing in every jurisdiction where approved or authorized to practice.

(Note 4)
The term “temporary legal services” means legal services on a temporary basis.

• U.S.A (State of California)
In the State of California, a person who is not licensed as a lawyer is prohibited from providing legal services, and any person who violates this rule is subject to criminal punishment (Sections 6125 and 6126 of the Business and Professions Code).
Until recently, foreign attorneys were not permitted to represent their clients in international commercial arbitration. However, in February 2017, the Supreme Court International Commercial Arbitration Working Group of the State of California recommended that the legislation be revised to permit out-of-state and foreign attorneys to represent parties in international commercial arbitrations on the grounds that, as a jurisdiction for international arbitrations, the State of California is not as popular as the State of New York and other U.S. jurisdictions (according to the report submitted by the Working Group above, the number of international arbitrations administered by AAA/ICDR in 2015 was 296 in the State of New York and 63 in the State of California) and other related grounds. The bill was passed in July 2018 and is scheduled to take effect in January 2019.
The amended law provides that a Qualified Attorney may provide legal services in an international commercial arbitration or related conciliation, mediation, or alternative dispute resolution proceeding, if any of the following conditions is satisfied (Code of Civil Procedure (amended)):
(1) The services are undertaken in association with an attorney who is approved to practice in this state and who actively participates in the matter;
(2) The services arise out of or are reasonably related to the attorney’s practice in a jurisdiction in which the attorney is approved to practice;
(3) The services are performed for a client who resides in or has an office in the jurisdiction in which the attorney is approved or otherwise authorized to practice;
(4) The services arise out of or are reasonably related to a matter that has a

substantial connection to a jurisdiction in which the attorney is approved or otherwise authorized to practice; or

(5) The services arise out of a dispute governed primarily by international law or the law of a foreign or out-of-state jurisdiction.

A Qualified Attorney rendering legal services is subject to the jurisdiction of the courts and disciplinary authority of the State of California pursuant to the California Rules of Professional Conduct and the laws governing the conduct of attorneys to the same extent as a member of the State Bar of California.

Criteria similar to those provided for in the UNCITRAL Model Law on International Commercial Arbitration are used to determine whether a case constitutes international arbitration or not (Section 1297.13 of the Code of Civil Procedure).

(For Reference) Article 1 of the UNCITRAL Model Law on International Commercial Arbitration

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his/her habitual residence.

* Each country's system referred to above is a summary of provisions of each country's laws and regulations that are publicly available.

Appendix 4

Report on Results of Our Interview Survey

At the first meeting of the Review Committee for Representation in International Arbitration, etc. by Registered Foreign Lawyers, representation in international mediation by Registered Foreign Lawyers and Foreign Lawyers other than Registered Foreign Lawyers (hereinafter referred to as “Registered Foreign Lawyers, etc.”) was positioned as one of the topics of discussion, and accordingly, a decision was made that we would conduct an interview survey to listen to explanations on the actual state of international mediation and opinions on the appropriateness of representation by Registered Foreign Lawyers, etc. from some organizations that had already dealt with or would in the future deal with international mediation. Responding to this, we conducted the interview survey. The following is the report of the survey.

• Period of the interview survey
From September 4, 2018 through September 6, 2018.

• Method for conducting the interview survey
The Judicial System Department of the Minister’s Secretariat of the Ministry of Justice and the Japan Federation of Bar Associations, which constitute the Secretariat, conducted direct interviews with persons in charge in the organizations with which the interview was conducted.

• Organizations with which the interview was conducted
The Japan Shipping Exchange, Inc.
The Japan Commercial Arbitration Association
Japan International Mediation Center in Kyoto

• Summary of the results of the interview survey
As per Annex.

Annex

Summary of the Results of the Interview Survey

1. Situation regarding International Mediation and Other Related Matters

- In Europe, international mediation has become increasingly used in reaction to the 2008 EU directive, in which the usefulness of resolutions of cross-border disputes by international mediation was shown, and other related circumstances. Likewise, in Asia, countries that are making efforts to activate international arbitration, such as Hong Kong, Korea and India as well as Singapore, are also making efforts to activate international mediation. However, even the Singapore International Mediation Centre deals with approximately 20 cases annually. Compared with the Singapore International Arbitration Centre dealing with over 400 arbitration cases annually, international mediation is still a developing field. An opinion was expressed that, in these circumstances, Japan, which has been compatible with mediation since old times, has what it takes to greatly advance this field of international mediation, including so-called third-country mediation where both parties were foreign companies.

- On the other hand, under present circumstances, there has been only a very limited number of international mediation cases dealt with in Japan. Some organizations with which we interviewed through this survey presented a view that the cases that had been dealt with by them were few in number. Among them, an organization that was actually dealing with international mediation explained that the number of cases had totaled approximately eight since fiscal year 2007.

2. Details of Disputes Dealt with as International Mediation and Other Related Matters

- An opinion was expressed that, because, unlike conciliation conducted in Japan, the common practice in mediation is to intensively conduct face-to-face mediation procedures for a period of a few days and to have parties reach a mediated settlement within the days, international mediation has the great advantage that it is less expensive than international arbitration and does not take long to reach a resolution.
- In cases subject to an arbitration agreement, mediation proceedings after the dispute concerned is referred to international arbitration proceedings, which are combined proceedings, are internationally used. Therefore, activation of the use of international mediation will directly lead to activation of the use of international arbitration. On the other hand, international mediation has the potential to be used also in cases not subject to any arbitration agreement. Generally, while parties face a certain hurdle in filing a petition for arbitration because, in arbitration, each dispute is resolved by an arbitral award in the first and last instance, mediation does not present such a hurdle. Some opinions were expressed that mediation has sufficient potential to be used in the context mentioned above, and that, in some cases, resolution through settlement is desirable in terms of continuation of the relationship between parties after mediation is completed and mediation has potential to be used in this aspect.
- With respect to actual cases where disputes were referred to international mediation, some organizations commented that cases concerning sales contracts seemed to account for a substantial fraction, although the number of cases dealt with itself was not large.
- The following cases were cited as examples of cases that had been dealt with so far.
  (i) Case 1
  Parties to the mediation were a Japanese-affiliated end-product manufacturer and an Asian component manufacturer, which were in a continuing contractual relationship.
  The Japanese-affiliated company manufactured finished products using components supplied by the Asian manufacturer. Some defects occurred in the finished products. To solve this situation, a petition for mediation was filed.
  (ii) Case 2
  Both parties to the mediation were Japanese-affiliated companies. With regard to construction work abroad, a dispute arose as to whether a party was liable to pay compensation and a petition for mediation was filed.

* In both cases above, each party was represented by attorneys at law certified as a Japanese legal professional.

3. Criteria to determine whether a case is an international mediation case

- Criteria to determine whether or not to treat a case as an international mediation case varies by organization. Some are using a criterion to classify cases based on the nationality of parties, i.e. to classify a case as an international mediation case

when either party is a foreign national or a foreign corporation. Another organization explained that it only classifies cases based on some factors such as whether the case is of an international nature and responds to each case flexibly, taking as an example a dispute between Japanese companies treated as a case of an international nature on the grounds that the case was related to plant construction abroad.

4. Opinions on Allowing Registered Foreign Lawyers, etc. to Represent their Clients in International Mediation

- The nearly unanimous consensus among the organizations with which we interviewed was that because either or both parties to an international dispute are foreign companies, which usually request Foreign Lawyers to undertake the case, it is critically important in the field of alternative dispute resolution to develop an environment that would enable Registered Foreign Lawyers, etc. to freely represent parties and it is necessary to allow Registered Foreign Lawyers, etc. to represent their clients in international mediation in order that Japan could be selected as a venue for dispute resolution by Registered Foreign Lawyers, etc.
  In this context, an interviewee expressed an opinion that if he/she had put himself/herself in the position of a lawyer consulted by a company that was a party to a dispute, he/she would come to terms with the fact that there was no choice but to commission a local lawyer to represent the client in cases where there was no other option but to select as a venue for dispute resolution a country where he/she was not allowed to represent the client, but it would be natural that he/she would select as a venue for dispute resolution a country where he/she could represent the client on his/her own in cases where he/she was allowed to select such country.
- In international arbitration practice, there are many occasions where multi-step dispute resolution clauses which require that a petition for mediation be filed prior to arbitration procedures are utilized. However, if Registered Foreign Lawyers, etc. are not allowed to represent their clients in international mediation in Japan, such dispute resolution clauses cannot be established, and this results in Japan being excluded from candidate locations for a venue for dispute resolution by parties to an agreement who intend to insert such dispute resolution clauses in the agreement. An opinion was also expressed that allowing Registered Foreign Lawyers, etc. to represent their clients in international mediation enables such parties to insert such dispute resolution clauses in an agreement and it would lead not only to promotion of the use of international mediation but also to promotion of the use of international arbitration.
- In addition, some organizations pointed out that it is important to allow Registered Foreign Lawyers, etc. to represent their clients also in international mediation in light of the previous data demonstrating that the number of petitions for international arbitration dramatically increased after the Foreign Lawyers Act was amended in 1996 to permit Registered Foreign Lawyers, etc. to represent their clients in International Arbitration Cases.

5. Other Matters

- In Asia, international mediation is now in the limelight. In Singapore, the Singapore International Mediation Centre was established approximately three years ago. In Japan, the Japan International Mediation Center in Kyoto is scheduled to be established in November 2018. According to the explanation given to us, the Center has already received a considerable number of inquiries mainly about mediation of

commercial disputes from foreign legal professionals.

- The range of cases dealt with by way of international mediation includes not only cases subject to an arbitration agreement but also various cases that are not subject to any arbitration agreement. This range includes not only cases concerning commercial disputes but also those concerning family law disputes except cases where parties are legally prohibited from agreeing on the matters in issue; for example, in cases concerning cross-border visitation, surrender of custody of a child, or other related matters, there is likely to be some need for international mediation. Compared to the commercial law field, there may be a question about how high the demand for Foreign Lawyers in the family law field would be. However, there seems to be room to accommodate some needs by allowing foreign languages to be used in mediation. An opinion was expressed that it is desirable to open the door as wide as possible.

Appendix 5

Number of Registered Foreign Lawyers(Gaikokuho-Jimu-Bengoshi)and Other Related Matters

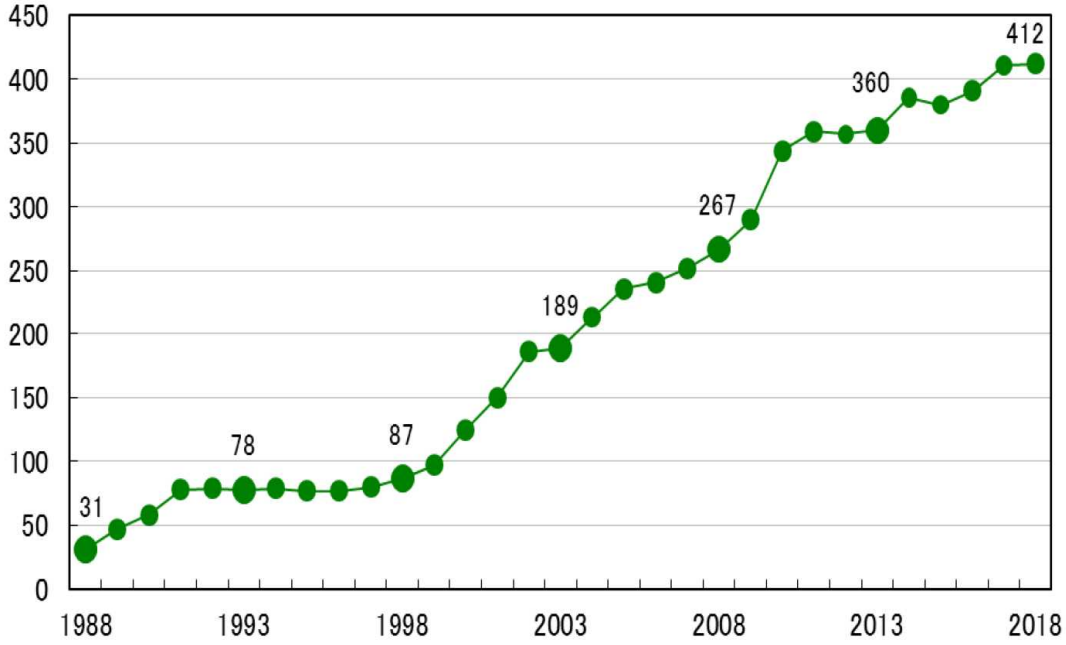
Number of Members of the Japan Federation of Bar Associations (as of September 1, 2018)

Local Bar Associations	52 associations
Attorneys	39,983 persons
Registered Foreign Lawyers	414 persons
Legal Professional Corporations	1,165 corporations
Registered Foreign Lawyer Corporations	6 corporations

(Note)
Members of the Japan Federation of Bar Associations consist of the above members, Okinawa special members (8 persons) and quasi-members (0 person).

Change in the Number of Registered Foreign Lawyers

(Persons)



(Note)
1. Data are as of April 1 of each year.
2. There were no registrations on April 1, 1987 because the Foreign Lawyers Act was enacted on April 1, 1987.

Appendix 6

Revision History of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers

May 1986 Enactment of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Foreign Lawyers Act) (April 1987 in effect)
- ○ Specifying reciprocity and the requirement of experience of having performed professional duties (experience of having performed professional duties for five or more years in the country where they have acquired the qualification) as requirements for approval by the Minister of Justice
- ○ Prohibiting joint enterprises by registered foreign lawyers and attorneys at law

September 1992 Establishment of the Foreign Lawyer System Study Group (1st FL Study Group)
Established by the Ministry of Justice and the Japan Federation of Bar Associations for the purpose of examination, study and consideration of the acceptance system for foreign lawyers

September 1993 Proposals by the 1st FL Study Group
- ○ Allowing certain joint enterprises
- ○ Allowing the employment of attorneys at law at joint firms of attorneys at law and registered foreign lawyers while maintaining the prohibition of the employment of attorneys at law by registered foreign lawyers alone
- ○ Relaxing the requirements of experience of having performed professional duties (allowance of the inclusion of a period of provision of services)
- ○ Consideration to further liberalization of representation in international arbitration should be given swiftly, etc.

June 1994 Establishment of the Study Commission on the Representation of Parties in International Arbitration
The Ministry of Justice and the Japan Federation of Bar Associations established this Commission for the purpose of conducting research on the ideal system of representation in international arbitration from the perspective that international arbitration should be activated and other related perspectives

June 1994: <u>Partial amendment of the Foreign Lawyers Act</u> (January 1995 in effect)
- ○ Relaxing reciprocity (not applying reciprocity to lawyers from the contracting countries of the WTO agreements)
- ○ Allowing specific joint enterprises of attorneys at law and registered foreign lawyers
- ○ Relaxing the requirements of experience of having performed professional duties (enabling the inclusion of a period of

provision of services in Japan up to two years into the five-year period of experience of having performed professional duties), etc.

October 1995 Recommendation by the Study Commission on the Representation of Parties in International Arbitration
Registered Foreign Lawyers and Foreign Lawyers should be allowed to represent parties to international arbitration proceedings

March 1996: Revision of the Deregulation Promotion Program (Cabinet Decision)
Undertaking consideration of the review of prohibition of employment, the requirements of experience of having performed professional duties, and prohibition of handling laws of a third country during FY1996, etc.

June 1996: Partial amendment of the Foreign Lawyers Act (September 1996 in effect)
Liberalization of representation in international arbitral proceedings

December 1996: Establishment of the Foreign Lawyer System Study Group (2nd FL Study Group)

March 1997: Second revision of the Deregulation Promotion Program (Cabinet Decision)
Taking necessary law amendment measures during FY1997 based on the results of the consideration of the review of employment, the requirements of experience of having performed professional duties, and the handling laws of a third country during FY1997

October 1997: Proposal by the 2nd FL Study Group
- ○ Relaxing the requirements of experience of having performed professional duties (shortening the period of experience of having performed professional duties from five years to three years, into which a period of provision of services in Japan can be included up to one year)
- ○ Allowing the handling laws of a third country (subject to advice by a qualified person etc.)
- ○ Easing the restrictions on the purposes of specific joint enterprises (permitting the provision of litigation service, etc. with regard to legal services with foreign affairs)

May 1998: Partial amendment of the Foreign Lawyers Act (August 1998 in effect)
Relaxing the requirements of experience of having performed professional duties (specifying the period of experience of having performed professional duties as three years, into which a period of provision of services in Japan can be included up to one year), etc.

December 1999: Submission of the second opinion by the Regulatory Reforms

Committee
Suggesting the consideration of necessary measures including the abolishment of the prohibition of employment and a review of the regulations on the purposes of specific joint enterprises

March 2001: Three-year Plan for Regulatory Reforms Promotion (Cabinet Decision)
Considering necessary measures such as a review of the regulations on the purposes of specific joint enterprises

July 2003: Partial amendment of the Foreign Lawyers Act (April 2004 partially in effect, April 2005 fully in effect)
○ Deletion of the provision prohibiting employment of attorneys at law by registered foreign lawyers
○ Measures to prevent registered foreign lawyers who run a foreign law joint enterprise with attorneys at law, etc. from overstepping their authority, etc.

June 2007: Three-year Plan for Promotion of Regulatory Reforms (Cabinet Decision)
Considering the incorporation of registered foreign lawyer offices to reach a conclusion

May 2008: Establishment of the Foreign Lawyer System Study Group

December 2009: Proposals by the Foreign Lawyer System Study Group
○ Introduction of the A corporation (a corporation which aims to provide legal services on foreign laws with foreign registered lawyers as its members) system
○ Introduction of the B corporation (a corporation which aims to provide legal services on Japanese and foreign laws with attorneys at law and registered foreign lawyers as its members) system

April 2014: Partial amendment of the Foreign Lawyers Act (March 2016 in effect)
Institutionalization of A corporations

June 2014: Regulatory Reforms Implementation Plan (Cabinet Decision)
Establishing the Review Committee for the Registered Foreign Lawyer System (tentative name) with the participation of registered foreign lawyers in order to discuss standards for the requirements of experience of having performed professional duties, etc. (measured in FY2014)

October 2014: Additional Regulatory Reforms, etc. in the National Strategic Special Zones (Decision of the Advisory Council on National Strategic Special Zones, October 10, 2014)
Discussing measures to promote the activities in Japan by those who obtained qualification as a lawyer overseas promptly within six

months after the enforcement of the Amended law, and taking necessary measures based on the result of such discussion.

March 2015: Establishment of the Review Committee for Registered Foreign Lawyer System

July 2016: Report Issued by the Review Committee for the Registered Foreign Lawyer System

- ○ It suggested that active consideration to the relaxation of the requirements of experience of having performed professional duties should be given
- ○ Based on the presupposition that B corporation system should be introduced, the report suggested the necessity to consider the concerns shown by relevant organizations and the issues, such as enabling a smooth entity conversion

August 2018: Establishment of the Review Committee for Representation in International Arbitration, etc. by Registered Foreign Lawyers or Foreign Lawyers