Kluwer Mediation Blog

Singapore Convention Series – Strategies of China, Japan, Korea and Russia

Olivia Sommerville (KCAB INTERNATIONAL) · Monday, September 16th, 2019

On 2 August 2019 the "3rd Asia Pacific Conference, Singapore Convention on Mediation: Strategies of China, Japan, Korea and Russia" was held in Seoul, Republic of Korea (Korea).

The Conference centred on the Singapore Convention on Mediation [1] (Singapore Convention), with distinguished speakers from across the region sharing their opinions and analysis of countries' perspectives on the Singapore Convention.

This blog post summarises how the Singapore Convention is perceived by countries in the Asia Pacific region, indicating how it may affect existing legal practices for international commercial mediation. It will focus on the perspectives of China and Korea, who have since signed the Singapore Convention, and Japan and Russia, who have yet to sign.

Signatories

Chinese Perspectives

Guiguo Wang (Professor, Zhejiang University) introduced the Chinese perspectives by reference to Confucianism, whereby, harmony is the most desirable state.[2] Once interpersonal harmony is disrupted, it can be restored through compromise which is aided by the input of respected intermediaries.[3] Thus, mediation has always been part of Chinese culture. Traditionally, these mediators were untrained but were able to reach a mutually abided agreement as parties respected and trusted the mediator and their input.

Prof. Wang explained that the formalisation and increased legalisation of enforcement proceedings, as introduced by the Singapore Convention, contrast with these Chinese values. He further explained that, as Chinese culture is based on trust, when individuals agree to abide by an agreement there is little need for an effective enforcement procedure.

Nonetheless, since the Conference, China has become a signatory of the Singapore Convention. As explained by Prof. Wang, a legal enforcement proceeding may not be necessary when conducting business in China, but it has proven very useful in reaching agreements with foreign companies. The Supreme Court of China has established the International Commercial Expert Committee, which aims to resolve disputes concerning the Belt and Road Initiative (BRI) and foreign

companies through mediation. Thus, the Singapore Convention is seen as a vital step forwards for the development of international dispute resolution in China.

Korean Perspectives

According to Young Joo Ham (Professor, Chung-Aung University Law School), mediation has been present in Korea for over 50 years. However, many legal practitioners still lack sufficient understanding of mediation and its development has stagnated. Prof. Ham stated that the main reason for this is mediation agencies misunderstand the term “mediation”. To remedy this, amongst other issues which impede the evolution of mediation in Korea, policy makers should focus more on the strong points of mediation such as its flexibility, making it easily distinguishable from litigation and arbitration.

Sejun Kim (Assistant Professor, Kyonggi University) explained that the Singapore Convention can be of great use in the development of commercial mediation in Korea. The current legal framework for mediation is governed by the Civil Mediation Act 1990, but this only applies to civil mediation. Here, the force of a mediated settlement agreement (MSA) is equivalent to a judgment and the instigator of the mediation is the court. There is no general law which applies to mediation overall.

Prof. Kim stated that the Singapore Convention can act as the basis of a “Commercial Mediation Basic Law in Korea” (Basic Law). This Basic Law would enshrine the Singapore Convention in domestic legislation. As mediation becomes more popular and there is an international trend to adopt legislation to facilitate this, the introduction of this Basic Law would ensure that Korea continues to evolve with current practices.

This Basic Law should aim to:
• ensure that the parties’ subjective views and goals are understood and respected throughout the mediation process;
• activate communication between parties;
• cause mediation to develop from a “cure model” similar to litigation to a “care model”, focusing on being flexible and fostering negotiation and opposed to all or nothing judgments; and
• minimize connection with “trial” and distance it further from litigation.

According to Prof. Kim, under the Singapore Convention the driving force of the mediation is the mediator and the focus is on resolving commercial and international disputes. The Singapore Convention seems compatible with the law in Korea as it does not apply if the places of business of all the parties are located in Korea. Therefore, the Singapore Convention has a different scope of application from Korean law and MSAs under the Singapore Convention can be enforced.

Non-signatories

Japanese Perspectives

Shusuke Kaiuchi (Professor, University of Tokyo) correctly predicted that Japan would not become a signatory of the Singapore Convention. In doing so, he made it clear that this does not mean that Japan will never sign the Singapore Convention. Rather, Japan is currently taking a neutral stance, waiting to see how it operates in practice. Prof. Kaiuchi also laid out the two main obstacles which delay the implementation of the Singapore Convention in Japan.

Firstly, the Singapore Convention is not compatible with the existing scheme for compulsory

execution in a civil matter. Under the Civil Execution Act 1990 (the Act), specific performance of a civil or commercial claim may be enforced through “compulsory execution”, which is carried out by a court or a court execution officer. Under Article 22 of the Act, compulsory execution can only be carried out based on a “title of obligation”.

However, MSAs are not included as a listed title of obligation. Thus, amendments to the law are required to include MSAs among the enforceable titles of obligation. However, Prof. Kaiuchi noted that MSAs can be distinguished from many titles of obligations as there is no res judicata to determine the validity of the agreement, despite the minimum procedural guarantee under Article 5(1)(e) and (f) of the Singapore Convention.

Furthermore, even if the validity of the agreement can be confirmed by a court order, enforceability may not be justified due to a number of difficulties, including the mediator being appointed after the agreement has been made solely to facilitate enforcement. Thus, the Singapore Convention is not currently compatible with the existing scheme for compulsory execution in a civil matter in Japan.

Secondly, the Singapore Convention is not compatible with the Alternative Dispute Resolution (ADR) regulations in Japan. Under the ADR Act 2004,[4] agreements must result from a certified mediation service. This is a problem as the Singapore Convention does not require any certification or qualification of a mediator. For international disputes, it seems unrealistic to require agreements to result from a certified mediation service. For domestic cases, it would be hard to enforce MSAs issued by a non-certified mediation service in Japanese courts.

For these two reasons, changes need to be made to the existing Japanese legal framework in order to implement the Singapore Convention. Given the uncertainty surrounding the adoption of the Singapore Convention and its impacts, Prof. Kaiuchi does not consider it to be the most appropriate time for Japan to become a signatory of the Singapore Convention.

Russian Perspectives

Russia did not sign the Singapore Convention either. Natalia Prisekina (Professor, Far Eastern Federal University School of Law) explained that mediation is not the usual method of dispute resolution in Russia. In Prof. Prisekina’s view, most of the support for mediation internationally stems from “judicial shortcomings”, namely a desire to reduce pressure on the costly court system which, due to congestion, is slow and has suffered a reduction in quality. For Russian citizens, there is less of a desire to resolve disputes through mediation as the courts are easily accessible and much more efficient and less costly than those in western countries.

The Supreme Court of the Russian Federation has noted three main reasons which actually negate the use of mediation. Firstly, there are organisational issues, as mediators are not readily available and have little experience of mediation procedure. Secondly, there are economic issues, such as the high cost of mediators and the lack of desire amongst judicial representatives to reconcile parties as it reduces their income. The final reason is subjectivity, which Prof. Prisekina states is the most important, as the common psychology of Russian society is the main factor which deters parties from mediation. Factors causing this bias against the use of mediation include:

• lack of awareness about mediation;

• distrust of the mediator;
• lack of negotiation skills and traditions; and
• the perception that the court's decision is more valuable.

This results in parties going to court instead of agreeing on a variety of issues with the assistance of an intermediary, which often would be the most advantageous solution.

The Singapore Convention has the potential to make mediation one of the most popular ways to resolve cross-border disputes. It would help Russian participants of international trade by allowing them to learn from the experience of foreign partners, making mediation more commonly used both in international business disputes and domestic disputes. It would create a basis for the enforcement of international settlements in countries with different legal, social and economic conditions whilst maintaining the flexibility that mediation affords. Additionally, the Singapore Convention would reduce the likelihood of the parties appealing to a court or international arbitration after mediation. Thus, Prof. Prisekina considers that the implementation of the Singapore Convention would help the development of the Russian legal system as a whole.

Comment

The Conference took place amid turbulence in the Asia Pacific region, with ongoing tensions between the host state and Japan. During various presentations, speakers from both countries expressed a desire to resume close social and economic relations. This current political climate exemplifies the importance of ADR and mediation, which aim to reconcile issues as well as create positive future relations.

It has been well publicised that 46 countries signed the Singapore Convention on 7 August 2019. Although the exact impact of the Singapore Convention remains to be seen, it presents an opportunity for international commercial mediation to develop significantly in the Asia Pacific region and globally, becoming a more widely accepted form of cross-border dispute resolution.

References[+]

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