AfCFTA and International Commercial Dispute Resolution – A Private International Law (Conflict of Laws) Perspective

By:

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The Agreement establishing the African Continental Free Trade Area (AfCFTA) has laudable goals. It seeks to create a geographic zone where goods, services and capital will move freely among member states. It does this by removing trade distortions and boosting factor mobility, competition, and investment flows. Regrettably, this goal is not new. The history of attempts to boost intra-African trade and ease factor mobility within the continent dates back to the immediate post-independence era. Many of those attempts have not achieved remarkable success. But, at the same time, it would be wrong wholly to dismiss them as failed efforts. The various trade and regional economic integration agreements concluded among African countries have achieved varying levels of progress regarding trade liberalization and factor mobility. Thus, as we reflect on the AfCFTA, we must be conscious of history, but we can also be cautiously

optimistic.

The need for progressive elimination of trade barriers is acknowledged in the AfCFTA and the related Protocols on Goods and Services. When we think of trade barriers, our minds often turn to the usual suspects, including tariffs, quotas, export and import bans, and technical barriers to trade. I seek to argue in my presentation that the rules for resolving cross-border commercial disputes and managing cross-border commercial (and indeed personal) relationships can also be significant barriers to trade. When properly attended to, the same rules can play a facilitative role in advancing trade liberalization and factor mobility. These rules are the domain of conflict of laws or private international law. In essence, I will argue that an effective conflict of laws or private international law regime can contribute to the free movement of goods, services, and capital and foster a healthy investment climate.

Conflict of law rules are especially important in resolving cross-border disputes between private commercial entities, be it through arbitration or litigation. It is the activities of these private commercial entities that will ultimately drive the success of the AfCFTA. The AfCFTA provides a mechanism for settling inter-state disputes – a subject on which my brother Professor Olabisi Akinkugbe has ably written. The inter-state dispute settlement mechanism is modelled after the WTO system. The AfCFTA does not provide rules for settling disputes between private commercial entities – the entities that will actually engage in trade under the AfCTFA. In essence, cross-border commercial disputes arising from the trading relations between private commercial entities trading under AfCFTA must be resolved using national law. I argue that the existing national laws on cross-border commercial dispute resolution need reform if they are not to become barriers to trade.

For those who may not be familiar with the domain of conflict of laws, let me give you an example to drive home my case. Assume that a Nigerian and Ghanaian business decide to take advantage of trading under the AfCFTA. They enter into a contract that provides that the contract is governed by Nigerian law. The contract further provides that in the event of a dispute, the parties submit to the exclusive jurisdiction of the Ghanaian courts. A dispute arises between the parties. In breach of the Ghanaian court jurisdiction agreement, the Nigerian business sues in Nigeria. Instead of declining jurisdiction to give

effect to the parties' Ghanaian jurisdiction agreement, the Nigerian court decides to hear the case. After two years of litigation in Nigeria, the Nigerian court gives judgment in favour of the Nigerian business. However, the Ghanaian business has little or no assets in Nigeria. Accordingly, the Nigerian business has to enforce the judgment in Ghana. When the Nigerian business sues in Ghana to enforce the judgment, the Ghanaian court declines to enforce the Nigerian judgment for two reasons. First, Nigeria is not one of the countries whose judgments can be registered in Ghana because Nigeria has not been designated for the purpose by the President of Ghana. Second, the court declines to enforce the judgment at common law because, in the court's opinion, the original claim should have been heard in Ghana (not Nigeria) – after all, that is what the parties agreed to in their contract.

We see clearly from this simple example a situation in which the trading relationship between the Nigerian and Ghanaian business has been frustrated or undermined because of the private international law regime operating in both countries. In other words, to these parties, the regime has become a barrier to smooth and orderly trading relations. As Justice Oguntade once noted in the Nigerian case of *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR 309 338, "it is inimical to the interest of trade and commerce if judgments in foreign courts cannot be readily enforced".

Lest you should think this is a concocted example from the ivory tower of academia, let me point out there are decided cases and existing national laws that concretely bring home this point. Since we are in Ghana, let me draw examples from Ghanaian law. Ghana has a regime for registering judgments from foreign countries. However, the regime applies only to judgments from designated countries. The President must designate those countries. To date, of the 55 African countries, only Senegal has been designated by the President. Clearly, there is the need for more African countries to be designated to reflect Ghana's commitment to African economic integration and the AfCFTA. The fact that the lack of Presidential designation can be hugely problematic became evident in the 2016 case of *Mba v. The Republic of Ghana*, Suit No. HRCM/376/15 (High Court, Ghana, 2016) (unreported). In this case, the High Court declined to enforce an $800,000 judgment from the ECOWAS Court of Justice partly because the ECOWAS Court had not been designated by the President.

The importance of the legal framework for resolving cross-border commercial disputes is evident from the fact that where countries envisage robust free movement of goods, services, and capital, they often devote time to developing their private international law or conflict of laws regimes both at the national and regional levels. Let's take one: as early as 1968, the member states of the then European Economic Community entered into an international convention to facilitate the enforcement of judgments from their respective courts in other member states. Since then, the member states have developed rules for determining when their national courts can take jurisdiction in a claim with foreign elements from another member state. They also have rules for determining which law to apply when a court takes jurisdiction regarding such a claim. Indeed, within the European Union, a robust private international law framework filled with many related regulations and case law has developed as an important backbone for the economic freedoms enjoyed within the union. Similar efforts are underway in regional organisations such as ASEAN, CARICOM, the OAS and MERCOSUR, all of which, at the minimum, aspire to ensure free trade among the member states.

Time and space will not allow me to expound the full scope of the private international law initiatives in all these organisations. However, the fundamental lesson from the experiences of all these organisations that conflict of laws rules can be a barrier to trade cannot be lost. In a recent article, Professor Emilia Onyema observed that the most critical hindrance to cross-border litigation in Africa is:

> the lack of a continental treaty on the enforcement of court judgments issued in one African country in another African country. This negatively impact on the enforcement of court judgments arising from cross-border litigation and thus severely limits the negotiability of national court judgments across Africa.

Dr Abubakri Yekini has also observed that:

> Foreign litigants may be persuaded to trade with Nigeria if they are assured that foreign jurisdiction clauses will be respected by Nigerian courts. [But] the current approach is not too satisfactory as there are

> some appellate court decisions which suggest that parties' choice may not be enforced in certain situations. Some of the local statutes like the Admiralty Jurisdiction Act which grants exclusive jurisdiction over a wide range of commercial matters may equally need to be reviewed.

And Lise Theunissen has noted that:

> As a result of economic integration in the African Union with the African Continental Free Trade Area, cross-border economic transactions are encouraged. Consequently, the number of private international law disputes on the African continent is increasing. At the same time, national legislation and case law of the African Union member states diverge significantly. This non-harmonised state of private international law forms an important obstacle to international trade and to cross-border economic transactions. For this reason, it is crucial for the African economic integration to strive for a harmonisation of private international law.

I argue that the AfCFTA Secretariate should investigate the extent to which the existing conflict of laws rules in the member states imposes barriers to trade and work to eliminate those barriers, as has been done in other regions of the world. In a 2006 paper I published in the International and Comparative Law Quarterly, I argued that a well-developed and harmonised private international law regime is an indispensable element in any economic integration effort and that Africa's economic integration efforts should pay attention to this. The inquiry I have proposed here could be an independent study or part of a broader study on the resolution of cross-border disputes within AfCFTA member states. In most member states, the current framework for the resolution of cross-border commercial disputes is through litigation before national courts or alternative dispute resolution mechanisms such as arbitration.

Without prejudice to the outcome of the proposed AfCFTA Secretariate's study, there are a number of options available to AfCFTA member states for developing an appropriate framework for the resolution of cross-border private commercial disputes arising from trading under the Agreement. I will briefly highlight four:

First, member states should be encouraged to reform their national laws through legislation and case law to better facilitate the needs of businesses. To this end, there should be respect for jurisdiction agreements, arbitration agreements, and choice of law agreements. There should also be greater willingness to enforce judgments from other member states.

Second, at the continental level, there is a need for harmonisation of private international law rules especially regarding jurisdiction and the enforcement of foreign judgments. The Organisation for the Harmonisation of Business Laws in Africa (OHADA) has also demonstrated through its work, that harmonisation of laws at the regional level in Africa is achievable if there is the required political will and commitment.

Third, the AfCFTA Secretariate should encourage member states to ratify or adopt relevant international conventions adopted under the auspices of the Hague Conference on Private International Law. These include the Hague Convention on the Enforcement of Foreign Judgments, the Hague Convention on Choice of Court Agreement, and the Hague Principles on Choice of Law in International Commercial Contracts. Even for countries that do not ratify or adopt these international conventions, specific provisions of the conventions could be used as models for domestic law reform. This approach has the advantage of reforming and advancing domestic law without the international commitments that come with ratification of international treaties.

Fourth, there is the need to strengthen arbitration to provide an alternative means of dispute settlement for businesses that do not wish to litigate. Existing arbitration centres on the continent should be studied and strengthened so that they can become an alternative forum for dispute resolution.

In conclusion, in this presentation, I have argued that the current national conflict of laws regimes to resolve intra-African private cross-border commercial disputes are not fit for purpose. They must be reformed to enable them to deliver on the goals of the AfCFTA. One can expect an increase in private cross-border commercial disputes arising from increased intra-African trade with the implementation of the AfCFTA. It would be unfortunate if all the efforts of member states and the AfCFTA Secretariate are devoted to developing AfCFTA’s inter-state dispute resolution mechanism, and little or nothing is done about the legal framework for resolving cross-border private commercial

disputes. This is because most of the trade transactions under AfCFTA would involve private business entities. Their rights need to be protected to ensure certainty and predictability for them.

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