

# Africa Current Issues

After the CFTA: Could African States Seize the Opportunities of the Singapore Convention on Mediation?

## **After the CFTA: Could African States Seize the Opportunities of the Singapore Convention on Mediation?**

### **Abstract**

The UN Convention on International Settlement Agreements Resulting from Mediation (known as the Singapore Convention on Mediation or SCM) was signed in Singapore on 7th August 2019 with eight of the 46 signatory countries coming from Africa.<sup>1</sup> The Convention will allow parties to rely on a mediated settlement agreement (MSA) and enforce it across borders following simplified procedures. It will also increase the visibility of mediation and encourage its use as an international dispute resolution mechanism, moving past the more commonly-used routes of arbitration and litigation. Legal practitioners hope that this Convention will build international commercial mediation practice, which has lagged behind more traditional forms of dispute resolution such as international commercial arbitration. However, its potential is clearer for jurisdictions with well-established mediation practices already in place such as Europe, the US, and Asia. What potential does the SCM have for African states and businesses? This paper examines the opportunities it offers the African states that ratify it, as well as the support structures and other commitments that will enable the Convention to fulfil its full potential.

### **Introduction**

With Africa's new Continental Free Trade Area agreed, African states will earnestly pursue—the modalities of regional integration, an area of development previously fragmented and hindered by uneven implementation. Regional and global standards increasingly come into play as a necessary component to lubricate the frictions of trade that inevitably arise as interactions increase. Whereas old trade regimes were purpose-built to suit the patterns of economic engagement in developed economies, African states now have an opportunity to fashion rules that directly address their continent's needs. International commercial mediation represents one of these new modalities, alongside the traditional forms of arbitration and litigation. Studies reveal that mediation consumes fewer resources, and that users are more satisfied with the outcomes, both in terms of the awards and the preservation of business relationships. As state-led enterprises are increasingly important in driving regional development models, this issue will significantly impact African states.

The SCM deliberately leaves open the issue of how domestic and sub-regional mechanisms should interact with international commercial mediation, and African states have a window in which to develop novel processes that draw on the strengths of their own systems, while remaining consistent with the global legal landscape. This will enable them to fast-track integration into the global economy as peers, rather than recipients. This paper examines how the Convention upgrades international commercial mediation as a viable form of dispute resolution, while assessing how African states can capitalize on this emerging framework, as well as actions they might take to make substantive rather than incremental gains.

Alternative dispute resolution methods (ADR) have evolved to handle disputes at the international level with binding finality. ADR refers to any method of settling disputes without use of litigation. These methods include mediation, arbitration, conciliation, negotiation, and neutral evaluation, among others. Arbitration was previously the most preferred ADR method for resolution of international commercial disputes because its outcomes (in the form of arbitral awards) are final and enforceable under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Arbitration Convention, 1958). Mediation did not gain as much popularity due to its weaknesses in enforceability. To circumvent this gap, practitioners and commercial mediation users applied hybrid/mixed methods (explained below) to convert each mediation settlement agreement (MSA) into an enforceable form, such as a consent award or an arbitral award.

When the SCM comes into force, it fills this gap by recognising MSAs as final and conclusive dispute resolution outcomes that are enforceable across borders. MSAs thus become enforceable international commercial settlement agreements arising from mediation, avoiding the use of courts through facilitation by a mutually-agreed neutral party - the mediator.

The table below captures the traditional strengths and weaknesses of the three main types of dispute resolution mechanisms prior to the SCM, where 'high' represents strengths and 'low' represents weaknesses of each ADR type, with 'medium' meaning in-between.

<i>Dispute Type</i>	<i>Arbitration</i>	<i>Mediation Pre-SCM</i>	<i>Litigation/Trial</i>	<i>Mediation Post-SCM</i>
<b><i>Processes</i></b>				
<b>Flexibility</b>	Low	High	Low	High
<b>Speed</b>	Medium	High	Low	High
<b>Confidentiality</b>	High	High	Low	High
<b>Cost-effectiveness</b>	Medium	High	Low	High
<b><i>Outcomes</i></b>				
<b>Enforceability</b>	High	Low	High	High
<b>Finality</b>	High	Low	High	High

In June 2018, the UN Commission on International Trade Law (UNCITRAL) finalised the texts of the UN Convention on the Enforcement of International Settlement Agreements Resulting from Mediation, and its corresponding Model Law – The UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), which was adopted by the UN General Assembly in December. Singapore, which had an active role in drafting, was selected as the venue for signing the SCM, which will enter into force six months after ratification by at least three member states. The Convention aims to answer past concerns over the enforcement of mediated settlement agreements involving multiple countries. Coming into force of the Convention thus rectifies traditional weaknesses (finality and enforceability) of mediation. MSAs will then be final and enforceable in accordance with international law. This provides a significant rationale for African states, which are rapidly developing and integrating into global value chains, to ratify the Convention.

## **Key features of the Singapore Convention on Mediation**

### ***Scope***

For a settlement agreement to fall under the purview of the Convention, it must meet the following four criteria – the agreement has to be mediated, concluded in writing by parties, and resolve a commercial dispute, which is international in nature, at its conclusion.<sup>2</sup> Settlement agreements excluded from the Convention pertain to consumer disputes for personal, family or household purposes, and those relating to family, inheritance or employment law; as well as court judgements and arbitral awards.<sup>3</sup>

### **Enforcement under the Convention**

Article 3(1) of the Convention addresses the sticky issue of MSA enforcement. In summary, once the settlement agreement fulfils the criteria of the Convention (as to scope above) the parties may begin proceedings in any courts of the signatory states to enforce obligations to each other enshrined in the MSAs; and the court will recognise and enforce the settlement agreement. Further, signatory states have leeway to put in place their own rules of procedure that will implement the Convention's expedited enforcement mechanism, unless there are grounds for refusing to grant relief.

### **Grounds for refusing to grant relief under the Convention**

Article 5 lays out an exhaustive list of defences to the enforcement of MSAs. Relief sought may not be granted if: - the party to the settlement agreement was under some incapacity; the settlement agreement is null and void, inoperative or incapable of being performed; is not binding or final; has been subsequently modified. Also, where obligations in the settlement agreement have been performed or are not clear or comprehensible relief may be refused. Further, relief may also be refused if granting it would be contrary to the terms of settlement agreement; and where there is serious breach of standards by a mediator or failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence. Finally, refusal will also be based on the grounds where granting of relief would be contrary to public policy of the party; and where the subject matter of the dispute is not capable of settlement by mediation under the law of the party.

### **What does the Convention mean for African States?**

The SCM is the first instrument of its kind and the use of mediation brings many potential benefits. As a consensus-based dispute resolution mechanism, the advantages of mediation include, *inter alia*, cost savings, expeditious and amicable resolution of disputes, process flexibility, party autonomy and most crucial, greater chance of better communication between parties thereby preserving pre-existing commercial relationships between parties.

Global mediation-focused activities have recently expanded as a method for cross-border dispute resolution, particularly in trade, energy, infrastructure and investments. For instance, ongoing regulatory and institutional framework reforms now include mediation and mediation components in processes such as the hybrid/mixed mode proceedings. This involves a combination of different alternative dispute resolution (ADR) mechanisms (ranging from mediation, arbitration, evaluation, negotiation and conciliation) allowing for the parties to opt-in or out and loop back or forward in the various processes as they progress toward a settlement. Such combinations include Med-Arb (mediation followed by arbitration), or Arb-Med (mediation after arbitration). Singapore's Arb-Med-Arb Protocol (AMA Protocol) jointly developed by two dispute resolution institutions – the Singapore International Arbitration Centre (SIAC) and Singapore International Mediation Centre (SIMC) – is a 3-step process that not only combines the advantages of confidentiality and neutrality, enforceability and finality but also offers flexibility and reduces costs previously associated with switching among ADR methods. Shortly after its 2014 launch, nine cases were handled under the AMA protocol, leading to settlements of more than EUR 375 million.<sup>4</sup>

With economic growth in Africa and rising investment in recent years, many African states are fast becoming investment destinations. The result is higher volume in inter-state investment originating from economic powers in Europe, Asia, and growth in intra-state investment. These developments have led to a demand for legal frameworks that protect investments and offer robust investor-state dispute resolution mechanisms. For example:

*At the international level*, African states (e.g. Algeria, Gambia, Senegal, South Africa and Sudan) and African intergovernmental organisations (e.g. African Legal Support Facility – ALSF – a wing of the African Development Bank Group) attended the discussions and negotiations leading up to drafting and

shaping the final SCM. These key actors have recognised the important role mediation plays in international commercial dispute resolution.

*At the continent level*, the African Continental Free Trade Agreement (CFTA) entered into force in May 2019. As of July, the CFTA has received 54 out of 55 signatures and 27 ratifications. The CFTA is one of the world's largest free trade areas, with a total population estimated at 588 million people, and GDP of USD 1.2 trillion across the 27 African Union member states.<sup>5</sup> The CFTA, with transport, communications, financial services, tourism and business services as priority sectors, will accelerate the liberalization and integration of the services market. One of the key protocols of the CFTA under negotiations is the protocol on disputes settlement. Negotiation and conciliation are a first stop in the dispute settlement hierarchy. The Singapore Convention provides an opportunity to add mediation to dispute settlement mechanism suites in future discussions and negotiations of ADR protocols, either as a standalone mechanism or as a component in a multi-tier dispute resolution mechanism.

Additionally, the Draft Pan-African Investment Code, whose objective is to foster cross-border investment flows in the Continent is under way. Chapter Six, and specifically Articles 41 and 42 on state-state and investor-state dispute settlement (ISDS), lists mediation, negotiation and conciliation as first options for dispute settlement, before arbitration and litigation can be attempted. However, the draft Code refers to mediation as a non-binding mechanism. This may soon change, as cross-border MSAs can be enforceable once agreement is reached, after the SCM comes into force.

*Regionally*, several regional binding instruments on trade and investment are under negotiation. For example, the SADC-COMESA-EAC Tripartite Free Trade Agreement launched in 2015 has a Tripartite Dispute Settlement Mechanism, which includes mediation among other mechanisms. Other regional economic blocs such as the Economic Community of West African States (ECOWAS), the East African Community (EAC), Southern African Development Community (SADC), and the Southern African Customs Union all have dispute settlement mechanisms with mediation incorporated. Article 26 of the Investment Agreement for the COMESA Common Investment Area requires a six-month amicable settlement period, during which the parties "shall seek the assistance of a mediator," unless an alternative dispute settlement method is agreed upon.

*At state level*, regulatory and institutional frameworks in a majority of African states support mediation. However, most domestic legislation on mediation is related to court-annexed mediation i.e. mediation processes instituted by judges, and addresses disputes of a civil nature such as family, employment, or inheritance law. As investment and trade opportunities grow, states are increasingly aware of the needs for regulatory and institutional reforms to support international commercial mediation at regional and continental levels. Commercial mediation is less often deployed at the domestic level in African states.

Other parts of the world see rapid growth in the use of commercial mediation. For example, in 2018, the UK experienced a 20% increase in the use of commercial mediation.<sup>6</sup> In November 2018, Japan launched the Japan International Mediation Centre (JIMC) in Kyoto, to provide world-class mediation services for various cross-border disputes. JIMC-Kyoto joins the Singapore International Mediation Centre (SIMC) as a dedicated international mediation centre serving the Asia-Pacific. Opportunities to employ mediation services will arise where economies and alliances have emerged to encourage free trade and investment. These opportunities include: - China's Belt and Road Initiative (BRI), which now spans over 70 countries, including North and East Africa. For the BRI's dispute resolution component, Singapore's International Mediation Centre (SIMC) and the China Council for the Promotion of International Trade (CCPIT) signed a MOU in January 2019. SIMC and CCPIT will jointly develop the rules, case management protocol, and enforcement procedures for disputes submitted to mediation, and establish a panel of mediators to resolve disputes arising out of China's BRI projects.<sup>7</sup>

At the international institutional level, International Centre for Settlement of Investment Disputes (ICSID) promotes mediation as a less expensive and faster dispute resolution option for states to use to settle investor-state disputes.<sup>8</sup> This opportunity could serve African states well for future investor-state dispute

settlements (ISDS) as research indicates that many African countries shy away from traditional ISDS mechanisms for lack of transparency, high costs, and outcomes that have marred the relationships between states and investors.<sup>9</sup> African states have responded in two ways: - either by altogether removing ISDS by arbitration (e.g. Tanzania), or by enacting their own domestic legislation which limits ISDS to mediation or arbitration via domestic courts (e.g. South Africa).

The SCM (and the Model Law) will permit enforcement of mediated settlement agreements in signatory countries. The Model Law is a useful tool for States that wish to align their legal frameworks with the SCM. African states that ratify the Convention and incorporate key provisions in their existing domestic laws will greatly streamline the processes for international businesses looking for entry points but are concerned about relationship preservation or enforceability of settlements. Additionally, the states with the most progressive legal frameworks would be well suited to serve as bases of operations for continental expansion. While many African states currently lack strong legal frameworks, mutual recognition of laws can be expected, given the rapid pace of negotiations on the CFTA and other regional and continental agreements. Pioneer ratifying states have the potential to serve as the bridge from the global to the regional networks of production. Thus, we can now explore the readiness of African states to maximise the trade and investment potential of the SCM.

### **Support structures for international commercial mediation in Africa**

Are African states Convention-ready? A state hoping to benefit from the Convention (whether it ratifies it or not) will need to have both regulatory (including domestic laws and policies on mediation) and institutional (courts, judiciary, mediation practitioners, and mediation institutions) frameworks in place. Regulatory and institutional frameworks already exist in Africa, both domestically and regionally. The following frameworks will ensure that the SCM is not introduced into a vacuum.

#### ***Regulatory frameworks***

In individual African states, regulatory frameworks including legislation, rules and policies on mediation are in place, although some will need amending to align with the Convention on Mediation. A State need not completely repeal or overhaul its existing mediation laws. The Singapore Convention lays out a minimalist approach (under its Model Law) on how states can incorporate the Convention into their domestic rules. States with existing legislation on mediation can facilitate the enforcement of cross-border commercial MSAs by incorporating the specific provisions of the Convention. Even states that are not official signatories to the Convention may utilize the revised Model Law, simply by aligning their domestic mediation legislation with the Convention. The SCM and Model Law also does not impose the method of enforcement; the states may enforce the MSAs according to their existing legal procedures. Adoption of the Model Law by member States will ensure smoother domestic implementation of the Convention, which sets down uniform rules in respect of the mediation process for jurisdictions to follow in drafting or incorporating international commercial mediation in their existing mediation laws.

#### ***Institutional frameworks***

Contemporary mediation institutions are increasingly visible throughout Africa. These range from highly advanced and complex institutions (e.g. South Africa, Nigeria, Egypt, and Morocco); to basic and industry-specific (e.g. Benin).<sup>10</sup> In response to current developments in international commercial mediation, Uganda recently launched its arbitration and mediation centre in May April 25, 2019 - the International Centre for Arbitration and Mediation Kampala, ICAMEK. ICAMEK's mediation rules mirror key provisions of the Singapore Convention and cater to international commercial mediation. Where country-specific efforts have been inadequate in addressing international commercial mediation, the regional institutional frameworks can fill the gaps. For example, The Organization for the Harmonization of Business Law in Africa (OHADA) based in Yaoundé, Cameroon, is made up of 17 states of Central and Western Africa encompassing 200 million inhabitants. In 2017, all 17 states adopted the Uniform Act on Mediation, the purpose of which is to conform mediation frameworks in the OHADA region and

harmonise business laws of its member states to promote investment in the region. This is similar to the US, where a majority of states adopted the Uniform Mediation Act (UMA).

Encouraging the development of mediation talent and building capacity from the ground up will require mediation training beyond that currently provided. Although existing centres such as those in Kenya and South Africa are already expanding and deepening their training and certification processes, we can expect training needs across the continent to rise rapidly.

Both the regulatory and institutional frameworks in Africa remain works in progress. To become truly Convention-ready, states will need to align their existing national laws of mediation with the Convention (or in some cases draft new legislation), as well as revamp institutional frameworks. Viewed from another perspective, the SCM will motivate and encourage the growth and development of home-grown mediation institutions, knowledge bases, and skills required to ready African states for the new era of cross-border mediation of commercial disputes needed to facilitate rapid growth in the volume of international trade.

### **Way forward for mediation in Africa**

The Convention's endgame is to complement each state's existing legal framework on international commercial mediation while contributing to the development of harmonious international economic relations by aligning the governance of international agreements across borders. Mediation provides an international dispute resolution mechanism that is easier, faster, less expensive, and more harmonious than other methods, yet enforceable.

Once a mediated settlement agreement is reached, cross-border enforceability automatically follows. There is no need to certify or notarise the MSA; nor any need to use hybrid methods to convert the MSA into a consent award or an arbitral award. In short, the MSA will be a complete, legally binding instrument, with finality and enforceability. Other jurisdictions that are signatories to the Convention will recognise the MSA in their decisions regarding relief.

As other countries taking the lead in international commercial mediation, African states should follow, developing their regulatory and institutional frameworks to match current developments in the international commercial mediation landscape, narrowing gaps, harmonising policy and practice, and building skills. While Africa's existing infrastructure is young, it can provide a springboard for embracing and expanding commercial mediation programs in Africa. Changes in dispute resolution policies requires initiative on the part of stakeholders such as governments or their ministries of justice/law – as in Singapore. Once the rules and skills are in place, legal professionals such as transactional lawyers and legal advisers with experience in dispute resolution can confidently advise clients in matters related to international commercial mediation, point out those issues that are appropriate for mediation at the outset, draft mediation clauses, and mediate settlement agreements.

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## References

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- <sup>1</sup> The eight African signatory countries are Benin, Republic of Congo, Democratic Republic of Congo, Eswatini (formerly Swaziland), Mauritius, Nigeria, Sierra Leone, and Uganda.
- <sup>2</sup> See Articles 1 (1) & 4, UN Convention on International Settlement Agreements Resulting from Mediation A/RES/73/198 (11 January 2019) available at <https://undocs.org/en/A/res/73/198> (accessed 17 June 2019)
- <sup>3</sup> *ibid* Articles 1(2) & (3)
- <sup>4</sup> See <https://globalarbitrationnews.com/arb-med-arb-what-is-it-and-how-can-it-help-the-parties-to-solve-their-disputes-efficiently/#page=1> (accessed 10 July 2019)
- <sup>5</sup> <http://worldpopulationreview.com/countries/countries-by-gdp/> (accessed 10 July 2019)
- <sup>6</sup> The Eighth Mediation Audit: A survey of commercial mediator attitudes and experience in the United Kingdom. A Centre For Effective Dispute Resolution, CEDR Report 10 July 2018, available at [https://www.cedr.com/docslib/The\\_Eighth\\_Mediation\\_Audit\\_2018.pdf](https://www.cedr.com/docslib/The_Eighth_Mediation_Audit_2018.pdf) (accessed 17 June 2019)
- <sup>7</sup> Singapore International Mediation Centre Press Release 24 January 2019, available at <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Press%20Release/Annex%20B%20Press%20Release%20on%20MOU.pdf> (accessed 17 June 2019)
- <sup>8</sup> ICSID Proposed and draft (Additional Facility) Mediation Rules (Annex E) available at [https://icsid.worldbank.org/en/Documents/X.Amendments\\_Vol\\_3\\_AFMR.pdf](https://icsid.worldbank.org/en/Documents/X.Amendments_Vol_3_AFMR.pdf) (accessed 17 June 2019)
- <sup>9</sup> T. Chidede, Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol, 11 December 2018, Tralac Blog: Perspectives on Africa's trade and integration. Available at <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcta-investment-protocol.html> (accessed 17 June 2019)
- <sup>10</sup> J.C. Dickerson, Overview of Commercial Dispute Resolution in Africa, 21 June 2012, available at <http://www.businessconflictmanagement.com/blog/2012/06/adr-in-africa/#more-1075> (accessed 17 June 2019)



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