Digitalising Trade Finance under the African Continental Free Trade Agreement: Lessons from the Model Law on Electronic Transferable Records

By:

Uchenna Anyamele

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In the last two years of the COVID-19 pandemic, it has become evident that supply chains relying on physical documents in Africa can be delicate. Long-standing development and infrastructural challenges peculiar to Africa particularly affects intra-African trade. As a means of survival, businesses and households turned to digital trade, thus accelerating digital technology adoption. Whilst the primary aim of adopting digital trade was to mitigate the economic downturn caused by the pandemic, there has been an increase in e-commerce, from 14% in 2019 to 17% in 2020. Recognising the ever-growing importance of e-commerce, the African Union and Government Assembly slated Phase III negotiations of the African Continental Free Trade Area (AfCFTA) to

focus on a Protocol on Digital Trade.

An essential aspect of digitalising trade is digitalising trade finance documents such as negotiable instruments. Negotiable financial instruments, largely paper-based, are an integral part of commercial transactions. However, they are fraught with challenges such as miscommunication, complex documentation flow, lack of transparency, delays and increasing documentary fraud, which can result in gross inefficiencies.

For MSMEs that will be trading under the AfCFTA, paper based trade can be cost prohibitive. To save costs and improve resilience under AfCFTA, paperless trade is imperative. However, electronic transferable records are hardly legally valid because most jurisdictions recognise only paper versions. The United Nations Commission on International Trade Law (UNCITRAL), recognising the need for a law to support global recognition of electronic transferable documents, adopted the Model Law on Electronic Transferable Records (MLETR) in 2017.

Given the ongoing AfCFTA Phase III negotiations of the digital trade protocol, this paper seeks to draw on the MLETR to make suggestions for the upcoming protocol.

Introduction

Digitalisation has become an imperative in shaping how the global society and economy function. The way, and how quickly businesses operate, how humans interact, and the mode of working are increasingly defined and determined by digital technology. Whilst technology has always driven trade, 'TradeTech' – 'the set of technologies that enables global trade to become more efficient, inclusive and sustainable' - has allowed leaps in efficiency in trade, like easing supply chain bottlenecks across different industries. There are various aspects of trade that could benefit from digitalisation. One critical aspect is digitalising electronic trade transactions and documents. Despite digitalisation attempts in this aspect, there is still a need for global legal recognition of electronic trade transactions and documents. Digitalising trade documents can reduce the volume of paper documents, mitigate fraud and reduce inefficiencies. The sheer volume of documents and the costs is burdensome for small businesses who want to trade internationally. Despite the benefits of electronic trade documents, most jurisdictions recognise only paper versions of documents.

The Model Law on Electronic Transferable Records (MLETR) is a framework developed by UNCITRAL, which recognises electronic transactions and documents by establishing a method for an Electronic Transferable Record (ETR) to become functionally equivalent to a paper-based transferable document or instrument.

Intra-African trade anchored and supported by AfCFTA promises many benefits. AfCFTA, the largest free trade area, presents an excellent opportunity for Africa to grow intra-African trade, diversify export and attract Foreign Direct Investments (FDI). One of the ways to maximise AfCFTA's benefit is through digital trading. However, there must be an enabling regulatory environment for this. Recognising this, the African Union (AU) decided that phase III negotiations of the AfCFTA would focus on the Protocol on Digital Trade (Protocol). It is expected that the Protocol would deal with digital versions of transferable records.

This piece will consider how the MLETR will serve as a model for the Protocol with respect to ETRs. After this introduction, I will provide a broad overview of the AfCFTA and briefly discuss the Protocol in section II. In section III, I consider the MLETR, as well as its benefits for AfCFTA and ways it can serve as a model for the Protocol. Section IV provides an overview of the MLETR in other jurisdictions. I conclude in section V.

The African Continental Free Trade Area (AfCFTA)

The AfCFTA is a momentous agreement approved by the 18th ordinary Session of Assembly of Heads of State and Government, held in Addis Ababa, Ethiopia in January 2012 which came into force in January 2021. The AfCFTA agreement is a strategic framework for delivering Africa's goal for inclusive and sustainable development. As one of the flagship projects of Agenda 2063, the AfCFTA by providing mutually beneficial trade agreements, is expected to grow intra-African trade by about 33 per cent, a significant increase from the current 12%, (a low percentage if compared with Europe at 68%. The World Bank predicts that the AfCFTA will lift about 30 million people out of extreme poverty by 2035, manufacturing is expected to increase from USD500 billion to USD1 trillion by 2025, while intra-African trade in agriculture is projected to increase by 20-30% .

One of the advantages of the AfCFTA is the opportunity it provides for diversification of exports and the possibility of attracting FDI. Critically, the AfCFTA provides a harmonized platform for accelerating trade in Africa. The upcoming Protocol could provide a specific regulatory framework for digital trade. Despite the benefits of the AfCFTA, there are costs that can impede its benefits. Thus, to harness the full benefits of the AfCFTA, transactional costs must be significantly reduced by enabling and efficient regulatory frameworks. Such frameworks would enable the free flow of goods, boost productivity and lower trade costs.

AfCFTA Protocol on Digital Trade

Digital trade laws are a necessary aspect of creating an enabling environment for digitalisation. Yet, African countries are generally reluctant to sign digital trade agreements. At the 11th WTO Ministerial Conference in 2017, 71 members agreed to explore negotiations on trade-related aspects of e-commerce. As of 2019, 76 members launched plurilateral e-commerce negotiations in the WTO. This was not backed by any mandate of the WTO because developing countries, except Nigeria, were reluctant to participate given their varying levels of development and the digital divide.

The Protocol was set in motion in February 2020 by the AU stating that the Phase III negotiations would also focus on digital trade. This Protocol which aims to promote the development of African-owned e-commerce platforms nationally, regionally and continentally, has many benefits including minimizing existing issues such as decreasing transportation costs for e-commerce deliveries by removing tariff barriers, upgrading digital infrastructure by establishing more reliable payment solutions and improving internet access across the continent.

Many aspects of digital trade in Africa are still challenging because countries adopt different approaches to policy issues, hence, the need for some harmonisation. It is expected that the Protocol will bring much needed harmonisation. In drafting the Protocol it will be necessary to determine where harmonisation is possible and what is required to make such harmonisation possible. Issues on e-commerce negotiations which the Protocol will address include (1) data governance (privacy, security, localisation, data portability,

harmonisation of data regulations across Africa); (2) digital business taxation; and (3) cross-border e-commerce trade facilitation (electronic trade, paperless trade, single windows, parcel delivery).

Regulatory Strides – The Model Law on Electronic Transferable Records (MLETR)

The MLETR was birthed as a result of the challenges of digitalising transferable documents and instruments. Some of these challenges include the fact that just a few jurisdictions recognise that electronic tree documents have the same qualities as a people counterparts. Digitally signed documents in certain jurisdictions do not have ownership attributes and specific functions that negotiable instruments required. Another challenge is the lack of standardisation we respect to regulation and interoperability of technology. There are also issues with complexity costs time and effort required to implement digital solutions for businesses.

In 2017 approved the UNCITRAL Model Law on Electronic Transferable Records (MLETR) which allows parties to undertake electronic commercial transactions, domestically and across borders, that otherwise would have been documented by paper. The MLETR is a key enabler of digital trade financing and paperless trade facilitation and supports the use of emerging technologies development such as blockchain, Internet of Things (IOT) and smart contracts.

One key advantage of the MLETR is that it seeks to identify a functional equivalent or analogue to possession. This means that the MLETR allows parties to use electronic trade documents in their international trade transactions. MLETR allows the transfer and possession of that electronic document to represent title to the goods, a feat previously difficult to accomplish.

AfCFTA and MLETR - Benefits

Digitising and standardising documents is especially important under the AfCFTA because it is the initial step in creating digital trade ecosystems across the AfCFTA. For SMEs in Africa who struggle with expansion, electronic negotiable instruments can, by reducing cumbersome and complex paper transactions enable that expansion. This is because digitalisation will reduce the cost and complexity of trade and enable more SMEs to participate in global

trade; since traditional paper-based systems and processes will be modernised MSMEs will operate more efficiently through the smarter use of technology solutions. One of the reasons why MSMEs in Africa are reluctant to expand is the fraud risks attendant with trade documents. Digitalising these documents will create safer, more secure digital systems which will ultimately reduce fraud and criminal activity reducing exposure to risk and disputes.

Digitalising negotiable instruments will also help to promote sustainable trade. This is particularly important in Africa where there is a digital divide. Digitalising negotiable instruments whilst bridging digital infrastructure gaps will ensure that people are not left behind.

The MLETR is a global standard for digitalising trade finance which can serve as a model for drafting trade document provisions in the upcoming Protocol. Where the AfCFTA provisions of the Protocol reflect the MLETR it can help facilitate trade in both regional and international markets because it will reflect more familiar and known provisions. This will enable a quicker and more effective implementation of the AfCFTA.

Enabling the use of digital trade documents under the AfCFTA will help customs and MSMEs to avoid the complex and costly regulatory oversight and compliance issues.

MLETR – Some Suggestions for the AfCFTA Protocol on Digital Trade

More recently, free trade agreements (FTAs) have begun including digital trade provisions. Such agreements include obligations to adopt model laws. Existing trade agreements scope e-commerce and its related provisions and commitments in three main categories as listed in section II (ii) above.

Under the AfCFTA Protocol, the provisions for the digitalisation of negotiable documents could be in the facilitation commitments section. Within that section would be a part dealing with electronic transferable records. Some recommended forms for such provision include:

- A provision calling for the adoption of MLETR by AfCFTA member state parties. The ICC suggested such a provision for the Joint Statement Initiative on Electronic Commerce (JSI). The recently concluded Digital

Economy Partnership Agreement (“DEPA”) between Singapore, New Zealand and Chile includes a soft obligation on parties to “endeavour to adopt” the MLETR.

- Alternatively, specific provisions related to scope and definition which are similar to the MLETR could be drafted as independent provisions. The scope of the Protocol could deal with ETRs but exempt securities, which can be dealt with under substantive law; the definition of electronic records could be a replica of the MLETR which builds on the data message on UNCITRAL Model Law on Electronic Commerce (MLEC) (2006). Since some AfCFTA member states have already adopted the MLEC this so it would be familiar to them. The definition of ETR reflects the functional equivalent approach, whilst the definition of ‘transferable document or instruments’ also focuses on key functions of transferability and providing title to performance. Both definitions leave certain aspects to substantive law. Some substantive provisions which could be considered include Article 7 which states that ‘an electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form’; Articles 8-11 on the functional equivalence of electronic and manual records and Article 12 on general reliability standards for methods used. This can ensure legal certainty whilst also allowing industry standards.

MLETR in other Jurisdictions

Singapore

Singapore adopted the MLETR into legislation. Before the amendment, the scope of the ETA excluded negotiable instruments. Following public consultations, the Singapore Parliament passed the amendment contained in Part 2a of the Electronic Transactions (Amendment) Act in February 2021. This meant that the ETA was amended to give effect to the MLETR instead of enacting a new and separate act. The Act largely follows the MLETR, albeit with a few modifications and omissions. The most significant ones are; the requirement that all information in a transferable document or instrument be reproduced in its electronic transferable record replacement and vice versa with exceptions like an accreditation system. The Singapore Act closely follows the articles 10 and 11 of the MLETR by referring to control and exclusive control

as functional equivalents of possession. The reliability standards are similar too.

Bahrain

As the first country to adopt the MLETR in 2019, Bahrain largely reflects the MLETR. Like Singapore, there is an accreditation system which is to be determined by the Minister of an administrative agency designated in a decree) to certify reliability. The legislation defines a "document" as: (1) bills of lading; (2) letters of credit; (3) warehouse receipts; and (4) any other document of title, in respect of an obligation to deliver goods indicated in the document, specified in a regulation issued by the competent Minister for Transportation after consultation with the Governor. The legislation defines "instrument" as: (1) cheques; (2) bills of exchange; (3) promissory notes; and (4) any other instruments, in respect of an obligation to pay a fixed amount of money indicated in the instrument, specified in a regulation issued by the Governor.

Abu Dhabi

The Abu Dhabi Global Market (ADGM), a financial free zone in the United Arab Emirates, issued its Electronic Transaction Regulations 2021. The Regulation adopts several UNCITRAL model laws, including the MLETR. With minimal amendments, it reflects the MLETR and allows issuance and signature of negotiable instruments.

G7 Collaboration

On 28 April 2021, the G7 digital and technology ministers committed to adopting ETRs in international trade. This, they agreed, is to be done through a framework that will promote the adoption of MLETR. A more comprehensive framework for G7 collaboration on ETR will be established based on the findings of a domestic scoping exercise.

Kiribati

On 11 August 2021, the Parliament of Kiribati passed the Electronic Transactions Bill and on 21 September 2021 the President of Kiribati assented to it. The Act recognises electronic transactions in commercial and non-commercial settings. It is based on UNCITRAL texts. A distinctive feature of the Electronic Transactions Act is that it incorporates in its Part 5 the MLETR.

Kiribati is the first Pacific country to do so, and the fourth jurisdiction in the world.

Conclusion

In seeking to create legal standards through the AfCFTA Protocol on Digital Trade, there is an opportunity to draw lessons from the MLETR, a model uniform law. This can help in creating harmonisation not only amongst African countries but with countries across the globe which have modelled their laws after the MLETR. Doing this can help make trade less complex for MSMEs trading under the AfCFTA.

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