



NCIA & THE SINGAPORE CONVENTION IN THE CONTEXT OF THE AfCFTA

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Background

The Singapore Convention on Mediation (also known as the United Nations Convention on International Settlement Agreements Resulting from mediation) is a new multilateral treaty developed by UNCITRAL. It provides a streamlined framework for the recognition and enforcement of mediated settlement agreements that resolve international commercial disputes – similar to the framework set out by the 1958 New York Convention on Arbitral Awards. UNCITRAL finalized the final text of the Convention on 25 June 2018 and was adopted by the U.N. General Assembly on 20 December 2018¹. The Convention was thereafter open for signature on 7 August 2019 when Singapore hosted the signing ceremony with forty-six countries becoming signatories on the even date.

On the inaugural event, the Minister of Home Affairs and Minister of Law, Singapore, K. Shanmugam, SC said, *“The Singapore Convention on Mediation is the missing piece in the international dispute resolution framework. It will help enhance cross-border enforceability of mediated settlement, and business will benefit from greater certainty and assurance.”* With Singapore, Fiji, and Qatar depositing their respective instruments of ratification in early 2020, the Convention entered into force on 12 September 2020 pursuant to article 14(1) of the Convention which provides that the Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval, or accession².

¹ U.N. Comm’n on Int’l Trade Law, Report on the Work of Its Fifty-First Session, U.N. Doc. A/73/17, ¶ 49 (2018), <http://legal.un.org/docs/?symbol=A/73/17> (noting the finalization of the Convention); U.N. Comm’n on Int’l Trade Law, Report on the Work of Its Fifty-First Session, U.N. Doc. A/73/17, U.N. Doc. A/73/17, at Annex I (2018), http://www.uncitral.org/pdf/english/commission/sessions/51st-session/Annex_I.pdf (providing the text of the U.N. Convention on International Settlement Agreements Resulting from Mediation) [hereinafter Singapore Convention or the Convention]; Press Release, General Assembly Adopts the United Nations Convention on International Settlement Agreements Resulting from Mediation, U.N. Press Release UNIS/L/271 (Dec. 21, 2018), <http://www.unis.unvienna.org/unis/en/pressrels/2018/unisl271.html> (announcing the Convention’s adoption by the U.N. General Assembly).

²United Nations Treaty Collection Status as of 26 May 2020, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en

The influence of the Convention to the Global practice of Mediation

The Convention saw forty-six countries becoming signatories when it was opened for signature on 7 August 2019 including three of world's largest economy countries – China, India, and the United States of America³. This far surpasses the ten countries who had initially signed the New York Convention in 1958 when it opened for signature⁴. To date, the Convention has recorded fifty-five signatories and ten ratifications which is an indicator that the globe is ready for the recognition and enforcement of International Mediation Settlement Agreements⁵. To fall within the scope of the Convention, a mediation settlement agreement must meet several criteria; it must be mediation, international and commercial and not subject to a specific exclusion (e.g., as a result of a reservation or declaration). It is expected that the Convention will positively impact the use of Mediation in International Commercial disputes noting that this mechanism was previously frowned upon due to its unreliability when it came to recognition and enforcement.

Countries such as China which is a signatory to the Convention has been historically using mediation as a means of dispute resolution owing to its socialistic approach and cultural factors. Despite this, China has been using unsophisticated mediation mechanisms though largely appreciated by its government. In his opening speech at the Opening Ceremony of The Belt and Road Forum for International Cooperation on 14 May 2017, Chinese President Xi Jinping spoke of the need for an '*equitable and transparent system of international trade*' and the global promotion of '*mediation in the spirit of justice*'⁶. The People's Republic of China reiterated on these ideals by showing

³ See note 2

⁴New York Arbitration Convention website, '*Contracting States*,' available at: <http://www.newyorkconvention.org/countries>

⁵ [Status: United Nations Convention on International Settlement Agreements Resulting from Mediation | United Nations Commission On International Trade Law](#) (accessed 11 November 2022)

⁶ Xi Jinping '*Work Together to Build the Silk Road Economic Belt and The 21st Century Maritime Silk Road*' (Speech by H.E. Xi Jinping President of the People's Republic of China At the Opening Ceremony of The Belt and Road Forum for International Cooperation) (14 May 2017) available at: , <http://en.cidca.gov.cn/2017-05/16/c_260434.htm>

their support towards and participation in the drafting of the Singapore Convention⁷ and eventually being its initial signatory.

The Singapore Convention, a groundbreaking treaty having been developed in such a such period of time is a clear indication that the global practice of mediation is ready to take off. The Singapore Convention has great potential to bolster the use of mediation as a method for resolving cross-border commercial disputes. Whether the Convention will live up to this promise will depend on whether a critical mass of states choose to ratify the Convention, and whether lawyers (particularly in-house counsels), mediators, and other stakeholders propagate potential benefits of the Convention make the pursuit of ratification worthwhile.

The Singapore Convention in the context of the AfCFTA

The AfCFTA Agreement is a mega-regional trade agreement that creates a Pan-African trade bloc and has the [potential to unite 1.2 billion people and create a \\$2.5 trillion economic area](#) across all 55 member states of the African Union (AU). [In terms of the number of participating countries, AfCFTA is the world's largest free trade area since the formation of the World Trade Organization \(WTO\)](#). This is an outstanding achievement – one which rendered the International Monetary Fund (IMF) to describe the agreement as “[an economic game changer](#)” for the continent, in its April 2019 Report.

The Abuja Treaty (entered into force in 1994) established the [African Economic Community \(AEC\)](#) which set in motion the formation of the AfCFTA. The Abuja Treaty provided that the AEC was to be established gradually in six stages of variable duration. This plan included the establishment of an African Continental Free Trade Area by 2018. AfCFTA is a flagship project under [Agenda 2063](#). Agenda 2063 is Africa's blueprint and masterplan for transforming Africa into a global powerhouse. During the Golden Jubilee celebrations of the formation of the AU in May 2013, [African heads of States and government signed the 50th Anniversary Solemn Declaration following the](#)

⁷ Peter Corne and Matthew Erie, 'China's Mediation Revolution? Opportunities and Challenges of the Singapore Mediation Convention' (OpinioJuris website, 28 August 2019) available at: <http://opiniojuris.org/2019/08/28/chinas-media-revolution-opportunities-and-challenges-of-the-singapore-mediation-convention/>>

realization that prioritizing continental and regional integration, amongst other issues, will reposition Africa to become a dominant player in the global arena. Agenda 2063 is to run for a 50-year period from 2013 to 2063.

Negotiations for the AfCFTA Agreement were launched by the African Union Heads of State and Government in June 2015. The African Union formally kicked off the operational phase of the Agreement during a high-level summit in Niger in early July 2019. It is here that the AfCFTA Agreement and the Protocol on Rules and Procedures on the Settlement of Disputes (Protocol on the Settlement of Disputes) came to life. Thirty-six countries in Africa had ratified the AfCFTA Agreement by December 3, 2020, and its trade operations commenced in January 2021.

In the context of mediation, Part VI of the AfCFTA Agreement under Article 20 establishes a Dispute Settlement Mechanism to be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes (“ the Protocol”). Article 8 of the Protocol envisions mediation as a form of dispute resolution mechanism under the AfCFTA. State parties have the right to undertake mediation at any time and in a confidential manner without prejudicing their rights in any other proceeding. Mediation may begin at any time and be suspended or terminated at any time by any of the state parties to the dispute.

A unique feature of mediation under the Protocol is that if state parties agree, the procedure for mediation may continue while the dispute settlement by a Panel⁸ established under the Dispute Settlement Body (DSB) mechanism proceeds.

Mediation process commences when a state party to a dispute requests the head of AfCFTA secretariat to facilitate the process of mediation. Such a request is to be notified to the DSB and the Secretariat.

While the AfCFTA provides for mediation as a mode of dispute resolution, it is silent as regards its binding nature as envisioned by the Singapore Convention.

⁸ Article 5(3) of the Protocol gives the DSB the authority to establish Dispute Settlement Panels and an Appellate Body. Further, the DSB has the power to establish its own Rules of procedure as it deems necessary towards the fulfillment of its responsibilities (Article 5(4) of the Protocol).

Should more African state parties who are signatories to the AfCFTA be also signatories to the Singapore Convention, an avenue for establishing binding, enforceable and recognized international mediation settlement agreements will have been established. To date, ten (10) African states⁹ are signatories to the Singapore Convention. This signifies that there is more to be done as regards the uptake of the Singapore Convention within the Africa Region.

What next for Mediation in Kenya under the realm of the NCIA

As for the NCIA, the Singapore Convention is highly welcomed with a hope that the rest of Kenya is ready to welcome this timely instrument. The next best step is to enact a domestic legislation on Mediation to not only give effect to the United Nations Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018, that accompanies the Convention (effective only if Kenya ratifies the Convention) but also capture Kenya's view on mediation practice. The presence of various stakeholders such as Wasilianahub, the Judiciary with its Court Annexed Mediation, and the NCIA, among other stakeholders in support of mediation practice is a touchstone that Kenya is ripe and ready to support the culture of the practice of Mediation and give it the adulation it deserves.

About the NCIA

Who we are

Nairobi Centre for International Arbitration (NCIA) is Kenya's premier International Arbitration Centre located in the capital city, Nairobi. The Centre was established in 2013 by the Nairobi Centre for International Arbitration Act, no. 26 of 2013 and has gained reputation as a neutral venue for the conduct of International Arbitration and other Alternative Dispute Resolution (ADR) services.

NCIA is "where disputes meet resolution" through access to eminent and experienced arbitrators and mediators with diverse skills, from different nationalities and jurisdictions and a best practice set of rules with administration

⁹ See Note 5

support. The Centre promotes the development and use of arbitration and ADR (Alternative Dispute Resolution) mechanisms as methods of resolving disputes.

In addition to its dispute administration services, NCIA hosts networking conferences, workshops, and events of interest to the arbitration and ADR Community. As a trainer, NCIA is also poised to offer training in arbitration, mediation, and other ADR mechanisms with listed trainers from across the globe. The Centre encourages collaboration with similar institutions or professional bodies.

What we do/offer

a) Arbitration

Arbitration is a way of solving commercial disputes outside ordinary courts. NCIA (Arbitration) Rules 2015 were issued on 24th December 2015 and revised in 2019. The rules incorporate best practices in international commercial arbitration and provide a flexible institute administered procedure.

The NCIA Arbitration Rules are adaptable for use in a diverse range of contractual agreements. The Rules offer flexible, predictable, and reliable institute administered procedures. The Centre also provides institutional support to the arbitration process including a panel of specialized arbitrators and hearing facilities at the request of parties.

The Centre's Rules of Arbitration are in line with the latest international standards, and they promote fairness and impartiality, confidentiality, integrity, efficiency, and effectiveness in order to make the service of the Centre as attractive as possible. The Centre's robust Arbitration culture is strengthened by the presence of leading Arbitrators in the field.

b) Mediation

Mediation is an effective means in settling disputes apart from litigation. An impartial and professionally trained mediator will assist all parties in undergoing negotiation and reach a settlement that is acceptable to all parties. The mediator will also assist in drafting the mediated settlement agreement.

NCIA provides institutional support to the mediation process including a panel of specialized mediators and facilities for mediation sessions at the request of parties at competitive terms. The NCIA Mediation Rules give participants in a dispute case an expeditious process where the Centre is designated for purposes of the mediation.

c) Negotiation, Conciliation and Adjudication

The Centre also provides institutional support to Negotiation, Conciliation and Adjudication processes including physical facilities at the request of the parties at competitive terms.

d) Hiring of hearing room facilities

NCIA is equipped with customized hearing room facilities for arbitration, mediation and all other closed-door discussions that may be required at the request of parties to the Centre.

e) Arbitration and Mediation Training

NCIA provides training for continuous professional development in international commercial arbitration and mediation.

How professional Mediators engage with NCIA

At the NCIA, we have an established a panel of mediators in which we welcome applicants who are professionally qualified. Professional mediators can apply to join our Mediator Panel through either our online portal or submitting a hard copy application to our offices. We also offer training services that cater for both professional and those who intend to commence their mediation training. Professional mediators can thus consider being involved as trainers or trainees. We also welcome professional mediators to encourage parties to consider NCIA as their institution of choice when drafting contracts that refer disputes to Mediation as well as encourage and welcome cooperation agreements with the present existing Mediation institutions in Kenya.