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INTERNATIONAL DISPUTE RESOLUTION CONFERENCE 2019

New Era of Global Collaboration

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How to make effective the Singapore Convention: A Korean View

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Talking Points

- The Korean Society of Mediation Studies
- The Singapore Convention v. the 2018 Model Law
- The Singapore Convention and the 2018 Model Law in Korea
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The Korean Society of Mediation Studies

- The Korean Society of Mediation Studies was established in 2009 to promote proper mediation in Korea and to develop international cooperation to this effect.
 - The Korean Society organized two Asia Pacific Mediation Conferences in 2017 and 2018 by inviting the mediation experts from China, Japan, Russia in particular, and the US in addition to Koreans.
 - The Korean Society published the first issue of “Asia Pacific Mediation Journal” in English in March 2019.
 - The members of the Korean Society, including myself, participated in publishing the “Dispute Resolution Mechanism for the Belt and Road” by contributing to the section on mediation rules in October 2016.
 - The Korean Society in cooperation with the Korean Commercial Arbitration Board has been educating mediators for the past 7 years.
 - The Korean Society intends to be an active platform for promoting the common understanding of and developing best practices of mediation in the region.

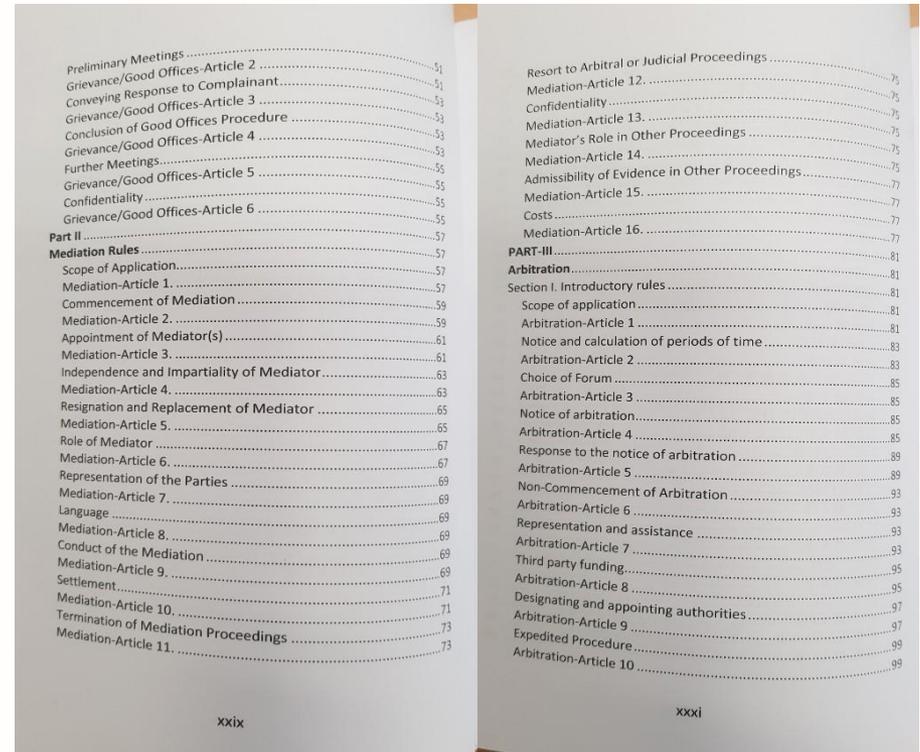
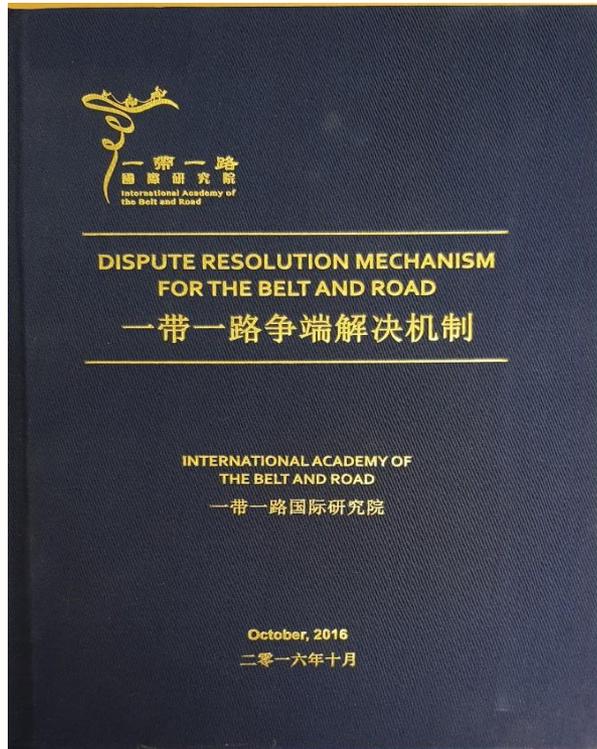
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Dispute Resolution Mechanism for the Belt and Road (2016)

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The 2017 Asia Pacific Mediation Conference in Seoul

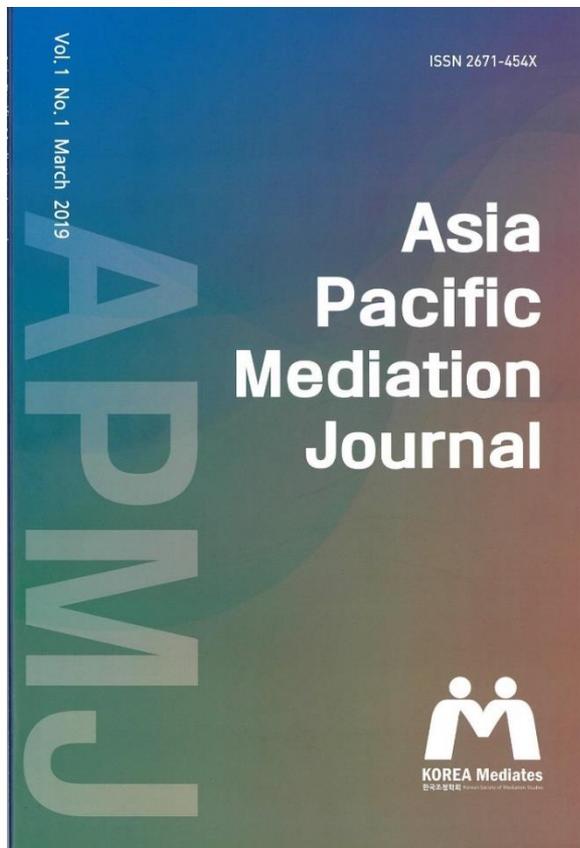
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The first issue of the Asia Pacific Mediation Journal published in March 2019

The Singapore Convention v. The 2018 Model Law

- Mediation is more appropriate for cross-border disputes where different States with their own legal systems are involved.
 - Those disputes may be properly and amicably settled through mediation which needs to be based on the interests of the parties, not on any particular rule of law.
 - Mediated settlement is more appropriate than formal processes like arbitration where decisions of right and wrong often pull the parties apart for a long time and even forever.
- The “Singapore Convention on Mediation” and the Model Law are certain to provide for a practical and guided way to pursue amicable settlement of international commercial disputes through mediation.

The Singapore Convention v. The 2018 Model Law

- During the discussion in the Working Group II, it was suggested that, as the Commission would be developing a model legislative text and a convention in parallel, it should be clarified that States would not be expected to adopt both instruments. (A/CN.9/901, para. 91)
 - It was also noted that the preparation of a convention would allow States that adopt the model legislative provisions in their domestic laws to become a party to the convention at a later stage. (A/CN.9/901, para. 92)
 - It was further agreed that a possible approach to address the specific circumstance of preparing both types of instrument could be to suggest that the General Assembly resolution accompanying those instruments would express no preference on the type of instrument to be adopted by States. (A/CN.9/901, para. 93)

The Singapore Convention v. The 2018 Model Law

- The UN General Assembly noted in the resolution 73/198:
 - The concurrent preparation of both the Singapore Convention and the amended Model Law was intended “to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation”.
 - However, it would not create “any expectation that interested States may adopt either instrument”.
- States would be able to bring the Singapore Convention into effect by adopting the Model Law.

The Singapore Convention v. The 2018 Model Law

- As a model law is a suggested framework to assist States in modernizing their laws, each State may consider adopting a model law in its entirety, as part of the State's legislation.
 - States enacting legislation based on a model law, however, have the flexibility to depart from its text.
 - “The Guide to enactment and use” would be adopted to provide guidance on how the substantive provisions (sections 2 and 3) of the Model Law should each be enacted as a stand-alone legislative text. (UNCITRAL Report, A/73/17, para. 67)

The Singapore Convention v. The 2018 Model Law

- The Model Law was drafted so as to ensure a level of consistency with the Singapore Convention.
 - The Model Law adopts the substantive provisions of the Singapore Convention on enforcing international settlement agreements in addition to its own provisions on the conduct of mediation.
 - Both instruments provide the enforcement of a settlement agreement “in accordance with the rules of procedure” and “under the conditions laid down” in the Convention [the section on international settlement agreements]. (the Convention, Art. 3(1); the Model Law, Art. 17(1))

The Singapore Convention v. The 2018 Model Law

- Even if it starts becoming effective, the Singapore Convention needs more State parties in order to really contribute to “the development of harmonious international economic relations”. (the Convention, Preamble)
- The Model Law, by being adopted by States, is expected to have the same effect as the Singapore Convention, and thus it also needs to be adopted by more States.
- In this regard, there might be a practical need for States, which have closer economic relations, including through FTAs, or by being in close proximity, to expedite the ratification of the Singapore Convention or the adoption of the Model Law.
 - The European Union and the One Belt One Road scheme in particular are to be noted in this respect.

The Singapore Convention v. The 2018 Model Law

- Until the Singapore Convention and the Model Law play a meaningful role to promote international commercial mediation as expected, however, there may be a need for a provisional system to provide the enforceability of international settlement agreements resulting from mediation.
 - The One Belt One Road Mediation Rules (Draft), for example, provides that “If the parties agree to formalize their settlement in an arbitral award for the purpose of enforcement, the mediator(s) conduct(s) his/their mediation in expedited arbitration proceedings, unless parties agree otherwise.” (Art. 10(5))
 - The arrangement above need to be provisional until the effective application of the Singapore Convention and the Model Law.

The Singapore Convention and the 2018 Model Law in Korea

- Court-involved mediation is regulated by the Judicial Conciliation of Civil Disputes Act (Civil Mediation Act, 民事調停法), which is considered as a main law on mediation in Korea.
 - The Civil Mediation Act does not provide a definition of mediation, but its purpose implies what mediation is: to “settle civil disputes according to a simple procedure based on the mutual concession between the parties, common sense and actual circumstances”. (Art. 1)
 - The Model Law provides a definition of mediation as follows: “a process... whereby parties to request a third person or persons (“the mediator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship”. (Art. 1(3))

The Singapore Convention and the 2018 Model Law in Korea

- The Civil Mediation Act does not provide a meaningful qualification for a mediator, while the Model Law does it.
 - The Civil Mediation Act provides a qualification for a mediator as follows: to be appointed ... “from among persons who have advanced knowledge and high moral reputation...” (Art. 10)
 - The Model Law provides a qualification for a mediator as follows: that a party may request such an institution to recommend “suitable persons to act as mediator” (Art. 6(3)(a)) and that in recommending ... individuals to act as mediator, the institution ... shall have regard to “such considerations as are likely to secure the appointment of an independent and impartial mediator”. (Art. 6(4))

The Singapore Convention and the 2018 Model Law in Korea

- The Civil Mediation Act provides the same legal effect of settlement agreements like the Model Law.
 - The Civil Mediation Act provides settlement agreements through court-involved mediation with “the same effect as a settlement in court”. (Art. 29)
 - The Model Law provides that if the parties conclude an agreement settling a dispute, that settlement agreement is “binding and enforceable”. (Art. 15)
 - If the Art. 15 of the Model Law is adopted for commercial mediation beyond court-involved mediation, then the effect of such mediation is to have a legally binding effect like the court-involved mediation in Korea.

The Singapore Convention and the 2018 Model Law in Korea

- The Singapore Convention would not adversely intervene or be significantly in conflict with the current systems of mediation in Korea.
 - The court-involved mediation, which is often a case in Korea, is out of the application of the Convention.
 - The other systems of mediation are not directly aiming at settling international commercial disputes.
- The Model Law, applying to international commercial mediation, however, would certainly be a good model for civil or private mediation, independent from court-involved or administration-involved mediation, in Korea.
 - The so-called “Commercial Mediation Basic Law”, if enacted, would certainly reflect the provisions of the Model Law.
 - The newly enacted law may affect the court-involved and other systems of mediation positively to be in line with the global standard of mediation as provided in the Model Law.

Conclusion

- The Singapore Convention would contribute to closer economic collaboration and developments particularly among Japan, PRC, Russia around Vladivostok, and ROK, which are in close geographical proximity.
 - The settlement of international/regional business disputes through mediation would be more efficient and competitive than that through arbitration, if the former would benefit from the enforceability provided by the Convention.
- Awareness of mediation and its benefits esp. among businesses should be increased, for example, in cooperation with business and trade associations and the experts of mediation in the region.