Conflict of Laws and Intra-African Commercial Disputes: To What Extent Does (Lack of) A Harmonized Pan-African Conflict of Laws Regime Support the AfCFTA Liberalization Agenda?

By:

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December 12, 2021

Introduction

Law plays an indispensable role in the economic integration of regions. However, a plethora of academic and legal literature on Africa's integration process pay more attention to the public international law dimensions of economic integration at the expense of private international law. These literatures are blinded by the fact that economic integration results in juxtaposition of both states and legal systems, thus private international law. A

case in point is the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement) which was signed on 21st March, 2018 in Kigali, Rwanda, and came into force on 30th May 2019. Article 20 of the AfCFTA Agreement establishes a dispute settlement mechanism (DSM) modelled along the WTO system. The DSM is administered in tandem with the provisions of the Protocol on Rules and Procedures on the Settlement of Disputes (the Protocol). The Agreement has jurisdiction on disputes arising between state parties only. Notably, it is the private investors and traders that are most adversely affected by some legal uncertainties caused by unpredictability, non-compliance and lack of trade remedies in the event of breach of regional trade agreements. However, the AfCFTA Agreement is conspicuously silent on cross-border disputes amongst private actors and the divergent systems of law operating in the State Parties. Presumably, the divergent national conflict of laws rules which are obsolete in many State Parties will continue to govern cross-border commercial disputes between these private actors.

To what extent the failure to have a unified and/or harmonised pan-African conflict of laws regime can support the objectives of intra-African trade and efficient dispute settlement is the fulcrum of this study.

AfCFTA and Private Actors in Context

As previously stated, Article 20 of the AfCFTA Agreement limits the jurisdiction of the AfCFTA DSM to State Parties. In addition, Article 1 of the Protocol defines a 'dispute' as a 'disagreement between State Parties regarding the interpretation and/or application of the (AfCFTA) Agreement in relation to their rights and obligations.' Further, Article 3 of the Protocol limits its application to disputes arising between State Parties concerning their rights and obligations as provided for the in the AfCFTA Agreement. This implies that, just like the WTO, private actors have no direct locus standi to invoke the jurisdiction of AfCFTA DSM procedures in their cross-border commercial disputes. This is so despite the different practice in regional courts of the regional economic communities (RECs) such as East African Court of Justice (EACJ), Courts of Justice of the Common Market for Eastern and Southern Africa (COMESA), and the Economic Community of West African States (ECOWAS) that adjudicate cross-border commercial disputes between private actors.

According to a 2016 UNCTAD Report, the Commission proffered advise to wit:

> Recognising that the negotiation of the CFTA will require mammoth effort on the part of African States, it would be a sad situation if implementation (sic) disputes would hinder fuller implementation of the agreement. FTA implementation disputes are known to be, as with most trans-national disputes, both costly and long-winded, and can produce uncertainty for businesses, both trading and investment. It is imperative, therefore, that the CFTA incorporate adequate mechanisms to prevent and resolve disagreements in an expeditious manner, such as through consultation, mediation or arbitration, avoiding duplication with the WTO dispute settlement mechanism where appropriate. These mechanisms should be easy to use, inexpensive (compared to WTO mechanisms), and quick in their response to the parties. Above all, AU member States will be required to make important contributions in terms of legal frameworks (both legislative and operational), as well as to instil a sense and culture of good governance and rule of law in their operators. (Emphasis added)

Along almost similar lines, Emilia Onyema quips:

> The question that therefore arises is whether the African state whose citizen has suffered loss as a result of such measures can espouse the claims of its citizen. Jurisprudence from the WTO DSM does not technically preclude such espousal, which can also be on the basis of diplomatic protection. The primary question is whether it will be desirable for states to use the DSM provided under the AfCFTA to espouse the claims of their citizens. In some situations, it may be preferable that a state or group of states pursue redress for their citizens via the DSM against another state or group of states. But in the vast majority of cases, the dispute will fall within the commercial contract between the transacting parties. (Emphasis added)

While advising on the need to incorporate private actors in the AfCFTA DSM framework, Akinkugbe proffers that the AfCFTA Agreement and the Protocol need to be amended in order to recognize the private sector as actors in the

AfCFTA DSM procedures. To him, most cross-border commercial transactions have been by private parties and corporations, which active transactions have led to the rising relevance of the regional courts. Therefore, given that the AfCFTA and its DSM have significant utility for private businesses, besides the challenges of opting for diplomatic protection, enhancing the overall access of the AfCFTA DSM will transcend its limitation and 'nip in the bud the under-utilization critique that has been the case with RECs in economic integration matters.

The Need for a Pan-African Conflict of Laws Regime

The study and development of private international law (also herein otherwise referred to as conflict of laws) in Africa has stagnated because the region has largely been excluded from, and not actively engaged with, many of the contexts in which the subject's development has been promoted in other jurisdictions. Quoting Kalensky, Oppong observes that the development of private international law of a society is influenced by material conditions of the life of that society at any given stage. These conditions include international trade, investment, global transportation and technological advancement. To Oppong, consequently, the comparative isolation of Africa from these phenomena has led to the underdevelopment of conflict of laws in the region.

Private international law is a concept with both national and international dimensions, thus providing a barometer for measuring the extent to which a country's legal system engages with other legal systems. This engagement is significantly exacerbated by the personal and commercial interactions between natural and juristic persons in national legal systems, which interactions have been at minimum in Africa in the past. There is an interesting debate on the role Africa and other Third World countries played in the development of international law. However, that debate is beyond the scope of this piece. The position adopted by this Note is that intra and extra-African economic interactions have been at minimum in the distant and recent past. These interactions generate conditions necessary for economic and social development, thus the minimum interactions have resulted in underdevelopment in Africa. Impressively, with the willingness of African leaders to implement the AfCFTA blows some wind of hope. However, the lack of (or inadequate, if any) activity on issues of conflict of laws in Africa takes the

Continent several steps back. Unlike other regions beyond the Continent, Africa currently lacks a multilateral treaty dealing specifically with issues of conflict of laws. The existing ones are bilateral agreements regulating the recognition and enforcement of foreign judgements. However, the impact of conflict of laws is evident in some African REC treaties that have borrowed from the techniques of conflict of laws by including provisos that 'transform' judgement of regional courts into judgements equivalent to national ones for enforcement purposes.

Therefore, despite Africa's minimal participation in the development of the subject, with the operational phase of the AfCFTA in effect, it is imperative that the influence of cases such as *the Republic of Mauritius versus Polytol Paints and Adhesives Manufacturers Co. Ltd* involving intra-African commercial transactions must not be ignored. As such, despite the commencement of the operational phase of the AfCFTA and due to the lack of a pan-African conflict of laws regime especially in the areas of commerce and trade, there is need for the region to devote more effort to develop the regime.

Going Back in Time: Private International Law in Pre-Decolonized Africa

Foremost, while attempting to construct the history of conflict of laws in pre-colonial Africa, I have to place a caveat that there is a dearth of resources documenting the virgin academic territories of African legal history. Nonetheless, Oppong observes that the pre-colonial Africa had empires, tribes and communities with distinct legal systems and significant differences between tribal laws. There also existed social and trading interactions among these legal systems and others beyond them. For example, to Rodney, salt generated a huge volume of trade between people of the interior and the Coastal African regions. Thus, the condition for conflict of laws challenges existed in pre-colonial Africa. Oppong further observes that 'the conflict of laws situation in pre-colonial Africa was a mixture of practices which functionally served as conflicts avoidance rules, and that there was a tendency to apply *lex fori* to issues that might involve consideration of a foreign law.'

During the colonial period, the development of private international law and its treatment thereof in colonial Anglophone Africa was not fostered by any serious academic or juristic discussions as compared to the English legal history. Two

major features of English private international law determined its application and treatment in the colonies. First was the historical resistance towards foreign law and the emergence of various fictions meant to turn foreign cases into local actions. Second was the act of having separate courts administering distinct bodies of law ostensibly to avoid conflict of laws problems. Taking South Africa as an example, Oppong narrates that its early contact with the Dutch, unlike the English, made it have an advanced conflict of laws regime even at the time when the Dutch relinquished the territory to the British, thus the lasting influence on the jurisprudence of the South African courts. Secondly, the country's favourable climate made it a preferred destination for European settlers who brought to its courts some claims whose subject matter emanated from their countries of origins. Besides, South Africa's long coastline made it a very important shipping centre for ships enroute to India and Australia, thus claims involving foreign ships, contracts of affreightment, and bills of lading. These examples, together with other cases which date back to the early 19th Century show how developed South Africa's legal system was in addressing conflict of laws problems. These cases include inter alia *Heinaman v. Jenkins 'Re Peytona'* " (1853-56) II Searles' Reports 10 on jurisdiction over foreign contracts; *Dunell and Stanbridge v. Van der Plank* in Re Schooner "Louisa," (1828-49) III Menzies' Reports 112 on arrest of foreign ships to establish jurisdiction; *Norden v. Solomon*, (1828-49) II Menzies' Reports 375 on jurisdiction over the assets of a foreign bankrupt; and *Wallace v. Hill*, (1828-49) I Menzies' Reports 347 on jurisdiction over a tort committed at sea aboard ship. Apart from South Africa, there are very few reported cases of 'true' private international law problems during the colonization period. Perhaps this is so because the African colonial phase was dominated by internal conflict of laws challenges rather than true private 'international' law problems. The reason for this was that trade within and with other colonies was largely monopolized by the colonial masters, an act which prevented economic interactions between the colonial subjects and third countries.

Nonetheless, as per Justice Gorman in the case of *Official Administrator v. Anba Bola Convent*, (1900-31) 1 S.L.R. 521, "the pressures of modern conditions or international intercourse" compel the rules of private international law." He therefore suggested that it was very desirable that private international law be uniform from state to state. This, together with the several private international

law cases in African courts during the colonial period show that African courts appreciated the relevance of private international law. It is against this background that Africa must understand and appreciate the need for a harmonized private international law regime in the region.

Conclusion: A New Dawn for Conflict of Laws in Africa

Compared to their Latin American counterparts, it is disheartening to see the underdeveloped private international law regime in Africa. Africa needs to develop rules that are not only outward-looking and flexible enough to attract the much-needed international (intra-African) trade and investment, but also inward-looking in a bid to protect Africans engaging in intra-African commercial transactions. Emphasis must be put on the need for the regime to be inward-looking because of the imbalances in bargaining power between the big economies and the small ones which are likely to be disadvantaged in the negotiations. As was the case in the Kenyan case of *Valentine Investment Company (Msa) Ltd. v. Federal Republic of Germany* [2006] eKLR the numerous occasions of slavish enforcement of out-of-Africa choice of forum agreements would, for example, occasion great cost and hardship on Africans.

The common law regime for the enforcement of foreign judgements in Africa is compounded of procedural obstacles such as unnecessary prolonged enforcement of foreign judgement procedures. This may clog free movement of factors of production in the AfCFTA as envisaged. The more expedited extant statutory enforcement regimes, especially those not signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, are oftentimes based on reciprocity and have only few African countries designated as beneficiaries. Adversely, judgements from other African countries that are not designated beneficiaries do not benefit from this expedited enforcement regime. This shows that for an effective implementation of a sustainable AfCFTA, it is indeed time to consider the possibility of a pan-African convention governing recognition and enforcement of foreign judgements. The adopted convention should unify and ease the recognition and enforcement procedures and also provide for grounds upon which such recognition and/or enforcement may be denied. The AfCFTA Agreement and its Protocols are silent in this regard.

In addition to the pan-African convention, given the non-litigious nature of African countries, as hereinbefore stated, the jurisdiction of the AfCFTA DSM should be expanded to include private actors. The reality on the ground is that the state orchestrated bureaucratic diplomatic protection may not be a feasible option for a private party whose financial interests are at stake and need to be urgently resolved. Elsewhere, there have been calls for the establishment of an African Commercial Court as a one-stop court for the enforcement or annulment of the final award. However, it is my belief that just like calls for the establishment of a separate African Court of Justice led to, instead, the merger of the African Court of Human and Peoples' Rights (ACHPR) and the African Court of Justice due to inter alia politics and finances, it would equally not be financially viable for the African Union to administer two courts, that is the African Commercial Court and the ACHPR. Alternatively, it may be financially sound to create a commercial division within the ACHPR or the African Court of Justice and Human and Peoples' Rights as the case may be, to deal with commercial disputes that have commercial conflict of laws dimensions. The implication of this is that the AfCFTA DSM will still be active but only available to State Parties, whereas private actors whose home countries have made the Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights declaration can opt for the ACHPR DSM. This may act as an incentive and mount pressure on State Parties to fasten the amendment procedure of the AfCFTA DSM to expand its jurisdiction to accommodate private actors. This will give private actors an opportunity to be a major part of the dispute resolution process thus deeper economic integration. Either way, the AfCFTA liberalization agenda is achieved.

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