Nigeria and AfCFTA: What Role has Private International Law to Play?

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The idea of economic integration is not new to Africa. It is a phenomenon that has been conceived as far back as the 1960s when many African countries gained independence. In 1980, the Organisation of African Unity (now African Union) came up a blueprint for the progressive development of Africa: the Lagos Plan of Action for the Economic Development of Africa, 1980–2000. However, the first concrete step towards achieving this objective was taken in 1991 when the African Heads of State and Government (AHSG) signed the treaty establishing the African Economic Community (AEC) (Abuja Treaty) in Nigeria. One of the operational stages of the AEC was the creation of a Continental Free Trade Area by 2028. In 2013, the AHSG further signed a Solemn Declaration during the 50th anniversary of the African Union. The Declaration sets another blueprint for a 50-year development trajectory for Africa (Agenda 2068). Item C of that Declaration is a commitment from the Member States to the speedy implementation of the Continental Free Trade Area. At last, this is now a reality.

The AfCFTA was adopted 5 years later on 21st March 2018 and it became effective on 30th May 2019. It was expected that trading activities under this framework would commence in July 2020. The ongoing global pandemic and shutdown of national economies frustrated the plan. The Agreement is now scheduled to take effect from 1st January 2021.

Africa seems to be showing some seriousness with the AfCFTA compared to previous attempts. Concerns were initially expressed when Nigeria was reluctant to sign the Agreement (Ghana Ports and Harbours Authority, 2020; Mizner, 2019; Financial Times, 2019). Such concerns cannot be dismissed considering that Nigeria is the biggest economy in Africa and has a population of about 200 million people. Happily, the Nigerian Federal Executive Council formally approved the ratification of the Agreement on 11th November 2020(Government of Nigeria, 2020). As at today, all the African countries are members of the AfCFTA except Eritrea. We can safely say that AfCFTA has come to stay.

According to the United Nations Economic Commission for Africa, the AfCFTA will be the biggest single market, with a GDP of $2.5 trillion and a whooping population of 2.5 billion people across 55 countries (UNECA, 2020). By 2050, it is also projected that Africa's population will be 2.5 billion; contributing about 26% of the world's working-age population (UNECA, 2020). As expected, AfCFTA has been generating interesting debates. Some legal commentators have penned some thoughts on the Agreement largely from international economic/trade law perspectives (Magwape, 2018; Onyejekwe and Ekhator, 2020; Akinkugbe 2019). Only a few private international scholars have written on the framework (Theunissen, 2020; Uka, 2020).

Nigeria's ratification of AfCFTA indicates that AfCFTA will become effective in Nigeria from next year, although Nigerian law requires AfCFTA to be domesticated (Abacha v. Fawehinmi [2000] 6 NWLR (Pt 660) 228). AfCFTA is projected to have significant impacts on the Nigerian economy. Although Nigeria's trade in goods and services to other African countries stands at 19.6% (export) and 2.13% (import) as indicated in the Q4 2019 statistic (National Bureau of Statistics, 2019), it is expected that this should witness a significant growth when AfCFTA becomes effective. More intra-African trading activities would potentially lead to the increase in cross border litigation in Africa generally and Nigeria in particular. The relevant question is to what extent does Nigerian private international law support trade liberalisation agenda of AfCFTA?

The AfCFTA has a dispute settlement mechanism modelled along the WTO system. This affects only disputes between the Member States. The Agreement is conspicuously silent on cross-border disputes amongst private citizens and the divergent systems of law operating in the Member States. It thus appears that for the meantime, the divergent national private international rules which are obsolete in many Member States will continue to govern cross-border disputes. To what extent this can support the objective of intra-African trade facilitation is left to be seen.

For Nigeria, it is time we revamped the Nigerian private international law. As a prominent member of AfCFTA, Nigeria should take a special interest in the progressive development of private international law through multilateral platforms both under the AfCFTA and other global bodies such as the Hague Conference. The current lackadaisical attitude to multilateral private international rules needs to change. For instance, Nigeria has neither joined the Hague Conference nor acceded to any of its conventions. The Evidence and Service Conventions would have delivered a more efficient international civil procedure for Nigeria. Also, the 2005 Choice of Court Convention (and hopefully the 2019 Judgments Convention) would give Nigerian judgments wider circulation and respect. At the Commonwealth level, Nigeria did not pay any significant role in the making of the 2017 Commonwealth Model Law on Judgments and has no intention of domesticating it. The point we are making is that Nigeria needs to be responsive to international calls for the development of private international law, not just from AfCFTA when such is made, but also ongoing global private international law projects.

To reap the benefit of AfCFTA, the Nigerian justice system must be made to be attractive to foreign businesspersons. No doubt, foreign litigants will be more interested in doing business in countries that have in place an efficient, effective and credible legal system that enforce contracts and dispose of cases timeously. Nigeria will be competing with countries such as South Africa, Egypt, Rwanda and Ghana. In one recent empirical research carried out by Prof Yemi Osibajo, the current Vice President of Nigeria, on the length of trial time in civil cases in Lagos State, it takes an average of 3.4 years to resolve a civil and commercial

transaction in Nigeria. A further period of 2.5 and 4.5 years is required if the matter proceeded to the Court of Appeal and the Supreme Court respectively (Osinbajo, 2011). Excessive delays in dispute resolution may make Nigeria unattractive for resolving business disputes. The other side of the coin is the enforcement of contracts, especially jurisdiction agreements. Foreign litigants may be persuaded to trade with Nigeria if they are assured that foreign jurisdiction clauses will be respected by Nigerian courts. 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 (Okoli, 2020b). 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.

Jurisdiction and judgments are inextricably linked together. Nigerian litigants should now be concerned about how Nigerian judgments would fare in other African countries. Our jurisdictional laws need to be standardised to work in harmony with those of foreign countries. Recent decisions indicate that Nigerian courts still apply local venue rules – designed to determine which judicial division should hear a matter (for geographical and administrative convenience) within a State in Nigeria – to determine jurisdiction in matters involving foreign element; consider taking steps to release property as submission; may even exercise jurisdiction based on temporary presence (Okoli, 2020a; Okoli, 2020b; Bamodu, 1995; Olaniyan, 2012; Yekini, 2013). It is doubtful if judgments from these jurisdictional grounds will be respected in other African countries, the majority of whose legal systems are not rooted in common law. In the same vein, Nigerian courts will recognise and enforce judgments from other African countries notwithstanding that Nigeria has not extended its statutory enforcement scheme to most African countries (Yekini, 2017). Nigerian judgments may not receive similar treatment in other African states as our reciprocal statute can be misconstrued to mean that their judgments are not enforceable in Nigeria without a treaty. Nigerian government should either discard the reciprocity requirement or conclude a treaty with other African states to guarantee the enforcement of Nigerian judgments abroad.

Boosting investors' confidence requires some assurances from the Nigerian government for the respect of rule of law. The government's rating is not too encouraging in this regard. In its 2020 Rule of Law Index, the World Justice Project ranked Nigeria 108 out of 128 countries surveyed (World Justice Project, 2020). This should not surprise practitioners from Nigeria. For instance, the Nigerian government does have regard for ECOWAS judgments although court sits in Abuja, Nigeria's Federal Capital Territory. Such judgments are hardly recognised and enforced thereby contravening art 15(4) of the ECOWAS Revised Treaty which stipulates that judgments of the court shall be binding on Member States (Adigun, 2019).

Lastly, AfCFTA should spark the interest of Nigerian practitioners, judges, academia, policymakers and other stakeholders in private international law matters. Nigeria cannot afford to be a spectator in the scheme of things. It should leverage on its status in Africa to drive an Afrocentric and global private international law agenda. More awareness should be created for the subject in the universities. Government and the business community should fund various programmes and research on the impact of AfCFTA, and subsequent frameworks that will be rolled out to drive AfCFTA, on the Nigerian legal system, its economy and people.