

Singapore Convention Series - Why China Should Sign the Singapore Mediation Convention: Response to Concerns (Part I)

Kluwer Mediation Blog
July 19, 2019

Wei Sun (Zhong Lun Law Firm)

Please refer to this post as: Wei Sun, "Singapore Convention Series – Why China Should Sign the Singapore Mediation Convention: Response to Concerns (Part I)", Kluwer Mediation Blog, July 19 2019, <http://mediationblog.kluwerarbitration.com/2019/07/19/singapore-convention-series-why-china-should-sign-the-singapore-mediation-convention-response-to-concerns-part-i/>

On 20 December 2018, the 73rd session of the UN General Assembly (UNGA) in New York passed a resolution to adopt the UN Convention on International Settlement Agreements Resulting from Mediation ("the Singapore Mediation Convention" or "the Convention") passed by the United Nations Commission on International Trade Law (UNCITRAL). The UNGA also agreed that the signing ceremony be held in Singapore on 7 August 2019. As the ceremony draws near, a heated debate was invoked on whether China should sign the Singapore Mediation Convention. This article is comprised of two parts. The first part will introduce concerns relating to China's legal and judicial system and provide responses to each of them from my perspective. The second part will cover other concerns relating to the interests of various bodies of China.

Concerns relating to China's legal and judicial system

1. Concern over the compatibility between China's legal system and the Singapore Mediation Convention

This concern is mainly reflected in the following three aspects:

Firstly, China lacks the legislation on commercial mediation. Commercial mediation is an independent means of dispute resolution and regulated by laws in many jurisdictions today.[fn]E.g. the Mediation Ordinance of Hong Kong, the Singapore Mediation Act.[/fn]. In contrast, there is no specialized law on commercial mediation in China. As a result, a lot of fundamental issues in commercial mediation such as the qualification of mediators and the confidentiality of mediation are not ascertained by laws. If China rushes to sign the Convention at this point of time, this might aggravate the lack of normalization in mediation procedures.

Secondly, recognition is a pre-step to enforcement of foreign court judgments and foreign arbitral awards in China. However, the mechanism of direct enforcement adopted by the Singapore Mediation Convention bypasses the recognition procedure and lacks legal basis under laws in China. Therefore, China must amend its Civil Procedure Law and other relevant laws in order to establish a supporting mechanism for the implementation of the Convention prior to consider signing the Convention.

Finally, under China's existing mechanism for the enforcement of settlement agreements resulting from mediation ("Settlement Agreements"), a Settlement Agreement should firstly be confirmed by the courts at the joint request of the parties before it can be relied on by a party for enforcement. This mechanism contradicts the direct enforcement mechanism created by the Singapore Mediation Convention. Provided that the Singapore Mediation Convention enters into force in China in the future, conflicts may arise in the application of the two mechanisms.

Response:

Admittedly, the lack of commercial mediation law poses a major challenge for China to sign the Singapore Mediation Convention. But it is in China's best interest to tackle this problem sooner rather than later.

Firstly, the People's Mediation Law which was adopted in 2010 as China's first legislation on mediation has actually hindered the development of commercial mediation in China. A good case in point is that Article 7 of the People's Mediation Law stipulates that "people's mediation commissions are organizations for the mass people and was set up in accordance with the law to mediate neighborhood disputes." Accordingly, the people's mediation is positioned as a form of community and neighborhood mediation with semi-official and non-professional features, which stands in contrast to the core values of commercial mediation—*independence and professionalism*. Moreover, Article 4 of the People's Mediation Law provides that people's mediation commissions may not charge any fees for providing mediation services. This is tantamount to strangling the financial supplies of people's mediation and has curbed the motivation for mediators, resulting in an impediment to the establishment of a team of professional mediators. Therefore, the legislature needs to accelerate its efforts to enact a specialized law on commercial mediation and to promote mediation as an independent and professional career.

Secondly, in the legislative plan of the 13th Standing Committee of National People's Congress (NPC) issued in September 2018, there was no mention of mediation-related laws. As the task list for the legislative work of the NPC, the legislative plan indicates the focus of the legislative work in the next five years. Thus, the enactment of commercial mediation law and reform of the mediation system is not on China's agenda for the near future. Signing the Singapore Mediation Convention will help set a countdown for the enactment of a commercial mediation law. Otherwise, a commercial mediation law may still not be in the horizon.

In conclusion, there is indeed incompatibility between the current legal system of China and the Singapore Mediation Convention, but it should not be a ground to not sign the Convention. Instead, China should seize this opportunity to accelerate the enactment of a commercial mediation law and to catch up with other countries in the development of commercial mediation. A viable approach is for China to first sign the Convention, followed by amendments to its domestic legal systems to ensure compatibility with the Convention, after which China may ratify the Convention. Signing the Singapore Mediation Convention will push the legislature to put the enactment of commercial mediation law on the agenda and will help pave the way for the development of commercial mediation in China.

2. Concern over disturbance to the judicial system of China

Because there is no reciprocal reservation in the Singapore Mediation Convention, some commentators worry that if China becomes a contracting state of the Convention, parties from non-contracting states would be able to apply for enforcement of Settlement Agreements in China, but Chinese parties would not be able to do so in non-contracting states. Consequently, some countries may take advantage of China's judicial proceedings. Further, if China becomes a contracting state of the Convention, the people's courts may be flooded with cases on the enforcement of Settlement Agreements, which may lead to a shortage of judicial resources. Besides, the phenomenon of fraudulent litigation and fraudulent arbitration also exist in China. Because the Singapore Mediation Convention enables a party to directly apply for enforcement of a Settlement Agreement in any contracting state of the Convention, some people are concerned that once China becomes a contracting state of the Convention, fraudulent mediation might also emerge if there is no regulation or control in place.

Response:

Firstly, regarding the lack of reciprocal reservation, because the Singapore Mediation Convention does not introduce the concept of "place of mediation" similar to "place of arbitration", nor does it define the nationality of a Settlement Agreement, there is no such thing as the Settlement Agreement of a contracting state or of a non-contracting state. Therefore, no reciprocal arrangements can be made and the Singapore Mediation Convention intends to benefit all countries rather than being limited to its contracting states.

As the world's second largest economy and a responsible country, China should orient the development of its institutions towards establishing a fair legal system, which demonstrates its core value of "building a community with a shared future for the mankind", and should never put its own interest first and partially protect its state-owned enterprises under the notion of nationalism. Legal professionals who are constantly calculating and concerned about being taken advantage of appear to have overlooked that the priority for the legal profession is to create a fair legal system instead of protecting the interests of a certain group. For example, if a Chinese company concludes a settlement agreement with a foreign company, under which the Chinese company is obligated to pay a certain amount of money to the foreign company yet it refuses to perform such obligation, and the foreign company files a claim before a Chinese Court, requesting for relief, then the right thing to do for the Chinese court is to provide the foreign company with due judicial protection rather than hinderance to the remedy it deserves. The issue of whether the mechanism of the Singapore Mediation Convention is to China's advantage should be examined from more profound perspectives.

Secondly, with respect to the possible explosion of cases relating to enforcement of Settlement Agreements in the people's courts, according to Zhang Wei, Director of the Shanghai Commercial Mediation Center (SCMC), in the hundreds of cases mediated by SCMC since its establishment where the parties reached settlement, all of the settlement agreements have been voluntarily complied with, without a single one being submitted to the people's court for mandatory enforcement. We also heard from JAMS on the scarcity of occasions where the parties failed to perform the settlement agreements. In addition, we know from the Singapore International Mediation Center (SIMC) that in all the cases where settlement was reached since its establishment in 2014, the settlement agreements were all complied with and there has been no record of seeking judicial confirmation of the settlement agreement yet. As Zhang Wei explains, commercial mediation is a dispute resolution method aiming at maximizing the parties' interest under the assistance of professional mediators. Therefore, generally the parties will voluntarily perform the settlement agreement. In view of the above, we anticipate that if China becomes a contracting state of the Singapore Mediation Convention, mediation as a means of alternative dispute resolution will play an increasingly important role in alleviating the burden of Chinese courts, and lead to more effective and appropriate use of judicial resources.

Thirdly, the concerns over fraudulent mediation can be addressed from the following three aspects. To begin with, like the way fraudulent litigation/arbitration is treated, the right attitude towards fraudulent mediation should be finding pertinent solutions. We do not ban litigation/arbitration due to the fear of fraud. Furthermore, the more developed China's mediation system is and the more mature the mediation industry becomes, the lower the rate of occurrence of fraudulent mediation would be. Professional mediators are more than able to discover fraudulent mediation in the same way as judges are with respect to fraud litigation. In order to establish a sound and independent commercial mediation system and to build a team of high-calibre mediators, we need to make active use of the Singapore Mediation Convention instead of abandoning it in whole in order to avoid fraudulent mediation.

Finally, China is fully capable of regulating fraudulent mediation. For one thing, by reference to Article 227 of the Civil Procedure Law, if a third party finds that the Settlement Agreement was reached through fraudulent mediation and has injured its legitimate rights, it can file an objection to the enforcement before the people's courts. For another, the behavior of seeking enforcement of the Settlement Agreement resulting from fraudulent mediation should be identified as "obstructing the judicial order or seriously infringing on the legitimate rights and interests of others", and criminal punishment be applied according to the provisions on fraudulent litigation in the Criminal Law. To conclude, fraudulent mediation and false litigation have existed for a long time, yet they do not frequently occur, which would by no means warrant rejection of an advanced system or refusing to sign the Convention.

As a conclusion, the concerns over the legal and judicial system should not be obstacles for China to sign the Singapore Mediation Convention but should be regarded as an opportunity for China to establish a unified commercial mediation system. For other concerns and responses relating to the interests of various bodies of China, please refer to Part II of this article which will be published tomorrow.