

Singapore Convention Series - Harmonization Of China's Legal System With The Convention: Suggestions For The Implementation Of The Convention In China (Part 2)

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This post, the second of a two-part series, examines further potential problems of implementing the Singapore Mediation Convention in China and proposes corresponding solutions. The [first post](#) in this series considered three potential problems and this second post examines four further potential problems.

4. The SPC should establish an annual reporting system for cases pertaining to enforcement of Settlement Agreements

This system aims to keep legal practitioners and parties relying on the Convention for seeking relief apprised of the standard of review and decisions of Chinese courts on this particular type of cases. It operates by requiring courts of all levels to give statistics on cases concluded pertaining to enforcement of Settlement Agreements at the end of each year, and to categorize them based on the decision of the court. In terms of the cases where the court refused to grant relief, a further classification can be made according to the grounds for refusal as stipulated in Article 5 of the Convention relied on by the court.

For a short period after China has signed and acceded to the Convention, the SPC, by reference to the progressive reporting system in the enforcement of foreign arbitral awards, may require the lower courts that are opposed to enforcing a specific settlement agreement to report its opinion level by level and eventually to the SPC for verification. This could not only help to generate uniform proficiency of courts in the Convention, but also reflects China's solid support to mediation.

There are two aspects that should be paid special attention to in implementing the progressive reporting system.

First, in the process of reporting the case, the parties and their representatives should be given the opportunity to state their opinions before each level of the higher court. This could be realized by setting up a hearing procedure, allowing the parties to submit written opinions, etc. The purpose is to avoid turning the reporting system into an internal procedure of the courts and to increase transparency.

Second, Paragraph 5 Article 4 provides, "[w]hen considering the request for relief, the competent authority shall act expeditiously." Considering the efficiency principle underscored by the Convention, it is suggested that an overall time limit for reviewing reported cases by courts of different levels should be prescribed.

5. Improve the regulations on the handling of fraud mediation

After the finalization of the Convention, some legal professionals expressed concerns about fraud mediation that may emerge in the course of implementing the Convention in China. Fraud mediation can be dealt with firstly by reference to Article 112 of the Civil Procedure Law, and secondly by penalizing relevant parties in accordance with provisions on fraud litigation in Criminal Law.

Firstly, Article 112 of the Civil Procedure Law prescribes, "[w]here more than two parties to a case maliciously collaborate among themselves for the purpose of infringing the legitimate rights and interests of any other party by making use of initiating lawsuits or mediation, the people's court shall reject the claims of such parties..." To apply for enforcing settlement agreement concluded through fraud mediation is the same as fraud litigation and fraud mediation stipulated in the Civil Procedure Law in nature, in the sense that they all capitalize on the power of trial and enforcement vested in the judicial authority through malicious collusion and result in harm to the interests of third parties. According to Article 1 of the Convention, the place where the mediation took place is not a factor in deciding whether the settlement agreement is of "international" nature. However, regardless of the place where mediation happens, so long as the parties reach a settlement agreement through fraud mediation and attempt to seek enforcement in China based on the Convention, the Chinese court shall reject the application and may impose penalties such as fines according to the severity of their behavior. The legislature and the SPC are expected to regulate the said behavior by reference to Article 112 of the Civil Procedure Law.

Secondly, Paragraph 1 Article 307 of the Criminal Law criminalizes fraud mediation. Where a party files a civil lawsuit based on fabricated facts, obstructs the judicial order or seriously infringes upon the legitimate rights and interests of others, it will be subject to criminal punishment. Article 1 of the Interpretations of the Supreme People's Court and Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases Involving False Litigation further stipulates that if a party collude with the enforcement debtor to fabricate claims by forging evidence and making false representations, this constitutes "filing civil actions based on fabricated facts" as stipulated in Paragraph 1, Article 307 of the Criminal Law. Article 2 prescribes that where a party brings about a civil action based on fabricated facts and caused the people's court to file a case to enforce arbitral award or notarized claims document which are made on the basis of fabricated facts, this constitutes "obstructing the judicial order or seriously infringing on the legitimate rights and interests of others".

The legislature and the SPC are expected to enact relevant regulations, identify the behavior of conducting fraud mediation based on fabricated facts and seeking enforcement of the settlement agreement resulting from the said mediation as "obstructing the judicial order or seriously infringing on the legitimate rights and interests of others", and to apply criminal punishment on fraud litigation to the said behavior.

6. China should speed up the enactment of laws on commercial mediation

Sub-paragraph 1(e), Article 5 "Grounds for refusing to grant relief" of the Singapore Mediation Convention considers "the mediator's serious violation of codes applicable to mediators or mediation" as a ground for the competent authority to refuse granting relief.

China's legislative framework on commercial mediation has not yet been established. Provisions on mediation are dispersed in the Civil Procedure Law, the Arbitration Law and other laws and regulations, most of which focus on people's mediation, administrative mediation and labor mediation, with very few on commercial mediation as an independent procedure. This will undoubtedly make it difficult for the competent authority to decide whether the conduct of the mediator is a violation of the codes applicable to the mediator or mediation when reviewing applications for enforcement of Settlement Agreements.

At the international level, a relatively mature set of legal rules in the field of international commercial mediation has gradually taken shape with years of development, which has provided significant reference to the establishment of China's legislative framework on commercial mediation. The Model Law on International Commercial Mediation (hereinafter the "Model Law") enacted by UNCITRAL is by far the most influential rules on commercial mediation. The Model Law has very detailed stipulations on the definition of commercial mediation, the appointment and disclosure obligations of mediators, commencement, conduct and termination of mediation proceedings, the effect of mediation and other issues that may arise after the termination of mediation. The fundamental principle for China's enactment of legislation on commercial mediation should be to support and facilitate the development of commercial mediation. It is advised that a systematic construction of mediation law should be conducted by making references to the Model Law and be premised on giving full respect to party autonomy.

7. To encourage the development of ad hoc mediation

Paragraph 3, Article 2 "Definition" of the Singapore Mediation Convention defines "mediation" as follows, "'Mediation' means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute." In the drafting process of the Convention, the Working Group also expressed the view that "mediation" should not be restricted to that carried out under the auspices of a mediation institution, or be implying an "arranged or organized process". Accordingly, enforcement of Settlement Agreements resulted from both institutional and non-institutional mediation can be sought in accordance with the Singapore Mediation Convention.

China's traditional commercial mediation can be categorized as mediation affiliated with the courts, mediation affiliated with arbitration institutions, and mediation administered by commercial mediation institutions. The effect of ad hoc mediation is not legally acknowledged. Therefore, it is suggested that China should recognize the effect of ad hoc mediation in relevant laws, encourage legal practitioners with expertise and capability to specialize in commercial mediation, cultivate a group of full-time mediators who take commercial mediation as an occupation, highly value their personal reputation and professionalism, and to establish a sound management and salary system for full-time mediators. Only in this way can China's commercial mediation system achieve full-fledged and healthy development.

In conclusion, the Singapore Mediation Convention has established a mechanism for the direct enforcement of international commercial settlement agreements, which will tremendously boost the development of non-litigation dispute resolution mechanisms. If China signs and accedes to the Singapore Mediation Convention, efforts should be made to improve and adjust the existing legal system to attain effective implementation of the Convention in China. Hopefully, that the above suggestions can make some contribution to the smooth implementation of the Singapore Mediation Convention in China.