

The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States

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Abstract

With the anticipated the Singapore Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) coming into force in August 2019, this paper reflects on what the Convention holds for the African States. It offers some thoughts on how best these states can take advantage of the Convention to not only be at par with the rest of the world but also benefit from the same as far as trade and investments are concerned. The Paper makes some practical recommendations that countries can draw from as they embrace the Singapore Convention.

1. Introduction

This paper is inspired by the international trade and investment community's desire to come up with a formal legal framework meant to enhance recognition and enforcement of international mediation outcomes through the enforcement of the Singapore Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention¹). While the Convention is set to come into force from August 2019², it raises some weighty issues especially in relation to the practice of mediation in Kenya and Africa in

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¹ Ministry of Law, Singapore, "Singapore clinches bid for UN Convention on Mediation to be named after Singapore," 21 Dec 2018. Available at <https://www.minlaw.gov.sg/content/minlaw/en/news/press-releases/UN-convention-on-mediation-to-be-named-after-Singapore.html> [Accessed on 3/4/2019].

² This Convention is open for signature by all States in Singapore, on 1 August 2019, and thereafter at United Nations Headquarters in New York (Article 10(1).

general. Notably, mediation is one of the Alternative Dispute Resolution (ADR) mechanisms that have global recognition due to its ability to resolve conflicts. Article 33 of the Charter of the United Nations outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that *the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* (Emphasis added).³ However, while these mechanisms are universally accepted, their practice generally varies from one society or jurisdiction to the other.⁴

International mediation involves different states or parties from different states, hence the international aspect. The trend has been that the outcome of a mediation is treated as a contractual agreement enforced as such and not as an award as in the case of arbitration. This has always been a problem in many states in that one party may pull out of such an agreement and seek court intervention as if the mediation never took place. This thus necessitated the drafting of the Singapore Convention in a bid to address this challenge. The mechanism has also not been very popular in many countries, especially in Africa, as a reliable platform for management of international commercial disputes due to the uncertain nature of its outcomes. It is on this basis that this paper analyses the Singapore Convention and the prospects and challenges that it holds for Kenya and the African continent.

³ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁴ Lindgren, M., Wallensteen, P., & Grusell, H., *Meeting the New Challenges to International Mediation: Report from an International Symposium at the Department of Peace and Conflict Research, Uppsala University, Uppsala, Sweden, June 14-16, 2010*, Department of Peace and Conflict Research, Uppsala University, 2010. Available at https://www.pcr.uu.se/digitalAssets/667/c_667482-1_1-k_ucdp_paper_6.pdf [Accessed on 3/4/2019].

2. Recognition and Enforcement of International Mediation Outcomes: Singapore Convention on International Settlement Agreements Resulting from Mediation

The need for the Singapore Convention was informed by the Parties' acknowledgement of a number of issues within the international sphere. To begin with, there was the recognition of the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably.⁵ They also noted that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation, and that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.⁶ These factors that created the need for the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations.⁷

The Convention is to apply to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that: at least two parties to the settlement agreement have their places of business in different States; or the State in which the parties to the settlement agreement have their places of business is different from either: the State in which a substantial part of the obligations under the settlement agreement is performed; or the State with which the subject matter of the settlement agreement is most closely connected.⁸

⁵ Preamble, United Nations Convention on International Settlement Agreements Resulting from Mediation.

⁶ Ibid, Preamble.

⁷ Preamble, Convention on International Settlement Agreements Resulting from Mediation.

⁸ Ibid, Article 1(1).

The applicability of the Convention however excludes settlement agreements: concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; relating to family, inheritance or employment law.⁹ It is also not apply to: settlement agreements: that have been approved by a court or concluded in the course of proceedings before a court; and that are enforceable as a judgment in the State of that court; and settlement agreements that have been recorded and are enforceable as an arbitral award.¹⁰

The Singapore Convention defines “mediation” to mean a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute.¹¹

The Convention sets out some general principles meant to govern mediation settlements as follows: each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention; and if a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.¹² The Convention also sets out the requirements for reliance on settlement agreements. The Convention requires that a party relying on a settlement agreement under this Convention should supply to the competent authority of the Party to the Convention where relief is sought: the settlement agreement signed by the parties; evidence that the settlement agreement resulted from mediation, such as: the mediator’s signature on the settlement agreement; a document signed by the mediator indicating that the mediation was carried

⁹ Ibid, Article 1(2).

¹⁰ Ibid, Article 1(3).

¹¹ Ibid, Article 2(3).

¹² Article 3, Convention on International Settlement Agreements Resulting from Mediation.

out; an attestation by the institution that administered the mediation; or in the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.¹³

However, the competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that: a party to the settlement agreement was under some incapacity; the settlement agreement sought to be relied upon: is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4; is not binding, or is not final, according to its terms; or has been subsequently modified; the obligations in the settlement agreement: have been performed; or are not clear or comprehensible; granting relief would be contrary to the terms of the settlement agreement; there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.¹⁴

In addition to the foregoing, the competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that: granting relief would be contrary to the public policy of that Party; or the subject matter of the dispute is not capable of settlement by mediation under the law of that Party.¹⁵ Notably, under the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

¹³ Ibid, Article 4(1).

¹⁴ Ibid, Article 5(1).

¹⁵ Article 5(2), Convention on International Settlement Agreements Resulting from Mediation.

(New York, 10 June 1958)¹⁶ public policy and arbitrability of certain matters are some of the grounds that recognition and enforcement of arbitral awards may be refused. Just like in arbitration, the Singapore convention will thus give state parties a huge leeway in determining the two grounds according to the domestic laws and policies.

The applicability of the Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.¹⁷ The Convention however allows a Party to the Convention to declare that: it shall not apply this Convention 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 is a party, to the extent specified in the declaration; it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.¹⁸

Also noteworthy is the provision that a regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention.¹⁹

If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.²⁰

¹⁶ United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

¹⁷ Article 7, Convention on International Settlement Agreements Resulting from Mediation.

¹⁸ Ibid, Article 8.

¹⁹ Ibid, Article 12(1).

²⁰ Article 13(1), Convention on International Settlement Agreements Resulting from Mediation.

The Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (Model Law). This is intended to provide parties with the flexibility to adopt either the Singapore Convention or the Model Law as stand-alone legal instruments or both as complementary instruments in order to facilitate a comprehensive legal framework on mediation.²¹ The Model Law, 2018, amends the Model Law on International Commercial Conciliation, 2002 and applies to international commercial mediation and international settlement agreements.²² It covers procedural aspects of international commercial mediation including *inter alia* appointment of mediators, conduct of mediation, disclosure of information, termination of proceedings and resort to arbitral or judicial proceedings.²³ Further, it provides uniform rules on enforcement of settlement agreements and also addresses the right of a party to invoke a settlement agreement in a procedure.²⁴ It has been argued that creation of a uniform enforcement process for settlement agreements achieved through international mediation, the Singapore Convention and Model Law will begin to place mediation on an equal footing with arbitration and litigation as a method of international dispute resolution.²⁵ Adoption of this framework creates an assurance on the

²¹ United Nations Commission on International Trade Law, "United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") Available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (Accessed on 06/12/2019)

²² United Nations Commission on International Trade Law, "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation 200) Available at https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation (Accessed on 06/12/2019)

²³ *Ibid*, S 2

²⁴ *Ibid*, S 3

²⁵ Hioureas, C, "The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?" Available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1567&context=bjil> (Accessed on 06/12/2019)

enforcement of settlement agreements and will boost the practice of international commercial mediation.

In light of the ever growing international recognition of the place of ADR mechanisms, the Singapore Convention will potentially change the way international mediation will be carried out and enforced across the world especially in the areas of trade, commerce and investment. The Singapore Convention is meant to allow the party seeking to enforce a mediated settlement agreement to skip the step of litigation and go right to the enforcement. The convention provides a method for settling parties to directly enforce their mediated settlement agreements.²⁶ It is meant to be the equivalent of the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)* as far as mediation is concerned. The next section looks at some of the concerns that may arise in the course of implementation of this Convention especially in the context of the African countries.

3. Singapore Convention on International Settlement Agreements Resulting from Mediation: Prospects and Challenges for African States

Most of the jurisdictions in Africa have been doing a lot to promote ADR mechanisms. However, much of the efforts however, have been focusing on arbitration with the other ADR mechanisms getting less than important attention. Mediation law and practice in most jurisdictions in such jurisdictions such as Kenya is still at its infant stage and still more or less informal, with parties getting a wide scope of autonomy in either accepting or rejecting the outcome of mediation processes. Domestic mediation still suffers from the litigious nature of the commercial community in African countries and mediation is yet to be considered mainstream. In fact, Kenya is among the countries that have made attempts at mainstreaming mediation in the commercial world by setting up such frameworks as the court annexed

²⁶ Patrick R. Kingsley, "The Singapore Convention on Mediation: Good News for Businesses," January 09, 2019. Available at <https://www.law.com/thelegalintelligencer/2019/01/09/the-singapore-convention-on-mediation-good-news-for-businesses/> [Accessed on 10/4/2019].

mediation, which is mandatory for certain cases.²⁷ The debate has not only been on the approach to be adopted in referring cases to mediation but also on whether there should be formal legislation on mediation. Despite this, there is a policy on mediation that is being prepared in Kenya as a way of mainstreaming the use of mediation in the country. However, there is still no institution that is exclusively dedicated to mediation as may be found in other jurisdictions such as Singapore. Institutions such as Strathmore Dispute Resolution Centre²⁸ and Nairobi Centre for International Arbitration Centre²⁹ offer mediation services alongside arbitration. There is therefore inadequacy of an efficient and harmonised framework for cross-border enforcement of settlement agreements resulting from mediation which is a major challenge to the use of mediation within the commercial community within the African continent. However, while these developments are good for the domestic mediation, there is still need for setting up infrastructure that promotes international mediation as mediation resulting from or capable of enforcement as court decisions are excluded from the Singapore Convention's scope.

Various jurisdictions such as Singapore have done a lot to set up various institutions to promote arbitration and other ADR mechanisms, including the Singapore International Arbitration Centre (SIAC), Singapore International Mediation Centre (SIMC), and Singapore International Commercial Court (SICC) and Maxwell Chambers to provide a full suite of dispute resolution services for international commercial parties to resolve their disputes in Singapore.³⁰ Singapore has also enacted the Mediation Act 2017, which provides, among other things, for the recording of mediated settlement

²⁷ The Pilot Project on Court Annexed Mediation in Kenya commenced on 4th April, 2016 at the Family Division and Commercial and Admiralty Division of the High Court in Nairobi. The Project has since been extended to cover other stations around the country.

²⁸ <https://strathmore.edu/sdrc/>

²⁹ Established under Nairobi Centre for International Arbitration Centre Act, No. 26 of 2013, Laws of Kenya.

³⁰ Ministry of Law, Singapore, "Singapore clinches bid for UN Convention on Mediation to be named after Singapore," 21 Dec 2018. Available at <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/UN-convention-on-mediation-to-be-named-after-Singapore.html> [Accessed on 3/4/2019].

agreements as orders of court, and facilitates the enforcement of mediated settlement agreements.³¹

Thus, while many jurisdictions outside Africa have shown great strides in promoting mediation as a means to resolve cross-border commercial disputes, there is not much evidence of the same happening in the African continent. This may be attributed to many factors. However, one of the major factors may be the fact that mediation in Africa has always been considered to be an informal mechanism. This has not only affected efforts to absorb it as a formal mechanism but has also made it difficult to document how and where it is practised. For instance, mediation in the customary, communal and informal setting has operated and functioned within the wider societal context in which case it is influenced by factors such as the *actors, their communication, expectations, experience, resources, interests, and the situation in which they all find themselves* (emphasis added).³² It is thus not a linear cause-and-effect interaction but a reciprocal give-and-take process.³³

There is not enough data to rely on in marketing African countries as a preferred venue for international mediation. As already pointed out, much of the efforts have been directed at promoting arbitration. The question therefore is whether the Singapore Convention on mediation holds any benefits for the African continent in general. While the Convention is meant to address the lack of an effective means to enforce cross-border commercial mediated settlement agreements across the globe, the uncertainty on the state of international mediation practice across the African continent makes it difficult for the businesses community in Africa to incorporate international mediation in their agreements to settle their cross-border commercial disputes. Mediated

³¹ Ibid.

³² United Nations Development Programme, et al, 'Informal Justice Systems: Charting A Course For Human Rights-Based Engagement,' 2012; see also Albrecht, P., et al (eds), 'Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform,' (International Development Law Organization, 2011).

³³ See Eilerman, D., 'Give and Take - The Accommodating Style in Managing Conflict,' August 2006, available at <http://www.mediate.com/articles/eilermanD5.cfm> [Accessed on 10/04/2019].

settlement agreements thus face a hurdle when it comes to enforcement. The Singapore Conventional on Mediation is expected to be widely endorsed, and in turn will create significant momentum in favour of the use and recognition of the mediation of international disputes just as the New York Convention led to a rise in the use and recognition of arbitration.³⁴

However, if African countries are to benefit from this Convention and avoid a situation where they have to run after the rest of the world to catch up as has been the case with international mediation, there is need to put in place structures that not only support informal mediation, but also promote international mediation. Just like in arbitration where national laws are required in recognition and enforcement of international arbitration awards, the courts of a contracting party under the Singapore Convention will be expected to handle applications either to enforce an international settlement agreement which falls within the scope of the Convention or to allow a party to invoke the settlement agreement in order to prove that the matter has already been resolved, in accordance with its rules of procedure, and under the conditions laid down in the Convention. It is thus important that African states consider putting in place some framework to support the application and implementation of the Singapore Convention.

This is the only way that they will take advantage of the Singapore Convention on Mediation to not only enforce international mediation outcomes within their territories but also offer venues for carrying out mediations that may stand the test of time and be enforced in other jurisdictions around the world on the basis of the Singapore convention. It is the high time that African States not only acceded to the Singapore Convention but also promote the growth of international mediation practice alongside international arbitration as part of opening up Africa as a suitable option to the global business community when seeking venues for management of international commercial disputes through mediation as well as qualified international mediators in Africa.

³⁴ Patrick R. Kingsley, "The Singapore Convention on Mediation: Good News for Businesses," January 09, 2019.

Embracing Singapore Convention may therefore facilitate the growth of international commerce and promote the use of international mediation around the world without excluding Africa as evidenced in international arbitration³⁵. A lot more needs to be done because the use of international commercial mediation within the business community in the African continent is currently still relatively rare compared with international commercial arbitration.

4. Getting the Best out of the Singapore Convention on International Settlement Agreements Resulting from Mediation

As already pointed out, if African countries are to avoid a situation where they struggle to set up a framework too late in the day as has been the case with international arbitration, they should take some conscious steps to enable them to effectively utilise the Convention.

There is a need to set up legal and institutional frameworks at the state level in order to facilitate the uptake and practice of mediation. The legal framework should among other things, provide for who should act as the competent authority for the purposes of the Convention. It is worth mentioning that while the Convention provides for a 'competent authority's' mandate under the Convention, there is no definition of who entails such authority. As such, it seems like state parties are given the discretion to define such authority. Under the New York Convention on arbitration, it is the national courts that perform similar functions as those of the competent authority (in Singapore Convention) as far as arbitration is concerned. There may therefore be a need to clearly define under the national laws who will play the role of the competent authority. Even where it is the national courts that will take up this mandate, this should be clearly defined in a legal instrument for clarity and certainty especially to the international community. One thing that must however be very clear in the national framework is that the competent authority should be independent and self-sustaining.

³⁵ Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 2, (2017), pp. 1-27.

In the Kenyan context, this role may either be given to the Nairobi Centre for International Arbitration which envisages the practice of international mediation in its framework or, at the risk of multiplicity of institutions in the country, have it working closely with another independent institution solely dedicated to mediation practice as is the case in Singapore. There is also a need to recognise and mainstream informal mediation. At the moment, it is arguable that a lot of mediators (who mostly deal with informal mediation) are left out.

The Preamble to the Convention states that one of its objectives is “the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, *social and economic systems* would contribute to the development of harmonious economic relations (emphasis added).” It is therefore possible that African states can still retain the practice of traditional mediation especially for domestic mediation while still making itself appealing to the global business community with respect to international mediation. This is especially important considering that the Singapore Convention will not apply to settlement agreements concluded for personal, family or household purposes by one of the parties (a consumer), as well as settlement agreements relating to family, inheritance or employment law.

The national structure should therefore take into account the role of culture in conflict management. Mediation is culture specific. Mediation may not be globalized at the local level.³⁶

³⁶ Agulanna, C., "Community and Human Well-Being in an African Culture," *Trames: A Journal of the Humanities & Social Sciences*, Vol.14, No. 3, 2010; Nussbaum, B., "African culture and Ubuntu," *Perspectives*, Vol.17, No. 1, 2003, pp.1-12; Tarayia, G. N., "The Legal Perspectives of the Maasai Culture, Customs, and Traditions," *Arizona Journal of International & Comparative Law*, Vol. 21, No. 1, 2004, pp.183-913; Idang, G.E., 'African culture and values,' *Phronimon*, Vol.16, No.2, 2015, pp.97-111; Kassa, G.N., "The Role of Culture and Traditional Institutions in Peace and Conflict: Gada System of Conflict Prevention and Resolution among the Oromo-Borana." Master's thesis, 2006. Available at <http://urn.nb.no/URN:NBN:no-17988> [Accessed on 13/04/2019].

In order to fully capture the spirit of mediation at the local level, there may be a need for public awareness and participation in the making of a national framework for mediation. The National framework can borrow from the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 with or without amendments. The procedural aspects of the Model Law covering the appointment of mediators, conduct of mediation and resort to judicial proceedings can be adopted. There is a need to ensure that the language used in mediation is acceptable to the parties. In Kenya, this could be English, Kiswahili and other local languages with translations provided.

As a way of ensuring a higher rate of success, there is a need to rally support from the business community and collaborate with such institutions as the International Chamber of Commerce, Kenya Private Sector Alliance (KEPSA), Central Organization of Trade Unions (COTU-K) and Kenya Association of Manufacturers (KAM), among others. Its success depends on not only the legal fraternity but also ensuring that everyone buys the idea and runs with it.

5. Conclusion

The drafting of the Singapore Convention is a step in the right direction: actualising Article 33 of the United Nations Charter. Africa should fully embrace and participate as a way of boosting trade and investments. Signing up for the Convention may be a good way of bypassing and ultimately setting standards of recognition and enforcement of mediation outcomes in the face of potential multiplicity of mediation laws in different states, just as is the case with international arbitration. African Countries can use the mediation Model Law as a basis for implementation of the Singapore Convention.

There are prospects-these should be harnessed. Challenges should be identified and dealt with to ensure a smooth uptake and operation of the Convention. The Singapore Convention represents an idea whose time has come. It can work to advance mediation as a facilitator of trade and business relations.

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