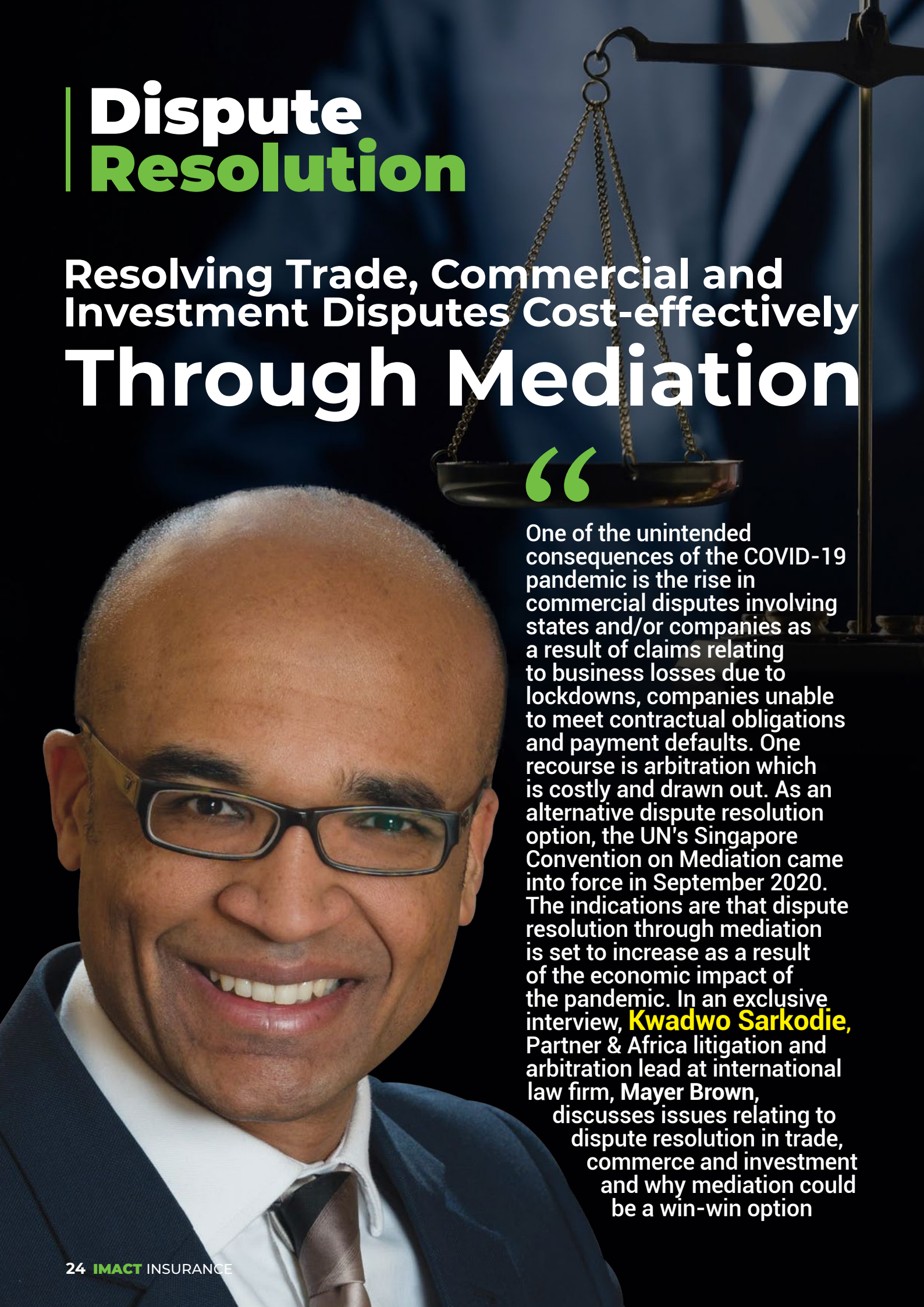
Dispute Resolution

Resolving Trade, Commercial and Investment Disputes Cost-effectively

Through Mediation



One of the unintended consequences of the COVID-19 pandemic is the rise in commercial disputes involving states and/or companies as a result of claims relating to business losses due to lockdowns, companies unable to meet contractual obligations and payment defaults. One recourse is arbitration which is costly and drawn out. As an alternative dispute resolution option, the UN's Singapore Convention on Mediation came into force in September 2020. The indications are that dispute resolution through mediation is set to increase as a result of the economic impact of the pandemic. In an exclusive interview, **Kwadwo Sarkodie**, Partner & Africa litigation and arbitration lead at international law firm, **Mayer Brown**, discusses issues relating to dispute resolution in trade, commerce and investment and why mediation could be a win-win option

Impact Insurance: The Singapore Convention comes at a time when the impact of the COVID-19 pandemic on the civil justice system has seen a wide encouragement of parties to look to alternative means of resolving disputes. Has there been an increase in dispute resolution through mediation since then or is it too early to assess given that disputes take time to work their way through?

Kwadwo Sarkodie: There has been a steadily growing interest in online mediation for some time. However, the Covid-pandemic has fast-forwarded us at least half a decade in terms of the market's willingness to mediate online. Business and social environments have been severely disrupted by the pandemic and mediation is an ideal dispute resolution forum to deal with the relational and commercial aspects of the many conflicts that are now emerging. As a result, we have seen the release of mediation related COVID-19 protocols such as that released by the Singapore International Mediation Centre[1] to deal with current international circumstances. Similarly, in recognition of the increasing need for mediators, the Civil Mediation Council has produced dedicated guidance for members on online mediation[2].

While we are not yet at a point where we have concrete mediation statistics for 2020, when they are released, I expect them to show a rise in mediations since early to mid-2020 when the pandemic took hold.

How well suited is the Singapore Convention to mediation specifically in trade, investment and associated areas? What are the specificities?

The primary goals of the Singapore Convention (the Convention) are to facilitate international trade and to promote the use of mediation for the resolution of cross-border commercial disputes.[3]

It establishes a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement[4].

The Convention applies to an agreement arising from mediation and concluded in writing by parties to resolve a commercial dispute which, at the time of its conclusion, is international. International is widely defined in the Convention[5].

The flexibility and ease of application of the Convention also makes it well suited to these areas. Unlike the New York Convention (NYC) (on Arbitration), there is no requirement in the Convention that the relevant settlement agreement be foreign (i.e. made in a different country from where it is enforced). The Convention

Maxwell Chambers, location of the Singapore International Mediation Centre

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therefore applies to all settlement agreements that meet the criteria above, wherever they are made and regardless of the governing law; and whether or not the country where the settlement agreement is made or whose law applies to the settlement agreement is itself a party to the Convention. 6 As with the NYC, it is also possible for the courts to refuse to grant relief on specified grounds laid down in the Convention.

Another important feature making it well-suited to international trade, commerce and investment is the fact that the parties retain their other rights to enforce the settlement agreement – such as through the relevant court or arbitral tribunal in accordance with the dispute resolution provision in their agreement. Hence, courts and arbitral tribunals can still serve as back-stops where mediation is unsuccessful.

Turning to investor-State disputes, the mediation procedure and mechanism does need to factor in certain specific concerns, for example, corruption and transparency. While confidentiality is perceived as a benefit of mediation, this may present an issue, as it is important for a State to be able to demonstrate transparency in settling an investor claim (which will inherently be politically sensitive) – it is important to avoid any risk of an impression that someone may be profiting from the settlement.

The choice of mediator is also critical – in addition to being neutral, the mediator also needs to be facilitative, directive and cloaked with institutional authority, in order to gain the approval of States 7. So, it will be interesting to see whether there are more mediations of investment disputes in future (arbitration being very prevalent at present). Only if mediations become commonplace will the Convention have any role to play in these disputes and it will also depend on the extent to which a State has invoked the reservations under the Convention.

What about disputes related to claims in export credit and investment insurance provision and to coverage of policies?

The convention provides a framework for enforcement rather than impacting the mediation process itself, so its use relies on mediation remaining a popular dispute resolution mechanism. I understand that mediation is an increasingly popular mechanism for resolving complex insurance coverage disputes and is also used for resolving export finance claims. So, the Convention could become relevant and useful for these areas.

However, it is worth talking about the reservations to the Convention here as it could impact whether these claims and investment claims actually fall within the Convention. A signatory State may specify two reservations:

1. That it shall not apply the Convention to settlement agreements to which it is a party, or to which any governmental agencies or any persons acting on behalf of a governmental agency is a party, to the extent specified in the declaration (Article 8(1)(a)) and/or
2. That it shall apply the Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention (Article 8(1)(b)).[8]

If a State opts for the first reservation, a wide range of disputes will therefore be excluded. As to the second reservation, it will mean that the Convention can only be invoked if the parties specify in their original contract that the Convention will apply to any settlement agreement arising out of mediation, alternatively in the settlement agreement itself.

So far of the 53 signatories, only Belarus, Iran and Saudi Arabia have signed or ratified the Convention with reservations. Belarus and Saudi Arabia adopted the first reservation while Iran adopted both reservations 9. I am optimistic that all the types of disputes we have spoken about so far will, by and large, fall within the remit of the Convention.

How well suited is dispute resolution through mediation to developing countries where both governments and companies especially SMEs do not necessarily have the resources nor the expertise to opt for alternatives such as litigation and arbitration which can be drawn out and expensive?

By facilitating a negotiated settlement between parties, mediation can usually provide them with a faster, more cost-effective and commercial method of resolving disputes than resorting to litigation and arbitration. It also provides the opportunity for the parties to become part of the tailored solution as they control the process and the outcome, and are able to maintain, restore or potentially improve their relationships.

However, until the Convention, no harmonised enforcement mechanism existed for negotiated settlements arising from mediation. Prior to the Convention, if an uncooperative counterparty to a mediated settlement agreement refused to comply with the terms of the agreement, the party seeking enforcement would often have to bring fresh litigation proceedings before the courts to sue on the settlement agreement, obtain a court judgment, and then attempt to enforce that court judgment.

The Convention obviates the need to litigate the breach of contract; the obligations contained in international settlement agreements are directly enforceable in contracting States simply by virtue of resulting from a mediation.

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So, the Convention has the potential to greatly increase the appeal of mediation as a mechanism of resolving commercial disputes with a cross-border dimension.

Further, as the Convention is consistent with the UNCITRAL Model Law on International Settlement Agreements resulting from Mediation (2018) States have the flexibility to either adopt the Convention, the Model Law or both as complementary instruments of a comprehensive legal framework for mediation[10].

The African Continental Free Trade Area (AfCFTA) Protocol on Investment is soon to be published. Do you expect the Protocol to further promote the use of mediation alongside, or instead of, arbitration in the resolution of investor-State disputes in Africa, perhaps alongside the Singapore Convention?

The discussions on the Investment Protocol have not been made public so we do not yet know the approach which will be adopted. The Investment Protocol should be published soon.

One would expect the Investment Protocol to be consistent with the approach taken in the Pan-African Investment Code (PAIC) as well as by Africa's numerous regional economic communities (REC). The PAIC introduced ADR, including but not limited to mediation, as a mandatory step in solving investment disputes. Under the REC protection investment instruments, the parties must make efforts to reach an amicable settlement of their dispute prior to initiating proceedings.

As the negotiation of the Investment Protocol is based on consensus, it is likely that the Investment Protocol will adopt the same approach as PAIC and leave the Member States to opt-in or opt-out of any investor-State dispute settlement mechanism. It is fair to say that African states have not always been praiseworthy of investor-State arbitration.

The statistics also seem to indicate that African states have a relative preference for solving disputes amicably. For example, of the 11 conciliation cases registered by the ICSID Secretariat, 9 have involved an African state. These comprise the only ICSID case where a State Party initiated a conciliation procedure, *Republic of Equatorial Guinea v. CMS Energy Corporation*. Further, at national level, numerous States are adopting rules that favour investor-State mediation and/or limit opportunities for investment arbitration.

I expect there to be a strong focus on amicable settlement mechanisms in the Investment Protocol (with, hopefully, a direct reference to mediation), which may either replace or exist alongside a right to arbitrate.

To what extent does the Singapore Convention supersede local laws and regional or continental codes such as the 2015 PAIC, which aims to "Africanise" international law, or do you see these complementing each other?

The Convention complements the PAIC, other codes and local laws since it is a tool aimed at promoting the enforceability of settlement agreements arising from mediation rather than one designed to regulate the mediation process itself. It is akin to the NYC in the arbitration world (and indeed modelled on the structure of the NYC). I see the Convention as fully supporting the likes of the PAIC which makes ADR mandatory.

Article 7 of the Convention is also relevant here since it clarifies that: *"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".*[11]

I also believe that the Convention creates a platform for discussion and should allow further multilateral collaboration on procedures for mediation and soft law, for example, codes of conduct and codes on mediator's disclosure, similar to what has happened in international arbitration.[12]

I am looking forward to seeing how the Convention impacts the use of mediation as a dispute resolution option. I think it is going to be a while before we know how effective it really is. Since it applies to particular set of circumstances, in which there is a settlement agreement, but one party refuses to accept the enforcement, we will have to look across a number of jurisdictions before we have got examples of the Convention being used. But the Convention is being well received globally. For example, in July this year, Ghana made a formal commitment that its courts would enforce mediated settlement agreements from international disputes.

South Africa and Egypt are promoting investor-State mediation through their investment protection laws. This is administered by their Departments of Trade & Industry as the default dispute resolution mechanism, without prior consent to, say, international arbitration. Gambia, Ghana, Ivory Coast, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Tanzania, Tunisia, and Togo, among others, have also adopted rules that favour investor-State mediation and/ or limit opportunities for investment arbitration. Can local laws and say the international conventions such as Singapore co-exist and cooperate?

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Absolutely, because they serve different purposes. The local laws may promote and regulate investor-State mediation and if the State in question is also a party to the Convention, then they will be obliged to enforce any settlement agreement (domestic or foreign) in accordance with the rules and conditions set out in the Convention.

While they can co-exist harmoniously, the specificities in the Convention may just bring fresh challenges to the mediation process which users should be aware of at the outset. For example, Article 4 of the Convention requires parties to produce evidence that the settlement resulted from mediation – this could be the mediator's signature on the settlement agreement, a document signed by the mediator indicating that a mediation was carried out or an attestation by an institution which administered the mediation. Individual mediators might be reluctant to do this, so African parties might wish to involve a mediation institution from the outset (if permitted by the local laws) as they may be more likely to provide the necessary evidence.

Since China is a predominant investor in emerging markets in Asia, Africa, Middle East and Latin America, there have been suggestions for setting up a Belt and Road Initiative (B&R) International Commercial Mediation Centre. In addition to PAIC and the AfCFTA Protocol, there is also the OHADA Uniform Act on Mediation adopted in November 2017. Are too many cooks spoiling the broth of mediation?

PAIC, the AfCFTA Protocol and the OHADA Uniform Act on Mediation are all reforms favouring investor-State mediation at continental level but with their own specific purposes. To me, it is not a matter of too many cooks spoiling the "mediation broth" - the more that can be done to promote and increase ADR, and mediation in particular, the better.

OHADA's mission is to harmonize business law in Africa in order to guarantee legal and judicial security for investors and companies in its 17 Member States. Before the Uniform Act in 2017, there was virtually no framework for mediation, ad hoc or institutional, so this filled a key gap. By contrast, I understand the AfCFTA Protocol to be building on PAIC and to address the fragmented nature of the investment legal framework throughout Africa by addressing the overlaps and inconsistencies and establishing a coherent continental investment legal framework. For example, looking at BITs alone, according to UNCTAD, African countries have signed a total of 854 BITs (512 in force); 172 intra-Africa BITs (47 in force)![13]

At the intercontinental level, the creation of the B&R International Commercial Mediation Centre also seems to favour investor-State mediation. Four key Belt and Road (B&R) jurisdictions – China, Hong Kong, Singapore and Malaysia – have already been promoting mediation in the context of B&R disputes. Mediation is particularly suitable for high-stakes, cross-border disputes of the type that B&R may generate, without endangering the underlying project or parties' relationships. Typically, these disputes will involve at least one Chinese, and one non-Chinese party and mediation is important given that Chinese parties prefer a less adversarial approach 14. Combining these factors with the likely increase in future B&R disputes, I think that a designated Mediation Center addressing

B&R-specific disputes will be invaluable and should help facilitate future Chinese engagement and investment in these emerging markets.

Third party funding is on the increase during COVID-19 as countries and companies are finding themselves under budget, liquidity and cash-flow pressures. This has seen the rise of litigation funds investing mainly in construction and financial services claims. Do you think litigation financing will take off especially in Africa and Asia?

In the past few years, Hong Kong and Singapore have enacted legislation expressly permitting third party funding showing they are quick to embrace change and shed historical limitations which made them less attractive and competitive as global arbitration centres. Many of the world's leading funders are now present in the region even though both legal regimes mandate the disclosure of the existence of the funding agreement and the funder's name (in Hong Kong the funded party must make these disclosures whereas in Singapore legal practitioners must do so in accordance with their professional conduct rules). I certainly foresee continued growth of the litigation funding industry in Asia including an increasing variety of funding products[15].

Like with Asia, funding is growing at a fast pace in Africa, where many jurisdictions either expressly allow litigation funding or simply do not regulate it. COVID-19 has negatively affected all African economies and litigation funding has become a really important means of ready access to capital to pursue legitimate claims, while removing cost and risk from the balance sheet. It therefore offers companies financial clarity and flexibility amid great uncertainty.

Funders have been increasingly interested in Africa for many reasons, which include the proliferation of disputes in Africa, their legal systems being based on English law or harmonised by the likes of OHADA and improved enforcement prospects. As portfolio funding continues to grow, I think this will benefit continents like Africa where disputes may not always be extremely high value but nonetheless meritorious.

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Although the Singapore Convention does not specifically mention Shariah-compliant dispute resolution – given that there are 57 member countries of the Islamic Development Bank – largely in Africa, Asia and the Middle East – is there a need to develop this as a subset of the Singapore Convention and other investment protection and mediation protocols?

Focusing on the Convention, Shariah law has important implications in the sense that in certain jurisdictions a breach of the Shariah requirements may lead to the inability to enforce the settlement agreement on the basis that it is contrary to public policy (Article 5). So, when enforcement is sought in MENA countries, particular attention should be paid to the compliance of mediated settlements with Shariah law insofar as it is a core component of public policy in that country (which it is in three ratifying countries: Jordan, Qatar and Saudi Arabia).

I am not convinced that we need to develop a subset of Shariah-compliant dispute resolution just yet. We could minimise the risks associated with this by, for instance, training mediators to better understand the Shariah requirements. Mediation centres could also scrutinise the settlement agreement and draw the parties' attention to any Shariah breaches. There is also nothing stopping parties from having two separate settlement agreements, one dealing with the Shariah issues and one dealing with the remaining issues.

References

1 https://simc.com.sg/simc-covid-19-protocol/
2 https://civilmediation.org/wp-content/uploads/2020/03/CMC-Guidance-on-Online-and-Remote-Mediation-31.3.20.pdf
3 https://www.singaporeconvention.org/convention/the-convention-text/
4 https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements
5 Article 1(1) international means: (a) At least two parties to the settlement agreement have their places of business in different States; or (b) The State in which the parties to the settlement agreement have their places of business is different from either: 4 (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) The State with which the subject matter of the settlement agreement is most closely connected.
6 Singapore Convention on Mediation – Lexis PSL
7 https://www.singaporeconvention.org/pdf/4-Report-Panel-3.pdf
8 Singapore Convention on Mediation – Lexis PSL
9 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en
10 https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements
11 https: uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf
12 https://www.singaporeconvention.org/pdf/4-Report-Panel-3.pdf
13 https https://www.tralac.org/blog/article/14468-substantive-issues-the-afcfta-investment-protocol-should-address.html
14 https://iccwbo.org/publication/icc-guidance-mediation-belt-road-disputes/
10 https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2021/article/third-party-funding-in-the-asia-pacific-region
https://www.imf.org/en/Publications/WEO/Issues/2021/01/26/2021-world-economic-outlook update