

# Potential Impact of Singapore Convention on Mediation in Asia-Pacific: Comparative Analysis of Mediation in Japan and Korea

## 아시아 태평양 지역의 조정에 대한 싱가포르협약의 잠재적 영향: 일본과 한국의 조정을 중심으로

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2023년 4월 일본은 United Nations에 의한 ‘조정에 의한 국제적 화해합의에 관한 국제연합협약’ (Convention on International Settlement Agreements Resulting from Mediation)(“싱가포르협약”)을 이행하기 위해 국내 실시법으로 “조정에 의한 국제적인 화해 합의에 관한 국제연합조약의 실시에 관한 법률”을 제정하였다. 일본은 아시아 태평양 지역에서 싱가포르협약을 이행한 두 번째 국가로, 싱가포르협약에 서명했지만, 아직 비준하지 않은 한국을 비롯한 주변 국가에 큰 영향을 미칠 것으로 예상된다.

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싱가포르협약은 특히 한-일 양국의 경제 성장과 민간 조정의 발전에 큰 영향을 미칠 것으로 예상된다. 협약을 시행함으로써 국제 거래와 기업들이 조정을 통한 합의가 집해될 수 있다는 보장이 있는 공론의 장으로 몰려들게 되어 양국의 경제가 활성화될 수 있다. 또한 민간 조정의 성장은 양국의 사법 시스템에도 긍정적인 영향을 미쳐 사법 사건 수에 대한 부담을 덜어줄 것으로 기대해 본다.

일본과 한국은 유사한 법률 문화를 가진 민법 국가로서 민간 조정을 거의 간과해 왔다. 그러나 일본이 싱가포르협약을 국내 규정에 맞게 성공적으로 이행하면서 이는 주변 국가들에 선례가 될 것이 분명하다. 한국은 2019년 싱가포르협약을 일본보다 먼저 서명한 국가 중 하나이지만, 국내 조정법의 부재 그리고 조정에 대한 개념과 이해 부족으로 인해 협약 이행에 대한 준비가 미흡한 상황이다. 본 논문의 핵심은 앞으로 싱가포르협약의 영향력을 예측하며 이에 대한 일본과 한국의 법적 기반의 필요한 적절한 변화가 무엇인지 계속해서 연구하며 그 의미를 찾으려 한다.

지속해서 발전해 가는 국제상사조정 시세에 적응해야 할 필요성이 커짐에 따라 한국의 국내 법적 기반의 발전과 변화가 필요해 보인다. 최근 일본의 발전은 앞으로 한국이 싱가포르협약을 비준하게 된다면 일본의 실시법은 국내 이행법률에의 실용적인 모델로 고려될 수 있을 것이다.

**[주제어]** 국제상사조정, 싱가포르협약, 화해합의, 집행, UNCITRAL

## I. Introduction

Mediation is a form of alternative dispute resolution (“ADR”) where the disputing parties voluntarily attempt to settle their dispute with the assistance of a third person or persons (“the mediator”).<sup>1)</sup> Generally, a settlement agreement resulting from mediation is viewed as a contract.<sup>2)</sup> Until recently, there was a lack of a cross-border mechanism for settlement agreements resulting from international mediation to give

1) Definition of Mediation in accordance to the Singapore Convention, Article 2(3). *See*, United Nations General Assembly, “Resolution adopted by the General Assembly 73/198, United Nations Convention on International Settlement Agreements Resulting from Mediation,” A/73/496, United Nations, 20 December 2018. [hereinafter Singapore Convention], <[https://uncitral.un.org/sites/uncitral.un.org/files/media/documents/EN/Texts/UNCITRAL/Arbitration/mediation\\_convention\\_v1900316\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media/documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf)> (Full text of the Singapore Convention).

2) Generally mediated settlement agreements are viewed as contract in most jurisdictions. However, in some jurisdictions the mediated settlement agreement could have a legal binding effect like a court judgment in accordance to the law and regulations of the State.

legal effect to the international mediated settlement agreement (“iMSA”). Due to this shortcoming, businesses have favored international arbitration or litigation rather than international mediation when international commercial disputes arose.<sup>3)</sup>

In 2018, a major development in the field of international commercial mediation occurred. The United Nations Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention”)<sup>4)</sup> was officially adopted by the United Nations General Assembly. Since then, fifty-six states have signed and fourteen states have ratified and implemented the Singapore Convention in their domestic law.<sup>5)</sup> Recently, Japan became the second major Asia-Pacific state to enact legislation implementing the Singapore Convention.<sup>6)</sup>

This paper intends to examine the possible impact and benefits of the Singapore Convention could have on the judicial system and the economies of Japan and Korea. Analyzing these will be critical in understanding the Convention’s significance. Recent developments in Japan could also help shape Korea’s approach to implementing the Singapore Convention.

## 1. Background

The Singapore Convention established a legal framework that allows and guarantees the cross-border “recognition and enforcement of commercial [iMSA],” resulting from international commercial mediation.<sup>7)</sup> The Singapore Convention applies only to ‘*international commercial disputes*’, which are defined as disputes arising from all

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3) The lack of a cross-border mechanism for giving legal effect to mediated settlement agreements is said to be a significant barrier to the willingness of some companies to use mediation. See, Timothy Schnabel, “The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements,” *Pepperdine Dispute Resolution Law Journal*, Vol. 19 No. 1. 2019, p. 57.

4) *Supra* note. 1.

5) See, *Singapore Convention on Mediation*, Singapore Management University, <<https://www.singaporeconvention.org/>> (last visited 2023.12.31)

6) *Ibid.*

7) Nadja Alexander et al. *The Singapore Convention on Mediation: A Commentary*, Kluwer Law International, Vol. 2, 2002, p.1

relationships of a commercial nature, such as trade transactions, investment, finance, and other business ventures.<sup>8)</sup> With the implementation of the Singapore Convention, direct enforcement of the iMSA is possible in courts of the signatory state without the need to have a review of the iMSA at the place of origin or where it was concluded.<sup>9)</sup>

## 2. Significance of the Singapore Convention for Japan and Korea

The Japanese legal system has always valued the importance of resolving disputes in a peaceful manner based on the cultural emphasis on duty and social harmony.<sup>10)</sup> Cultural similarities can be found in Korea as well. Japan and Korea have very similar legal frameworks concerning ADR and, in particular, mediation. Both countries are civil law jurisdictions and court-annexed mediation is the most reliable and popular form of mediation. Due to the high reliability of court-annexed mediation, private mediation in both jurisdictions has been rather underdeveloped. In Japan and Korea, establishments of mediation centers or institutions have gained attention, indicting the recent trend toward facilitating private mediation.<sup>11)</sup> At this time, in Korea, the legal framework for mediation is governed by the Judicial Conciliation of Civil Disputes Act of 1990 (“JCCDA”),<sup>12)</sup> but as the title suggests, this legislation only

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8) *Id.* p.32

9) *Id.* p.17.

10) Historically, Japan was known as a *non-litigious society*, where harmonious relationships are valued and thus non-adversarial dispute resolution methods such as mediation is deeply rooted in the culture and the legal system. See, Katja Funken, “Court-connected Mediation in Japan and Germany”, *German Law Journal*, Vol. 3, Issue 2, 2002. p.3.

11) Japan has recently opened the Japan International Mediation Center in Kyoto (“JIMC-Kyoto”), an international mediation center which receives support from the Japan’s Foreign Ministry, Justice Ministry and Ministry of Economy, Trade, and Industry for staff and training. See, Nikkei Asia, “Japan to open center for international business arbitration”, 2017.05.18., <<https://asia.nikkei.com/Politics-Economy/Policy-Politics/Japan-to-open-center-for-international-business-arbitration>>; In Korea, the Korea International Mediation Centre (“KIMC”) was established in 2020 and remains the only mediation centre for international disputes. See, Legal Business Magazine, “South Korea: The next hub for international dispute resolution?”, 2023.04.26., <<https://www.legalbusiness.co.uk/disputes-yearbook-2023/sponsored-briefing-south-korea-the-next-hub-for-international-dispute-resolution/>>.

applies to court-annexed civil mediation.<sup>13)</sup> Ratification and implementation of the Singapore Convention for Korea can provide an opportunity to develop the legal framework for international commercial and private mediation in Korea. On that account, Korea should become a party to the Singapore Convention and refer to the latest developments in Japan as a precedent.

## II. Potential Impact of the Singapore Convention on Japan and Korea

### 1. Promotion of the Use of Private Mediation

Statistics from the Judicial Yearbook of 2022 published by the National Court Administration of Korea showed that in 2021 the Korean courts handled 892,607 civil law cases. Of the total number of civil cases, 66,909 cases opted for civil mediation (7.49% of the total civil cases). Of the total number of civil mediation cases, 7,616 cases were successfully settled (11.5% success rate).<sup>14)</sup> In comparison, according to the Japan Statistical Yearbook 2024, in 2021, there were 1,374,000 civil and administrative cases handled by the Japanese Courts and about 32,000 cases were mediation cases (2.3% of the total civil and administrative cases).<sup>15)</sup> As international mediation for international commercial disputes becomes more prevalent

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12) Judicial Conciliation of Civil Dispute Act, Ministry of Justice of Republic of Korea, 1990, [hereinafter JCCDA], <[https://elaw.klri.re.kr/eng\\_mobile/viewer.do?hseq=52915&type=part&key=8](https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=52915&type=part&key=8)>.

13) Judicial Conciliation of Civil Disputes Act of 1990 (“JCCDA”), formed a court-annexed mediation program, which allows significant discretion for the courts to mandate a civil mediation process even when there are no agreement or request from either party. JCCDA is also called the Civil Mediation Act. See, Nohyoung Park, “Court-Annexed Mediation in Korea,” *Asia Pacific Law Review*, Vol. 17, Issue sup.1: Special issue on Mediation, 2009, p.152.

14) For the purpose of this paper, number civil mediation cases handled by the judge is shown. See, National Court Administration of Supreme Court of Republic of Korea. 2022. *Judicial Yearbook*, <<https://www.scourt.go.kr/portal/news/NewsViewAction.work?pageIndex=1&searchWord=&searchOption=&seqnum=8&gubun=719>>.

15) Statistics Bureau of Japan. 2024. *Statistical Yearbook 2024*. Ministry of Internal Affairs and Communications, <<https://www.stat.go.jp/english/data/nenkan/73nenkan/index.html>>.

and accessible under the Singapore Convention, more people will be convinced to use private mediation when domestic or international commercial disputes arise. Subsequently, private mediation could become an effective substitute for litigation or civil mediation and aid in lessening the burden on the judicial system. Moreover, the statistics indicate that both jurisdictions are familiar with the concept of mediation, and therefore, the Singapore Convention aligns with the state policies of Japan and Korea.

## 2. Enhancement of International Trade

Singapore Convention will assist in the growth of international mediation by highlighting its procedural efficiency and providing legal certainty. Consequently, the promotion and use of mediation could reduce the costs of legal fees for transnational businesses. A report from the Centre for Effective Dispute Resolution in London showed mediation could save businesses around “£4.6 billion (\$5.8 billion) per year in management time, relationships, productivity and legal fees”.<sup>16)</sup> Suppose Korea implements the Singapore Convention as Japan has. In that case, Korea will also be able to provide legal certainty for domestic and foreign businesses in circumstances where international commercial disputes do occur. Businesses could be attracted to conduct transnational transactions knowing the Korean government has formally recognized mediation as a reliable option for resolving international commercial disputes under the Singapore Convention.<sup>17)</sup>

For the member states, the Singapore Convention could attract new businesses

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16) Ministry of Justice of United Kingdom, 2023. Consultation outcome Government Response to the Consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018). <[https://www.cedr.com/wp-content/uploads/2021/05/CEDR\\_Audit-2021-lr.pdf](https://www.cedr.com/wp-content/uploads/2021/05/CEDR_Audit-2021-lr.pdf)>.

17) The EU Intellectual Property Office released a report to support that Singapore Convention could support business expansion, international trade and investment for EU businesses. A framework that ensures the enforcement of mediated settlement agreements will reduce uncertainty and risks when entering into new commercial relationships with non-EU business partners. *See*, Alternative Dispute Resolution Service, 2022, *ADR-SAB Working Group 3: position paper on the Singapore Convention on Mediation*, European Union Intellectual Property Office, <[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/contentPdfs/law\\_and\\_practice/adr/Position\\_Paper\\_Singapore\\_Convention\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/adr/Position_Paper_Singapore_Convention_en.pdf)>, p.4.

and consolidate relationships with parties to the Convention. Japanese courts are now likely to be more attractive to transnational businesses due to their ability to adjudicate international commercial disputes efficiently through mediation.

It is also worth noting that Korea is already an established member in international trade and is ranked as the second country with the most free trade agreements (“FTAs”) in Asia.<sup>18)</sup> Most of the agreements include a provision as the following:

1. Good offices, conciliation, and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.
2. Good offices, conciliation, or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated by any party to a dispute at any time.<sup>19)</sup>

When disputes arise, the States or the Parties to the FTA have the right to seek mediation at any given time. Although these provisions are included in most of the FTAs Korea has signed, they do not explain their binding nature. Thus, the implementation of the Singapore Convention by Korea could provide legal certainty by ensuring the enforcement of settlement agreements resulting from disputes related to the FTA.

### III. Implementation of the Singapore Convention in Japan

#### 1. Mediation in Japan: Overview

In 1951, the Japanese Civil Mediation Act was implemented and all civil mediations

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18) Singapore has the highest number of free trade agreements at forty-four and Korea is ranked second with thirty-nine agreements. See Free Trade Agreements, <<https://aric.adb.org/fta-comparative>>.

19) See, Free Trade Agreement Between Korea and ASEAN Article 4, <[https://www.fta.go.kr/webmodule/\\_PSD\\_FTA/asean/1/20100413\\_asean.pdf](https://www.fta.go.kr/webmodule/_PSD_FTA/asean/1/20100413_asean.pdf)>; Free Trade Agreement Between Korea and Singapore Article 20.5, <[https://www.fta.go.kr/webmodule/\\_PSD\\_FTA/sg/1/KSFTA.pdf](https://www.fta.go.kr/webmodule/_PSD_FTA/sg/1/KSFTA.pdf)>; Free Trade Agreement Between Korea and Central America Article 22.6 <[https://www.customs.go.kr/download/ftaportalkor/\\_down/trty/han\\_ma\\_01\\_eng.pdf](https://www.customs.go.kr/download/ftaportalkor/_down/trty/han_ma_01_eng.pdf)>; Free Trade Agreement Between Korea and Canada Article 21.5 <[https://fta.go.kr/webmodule/\\_PSD\\_FTA/ca/2/1\\_ko\\_ca\\_eng.pdf](https://fta.go.kr/webmodule/_PSD_FTA/ca/2/1_ko_ca_eng.pdf)>.

conducted by the court were subjected to the Civil Mediation Act.<sup>20)</sup> In Japan, mediation can be categorized into three types: civil, administrative, and private. Civil mediation conducted with the intervention of the court was considered the only type of mediation with legal effect.<sup>21)</sup> Administrative mediations refer to mediations that may be operated by administrative agencies or other dispute resolution committees established under individual laws on administrative mediation. Private mediations refer to mediation conducted by the private sector or organizations. As mentioned above, administrative and private mediation does not have the legally binding effect as civil mediation does.<sup>22)</sup>

In 2004, the Act on Promotion of Use of Alternative Dispute Resolution (“ADR Promotion Act”)<sup>23)</sup> was adopted to promote alternative dispute resolution mechanisms such as arbitration and mediation in private disputes. The ADR Promotion Act established that only domestic settlement agreements from a certified mediation service would be recognized as contracts.<sup>24)</sup>

## 2. Implementation Act of the Singapore Convention

Surprisingly, Japan seemed skeptical about becoming a signatory of the Singapore Convention in 2019. This uncertainty may have been due to the fact that the Singapore Convention “did not seem compatible with the existing scheme for compulsory

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20) Civil Mediation Act, Ministry of Justice of Japan, <<https://www.japaneselawtranslation.go.jp/en/laws/view/4219/en>>.

21) Soo-Hye Cho, “Reforming the Enforcement of Settlement Agreements Resulting from mediation in Japan: Collision Between Singapore mediation Convention and Enforcement Procedure of Civil Law Countries” (조정에 의한 화해합의의 집행에 대한 일본의 개정논의: 싱가포르협약과 대륙법계 법제의 충돌을 중심으로), *Law Review* Vol, 63, No. 3, Institute of Law Studies Pusan National University, 2022, p.6

22) *Id.* p.7.

23) The Act on Promotion of Use of Alternative Dispute Resolution (Act No.151 of 2004), [hereinafter ADR Promotion Act], Ministry of Justice of Japan, <<https://www.cas.go.jp/jp/seisaku/hourei/data/AOP.pdf>>. (Full text of the ADR Promotion Act in unofficial English translation).

24) Byung Seo Jun, “Introduction of the Act on the Implementation of the Singapore Convention on Mediation in Japan” (일본의 싱가포르 조정협약의 실시법의 소개), *Chung-Ang Journal of Legal Studies*, Vol. 47, No.2, 2023, p.186.

execution in a civil matter.”<sup>25)</sup>

In response to the possible complications in the implementing the Singapore Convention, the Institute of Commercial Law, a public interest corporation, held seven study group meetings beginning in 2019.<sup>26)</sup> On April 23 of 2023, the Japanese legislative body (“Diet”) passed the Implementation Act, which will take effect on April 1 of 2024. According to Article 3 of the Singapore Convention, the Convention establishes a framework for cross-border enforcement of iMSA but leaves the rules of procedure of enforcement to each member state. In Japan, for civil enforcement of an iMSA, it is required to go through the court procedure to obtain an enforceability order from the court.<sup>27)</sup> Thus, the Implementation Act was enacted to establish a new legal procedure for the court in order to grant enforcement power to the iMSA and successfully implement the Singapore Convention.<sup>28)</sup> Simultaneously, the Japanese government also amended the ADR Promotion Act to allow settlement agreements resulting from certain types of domestic mediation to be enforceable and, therefore, kept the scope of the Implementation Act limited to iMSA.<sup>29)</sup> It is presumed that the ADR Promotion Act, as a pre-existing domestic legal framework, was amended to coordinate with the new Implementation Act and provide a clear

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25) According to Professor Kaiuchi, two main obstacles had to be resolved to implement the Singapore Convention. First was incompatibility of Civil Execution Act and the Singapore Convention. Second, incompatibility of the Singapore Convention with the Alternative Dispute Resolution and domestic regulations in Japan. *See*, Olivia Sommerville, “Singapore Convention Series-Strategies of China, Japan, Korea and Russia,” Kluwer Mediation Blog, Sept. 16, 2019, <<https://mediationblog.kluwerarbitration.com/2019/09/16/singapore-convention-series-strategies-of-china-japan-korea-and-russia/>>.

26) The study group examined and considered revision of the existing Japanese Arbitration Act and the possibility of ratification of the Singapore Convention. *See*, Soo-Hye Cho, *supra* note.21, p.53.

27) Civil Execution Act, 1979, Ministry of Justice, Article 22(vii), <[https://www.japaneselawtranslation.go.jp/en/laws/view/4272/en#je\\_ch2sc1at1](https://www.japaneselawtranslation.go.jp/en/laws/view/4272/en#je_ch2sc1at1)>.

28) Ryunosuke Ushijima, “Outline of the Act to Partially Amend the Arbitration Act, etc. of Japan”, King & Wood Mallesons, <<https://www.kwm.com/jp/en/insights/latest-thinking/Outline-of-the-Act-to-Partially-Amend-the-Arbitration-Act-etc-of-Japan.html>>.

29) After the amendment, the ADR Act allows certain commercial settlement agreements and certain civil settlement agreements to be enforceable. *See*, Kazuhiro Kobayashi, “Recent Amendments to the Arbitration Act and the New Mediation Law-Part III”, *OH-EBASHI Newsletter*, Winter Issue, 2023, <[https://www.ohebash.com/jp/newsletter/NL\\_en\\_2023winter\\_Kobayashi.pdf](https://www.ohebash.com/jp/newsletter/NL_en_2023winter_Kobayashi.pdf)>.

separation of the enforcement procedure for domestic settlement agreements from the iMSA.

## 2.1 Scope of the Implementation Act

Under the Implementation Act, the scope of application is wider than the Singapore Convention because the Japanese legislation broadened the definition of ‘*international settlement agreement*.’ The Singapore Convention defined ‘*international settlement agreements*’ as when “(1) some or all of the parties have their addresses, offices, or places of business in different States, or (2) the State in which some or all of the parties have their addresses, offices, or places of business is different from the State in either the place where a substantial part of the obligations under the agreement is performed or the place with which the subject matter of the agreement is most closely connected to.”<sup>30)</sup> The Implementation Act broadened the scope of application by adding international settlement agreements concluded when “some or all of the parties are persons with an address, main office or place of business outside of Japan” could be subject to the Implementation Act.<sup>31)</sup> Therefore, the Implementation Act could be applicable even if two parties reside in the same country other than Japan.<sup>32)</sup>

## 2.2 Reservations Under the Implementation Act

Japan<sup>33)</sup> declared one of the two reservations available under Article 8 of the Singapore Convention.<sup>34)</sup> The reservation declared by Japan under Article

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30) Singapore Convention, Article 1(1)(a), (b).

31) Implementation Act, Article 2(3)(i), (ii), and (iii).

32) Kazuhiro Kobayashi, *supra* note. 29.

33) Japan is one of the six states to have declared a reservation under the Singapore Convention. *See*, United Nations Treaty Collection, United Nations, <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-4&chapter=22&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en)>.

34) Japan did not declare reservation under Article 8(1)(a) of the Singapore Convention. Article 8(1)(a) allows a state to declare the Singapore Convention “shall not apply...to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency

8(1)(a)(1)(b) of the Singapore Convention stipulates that mediated settlement agreements will be enforceable only when the parties to such agreements agree to be covered by the Convention.<sup>35)</sup> This reservation allows an opt-in approach, which means parties to the mediation must declare or express consent for the Singapore Convention to apply the iMSA. In accordance with the reservation, the Implementation Act stipulates that a party or the parties must file a petition with the court for a civil execution order for civil enforcement of the iMSA in Japan. When a petition is filed with the court, the parties must provide an agreement showing that the parties intended for the iMSA to be subjected to civil enforcement based on the Singapore Convention.<sup>36)</sup>

### 2.3 Grounds for Refusing Enforcement of iMSA Under the Implementation Act

Compared to the Singapore Convention, the Implementation Act provides narrower grounds for refusing the civil execution of the iMSA. For example, Article 5(1)(b)(ii) of the Singapore Convention, which allows the competent authority to refuse enforcement when the settlement agreement is not binding or final by its terms, was not included within the Implementation Act. Additionally, the Implementation Act does not include a ground of refusal based on Article 5(1)(d) of the Singapore Convention, where the competent authority may refuse enforcement of the iMSA when granting relief would be contrary to the terms of the settlement agreement.<sup>37)</sup> These grounds of refusal were not included because the Implementation Act sets forth a civil execution agreement as a prerequisite before seeking enforcement of the iMSA. It would have been redundant to include grounds of refusal provisions such as Article 5(1)(b)(ii) or Article 5(1)(d).<sup>38)</sup>

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is a party, to the extent specified in the declaration,” *See*, Singapore Convention, Article 8(1)(a) for the full text.

35) Singapore Convention, Article 8(1)(b).

36) Implementation Act, Article 3.

37) Singapore Convention, Article 5(1)(d).

38) A civil execution agreement is a prerequisite before seeking enforcement of the settlement agreement,

## IV. The Singapore Convention and Korea

### 1. Mediation in Korea: Overview

Mediation in Korea can be sorted into three categories: civil, administrative agency, and private. Like Japan, court-annexed civil mediation is the most used form of mediation, while private mediation is scarce.<sup>39)</sup> Although mediation is not the most popular form of dispute-resolution mechanism in Korea, the Korean government has made efforts to promote the use of mediation through its legislative initiatives and programs. For example, the Korean government enacted the JCCDA in 1990. Then, perceiving the Singapore Convention aligned with the government's commitment to develop mediation, Korea was one of the three major Asian states to sign the Singapore Convention in 2019.<sup>40)</sup> A Task-Force was formed by the government in 2021 to examine how the Singapore Convention would be implemented.<sup>41)</sup> In spite of the commitment to develop mediation, there continues to be a lack of awareness of what mediation is and, is often confused with negotiation or conciliation.<sup>42)</sup> Article 3 of the Singapore Convention stipulates, that each party to the Convention has to enforce a settlement agreement by domestic rules of procedure.<sup>43)</sup> Korea has no domestic rules of procedure or legislation on private mediation. Thus, further

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and thus, questioning the binding-ness or finalization of the settlement agreement would be redundant. Such ground of refusal was not included within the Implementation Act. *See*, Soo-Hye Cho, *supra* note. 21, p.64.

39) Sae Youn Kim and Joonhak Choi, "Mediation in South Korea", *Revista Brasileira de Alternative Dispute Resolution*, ano.5, n.9, 2023, p. 146.

40) Three of the four largest economies in Asia – China, India and South Korea- signed the Singapore Convention on Mediation during the signing ceremony in 2019. Notably, Japan was absent. *See*, Nadja Alexander, *supra* note.7, p.10.

41) The Task-Force is consists of 10 experts; 6 legal scholars, 2 attorneys and 1 prosecutor. *See*, Law Times, Ministry of Justice Launches "Task Force on Legislation to Implement Singapore Mediation Convention" (법무부 '싱가포르 조정협약이행법률 제정 TF' 발족), 2021. 03. 10., <<https://www.lawtimes.co.kr/news/168524>>.

42) Mediation and conciliation are understood and practiced "interchangeably in Korea." *See*, Nohyoung Park, *supra* note.13, p.152.

43) Singapore Convention, Article 3.

preparations will be necessary if the Singapore Convention is to be implemented in Korea.<sup>44)</sup>

## 2. Development of the Legal Framework for Future Implementation of the Singapore Convention

### 2.1 Development of the Legal Framework

The development of the legal framework to successfully implement the Singapore Convention is a crucial issue among Korean scholars and demands our attention. After considering various opinions and proposals based on efficiency preferences and different evaluations of the current status of mediation in Korea, this paper suggests three possible options for the Korean government.<sup>45)</sup>

- ① Enactment of a law to implement the Singapore Convention,
  - ② Enactment of a law to implement the Singapore Convention and adoption of UNCITRAL Model Law on Mediation (“Model Law”)<sup>46)</sup> and
  - ③ Enactment of General Mediation Law, then implement Singapore Convention.
- The first option would be for the Korean government enact a law like the

44) Sae Youn Kim, *supra* note.39 p. 151.

45) Varying recommendations by legal scholars from Korea. See, Nohyoung Park, *International Commercial Mediation System: Focusing on the Singapore Convention* (국제상사조정체제: 싱가포르조정협약을 중심으로), Park Yeongsa, 2021, p.159 (Professor Park proposed: (1) enactment of an Implementation Act of the Singapore Convention or (2) enactment of an Implementation Act of the Singapore Convention and adoption of a new basic law of mediation for domestic mediation); Sun Ju Jeong, “Singapore Convention on Mediation and Recognition and Enforcement of Settlement Agreement” (싱가포르협약과 조정 결과의 승인집행), *Civil Procedure*, Vol. 24, No. 2, Korean Association of The Law of Civil Procedure, 2020, pp.8-9 (Proposed enactment of a basic law on mediation with inclusion of the Singapore Convention and not adopt the UNCITRAL Model Law).

46) A Model Law on Mediation was prepared simultaneously with the Singapore Convention as a suggestion for the law-makers in national governments to consider adopting as a part of their domestic legislation and is not binding as a Convention. See, United Nations General Assembly, “Resolution adopted by the General Assembly 73/199, Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the United Nations Commission on International Trade Law”, A/73/496, United Nations, 20 December 2018.[hereinafter Model Law].

Implementation Act of Japan, where the Singapore Convention would be implemented, and the legislation would be applicable only to iMSA. While this option would be most efficient, it would also result in neglect of the development of domestic private mediation. If option one is chosen, the Korean government must devote resources to publicize its status as a member state of the Singapore Convention. The government should also fund or sponsor programs to increase the number of mediators in Korea and to raise awareness of mediation.

For the second option, an act to implement the Singapore Convention could be prepared, and the Model Law could be adopted. The Model Law will provide the rules and procedures for private mediation and enforcement of settlement agreements. Option two would be an adequate choice but the Model Law may have to be modified to suit the legal culture and mediation practices in Korea.<sup>47)</sup>

Lastly, the third option would be to enact a General Mediation Law and implement the Singapore Convention accordingly. The General Mediation Law would set forth rules and procedures for private mediation in Korea. Amongst other procedures, the focus should be on clarifying the definition of mediation and the mediation procedure, as well as the training and qualification of mediators. After establishing the General Mediation Law, the Singapore Convention could be implemented accordingly and orchestrated to suit the domestic legal framework. Option three would be ideal, but it will be a protracted process compared to other options. Supplementary studies on mediation culture in Korea must be conducted with participation from legal scholars and professionals.<sup>48)</sup> Then, the government must incentivize corporations to use mediation for domestic and international commercial contracts. Free or affordable training and certifications of mediators could be sponsored by the government or free use of online platforms to conduct online mediation. The government should

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47) The Model Law was shaped largely by Anglo-American law. Due to confidentiality, it is difficult to predict how incompatible or compatible the Model Law would be for mediation practices conducted in Korea. See, Soo-Hye Cho, *supra* note.21, p.29.

48) Due to the lack of basic law on mediation in Korea, Korean commentators have repeatedly expressed the need to focus on definition of mediation and the mediation procedure and qualification on mediators. See, Sun Ju Jeong, *supra* note.45, pp.10-13; See also, Nohyoung Park, *supra* note.13, pp.158-161.

also support establishing independent private mediation centers and institutions, but it should not run them to prevent political policies from influencing private mediation.

## 2.2 Scope and Reservations

As the Japanese Implementation Act did, the Korean government should also adopt a broadened definition of international settlement agreements to broaden the scope of the application further. A broadened scope of application will be inclusive and attractive for parties seeking to enforce iMSA in Korea. Next, Korean legislators should examine the possibility of declaring any of the two reservations available under Article 8 of the Singapore Convention. Japan has declared a reservation to allow an opt-in approach by Article 8(1)(b), but it is strongly recommended that Korea abstain from declaring any reservations. First, there is a likelihood that the parties to the dispute are unaware of the need to opt-in according to the law of the state where enforcement is likely to be sought.<sup>49)</sup> Second, the Singapore Convention aims to create an efficient cross-border enforcement legal framework and promote mediation. Such purpose may be diluted by imposing additional requirements to opt-in, which could be viewed as “burdensome and unnecessary.”<sup>50)</sup> To avoid confusion for the users of mediation, it is recommended that Korea does not declare any reservations.

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49) Many scholars agree the declaration of the reservation under Article 8(1)(b) may significantly limit the Convention since most users are unlikely to be aware of the need to opt-in. However, opinions in declarations of reservations vary for political reasons. See, Itai Apter and Coral Henig Muchnik, “Reservations in the Singapore Convention-Helping to Make the”New York Dream “Come True”, In N. Gliagias (Ed), *Singapore Mediation Convention Reference Book*, Vol. 20, No. 4, 2019, Cardozo Journal of Conflict Resolution. p.1278; Timothy Schnabel, *supra* note.3, p. 57.

50) Itai Apter and Coral Henig Muchnik, *supra* note. 49, p.1277.

### 3. Development of Social Programs for the Future Implementation of the Singapore Convention

#### 3.1 Awareness of Mediation

Besides legal issues, considerable resources must be devoted to educating and promoting mediation for legal professionals, businesses, and the general public. Many legal professionals and businesses in Korea do not completely understand the mediation process or the Singapore Convention. A survey conducted by the Korean Institute of Criminology and Justice and the Korean International Mediation Centre showed that 60.7% of the survey respondents from Korea were unfamiliar with the Singapore Convention.<sup>51)</sup> In the same survey, 91.5% of the respondents attested that mediation is not actively used in international commercial disputes in Korea.<sup>52)</sup> Going forward, social awareness and education should be sponsored by the Korean government and executed by educational institutions and ADR institutions like Japan<sup>53)</sup>

#### 3.2 Training and Qualification of Mediators

The Singapore Convention identifies misconduct by a mediator as a possible grounds for the competent authority to refuse enforcement of the iMSA.<sup>54)</sup> However,

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51) Survey conducted between 81 Korean experts, including corporate executives or employees in the legal team, in-house counsels, law firm lawyers, government officials and law professors. See, Han kyun Kim et al. "Empirical Analysis for International Arbitration and Mediation System for Domestic Policies"(국제 중재 및 조정제도 활성화를 위한 법무정책 연구), In H. Kim et al.(Eds), *Justice Policies on the Promotion of International Arbitration & Mediation in Korea*, p.244.

52) Respondents answered lack of awareness and lack of trust in the mediator or the mediation institutions contributed to the insufficiency in use of mediation in international commercial disputes. See, *Id.* p.241.

53) Currently Korea uses the term "mediation" in court-annexed mediation and administrative mediation despite distinct differences in the two procedures. In court-annexed mediation, the mediator has the authority to make decisions on the settlement agreement in accordance to the Article 30 of the JCCDA or the Civil Mediation Act. The Singapore Convention defines mediation as a procedure among disputants with a mediator who does not have any authority to govern or influence the process. See, Sun Ju Jeong, *supra* note.45, p.10.

54) Singapore Convention, Article 5(1)(e) and (f).

the Singapore Convention does not specify which standard applies to the mediator or the mediation process. There needs to be more of an international code of conduct for mediators, and unsurprisingly, there is a lack of a domestic code of conduct for mediators in Korea. For example, in Japan, under the ADR Promotion Act, a mediator may obtain a certification from the Minister of Justice for any private mediation conducted in Japan.<sup>55)</sup> In Singapore, the mediator may be certified by the system designated by the Ministry of Law of Singapore to conduct mediation.<sup>56)</sup> Like Japan and Singapore, training and qualification for mediators in Korea are recommended to be regulated under a unified governmental system to prevent misconduct by the mediators and to deter inconsistencies in mediation procedures.

## V. Conclusion

Reports have shown that countries worldwide are beginning to acknowledge the significance of the Singapore Convention. The United Kingdom, which has yet to ratify the Convention, is reviewing the possibility of becoming a member state with an optimistic outlook.<sup>57)</sup> The European Union, which is not a signatory of the Singapore Convention, has also published a favorable outlook on the Singapore Convention, insinuating the Convention would be beneficial to the European Union members.<sup>58)</sup> As more member states join the Convention, the use of international mediation will exponentially increase. For Japan and Korea, an increase in a number of international mediations would then likely lead to the development of private

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55) ADR Promotion Act, Article 5.

56) The Minister for Law designed Singapore International Mediation Institute Credentialing Scheme (SIMI Certified mediator) as an approved certification scheme. *See*, Singapore Mediation Act 2017, Article 2(1), <<https://sso.agc.gov.sg/Act/MA2017>>.

57) The Ministry of Justice of the United Kingdom have published reports which indicate that majority of the legal professionals believe “becoming a Party [to the Convention] would be beneficial for cross-border commercial dispute resolution and the UK court load.” *See*, Ministry of Justice of United Kingdom, *supra* note.16, p.26.

58) Alternative Dispute Resolution Service, *supra* note.17, pp. 4-6.

mediation and, therefore, lessen the burden on the judicial system. Economically, new business entities could be attracted to conduct business ventures in Japan and Korea since foreign businesses will feel secure with administering business in a jurisdiction where the legal framework for resolving international commercial disputes is well established.

Japan's preparation steps to harmonize the implementation of the Singapore Convention with its domestic legal framework were commendable. While it may be time-consuming, it is strongly recommended for the Korean government to enact a General Mediation Law then implement the Singapore Convention. This proposal will ensure the establishment and development of private mediation in Korea and allow the implementation of the Singapore Convention accordingly. The Korean government should encourage corporations to include the mediation clause in international and domestic commercial contracts by providing incentives such as affordable mediator certification programs for corporations and their employees. With a growing number of uses of online dispute resolution, the government could also provide incentives such as free access to online platforms for corporations to conduct online dispute resolution.

Japan and Korea have influenced each other's policies for centuries, owing to their similar legal systems and judicial cultures. Therefore, Korea should view initiatives taken by Japan to implement the Singapore Convention as a prototype for future endeavors. As the rest of the world moves forward with the current trend of international mediation, it is imperative Korea partakes in the upcoming changes but does so with caution and scrupulous planning as a member of the international community.

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## [ Abstract ]

## Potential Impact of Singapore Convention on Mediation in Asia-Pacific: Comparative Analysis of Mediation in Japan and Korea

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In April of 2023, Japan enacted the Act for Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation (“Implementation Act”) to implement the United Nations Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention”). Japan is the second country from the Asia-Pacific region to implement the Singapore Convention. Such development is expected to influence the surrounding countries, especially the Republic of Korea, which has signed but has not yet ratified the Convention.

The Singapore Convention presents a significant opportunity for the economic growth and development of private mediation in both Japan and Korea. Its implementation could attract international transactions and businesses to a forum where there is a guarantee that a settlement agreement by mediation can be enforced, thereby potentially boosting the economies of both countries. The anticipated growth of private mediation is also expected to have a positive impact on the judicial systems of both countries, relieving the burden on the judicial caseload.

Both Japan and Korea, as civil law jurisdictions with similar legal cultures, have largely overlooked private mediation. However, Japan’s successful implementation of the Singapore Convention which is in line with its domestic regulations sets a precedent. In 2019, Korea was one of the first countries to sign the Singapore Convention, but it lacks a mediation law and is unprepared for implementation of the Singapore Convention.

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Therefore, a thorough study of the key provisions of the Japanese legislation could serve as a practical model for Korea and its future endeavors.

[Key Words] international commercial mediation, Singapore Convention, settlement agreement, enforcement, UNCITRAL