

Commercial Disputes under the AfCFTA Area: The Case for Regional African Arbitral Centres

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Short Summary

This article argues for the use of arbitration before identified regional arbitration centres in Africa, for the resolution of intra-African private commercial cross-border disputes that will arise from the implementation of the AfCFTA.

Introduction

The fifty-five African Union (AU) member states agreed to set up the African Continental Free Trade Area (AfCFTA),¹ and the Agreement was ratified by the required twenty-two states for it to come into effect on 30 May 2019. The Agreement has now been signed by fifty-four African states,² and currently ratified by 36 of these states.³ Trading in goods under the Agreement started on 1 January 2021. The AfCFTA Agreement is a continental trade agreement designed to facilitate economic growth through the liberalisation of trade in goods and services, removal of tariff and non-tariff barriers, and the free movement of persons, capital, goods and services.⁴

The significance of this Agreement can be gleaned from the World Bank Group which notes in its very recent publication, *The African Continental Free Trade Area: Economic and Distributional Effects*, that the AfCFTA free trade area is the largest free trade area in the world (outside the World Trade Organisation, WTO) covering a market of 1.3 billion people, with the potential for real income gains to “increase by 7 percent by 2035 or nearly USD 450 billion (in 2014 prices and market exchange rates)”.⁵ The World Bank further notes that the,

AfCFTA would significantly boost African trade, particularly intraregional trade in manufacturing (by 60%) ... the volume of total exports would increase by almost 29 percent by 2035 relative to the baseline. Intracontinental exports would increase by over 81 percent, while exports to non-African countries would rise by 19 percent ... By 2035, total production of the continent would be almost US\$212 billion higher than the baseline.⁶

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¹ This was at the 18th Ordinary Session of the Assembly of Heads of States and Governments of the AU in January 2012.

² Eritrea has not yet signed the AfCFTA.

³ See, the AfCFTA Secretariat webpages for more details at: <https://afcfta.au.int/en> [accessed 21 July 2021]

⁴ Preamble to the Agreement Establishing the African Continental Free Trade Area signed on 21 March 2018 in Kigali by forty-four African states.

⁵ World Bank Group, “The African Continental Free Trade Area Economic and Distribution effects (The World Bank, 2020) page 3.

⁶ The World Bank, 2020, pages 3-5.

The IMF also takes a positive view of the possible gains from the execution of the AfCFTA. It notes that in 2017, intra-African trade was only 17% compared to over 50% within the European and Asian regions.⁷ This IMF *Staff Discussion Note* concludes in part that, "... various models in the literature show that the potential income and welfare gains from the AfCFTA are significant."⁸

These studies, among others, all point to growth in intra-African trade in goods and services as a direct result of the AfCFTA through the reduction in trade (tariff and non-tariff) barriers and trade facilitation.⁹ The AfCFTA is part of the African Union's 2063 Agenda, 'The Africa we Want',¹⁰ which itself arises from the Abuja Treaty¹¹ and the Lagos Plan of Action.¹² Thus, the AfCFTA does not exist in a vacuum but forms part of the actions towards the actualisation of the vision of economic prosperity and development of African states as envisioned by the OAU and the AU, and more recently restated in the Agenda 2063 of the AU.

This envisaged increase in intra-African trading activities will inevitably lead to more intra-African disputes arising from such transactions. The AfCFTA include a Dispute Settlement Protocol¹³ that closely mirrors the Dispute Settlement Understanding of the WTO.¹⁴ This Protocol focuses on the mechanism for the resolution of disputes arising under the AfCFTA and its Protocols between the member states parties to the AfCFTA. It does not provide for dispute resolution mechanisms for the private commercial disputes that will arise between the private parties that will engage in the trading activities. This paper examines this latter issue.

At the Nigerian Bar Association Section on Business Law conference in 2018 I presented a lead paper where I argued for arbitration to be promoted as the dispute resolution mechanism of choice for the resolution of disputes that will arise from private commercial transactions pursuant to the operation of the AfCFTA. I subsequently developed my thoughts on this

⁷ Lisandro Abrego, Mario de Zamaroczy, Tunc Gursoy, Salifou Issoufou, Garth P. Nicholls, Hector Perez-Saiz, and Jose-Nicolas Rosas, "The Africa Continental Free Trade Area: Potential Economic Impact and Challenges, IMF Staff Discussion Note, May 2020 at page 10 [also available online at: <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2020/05/13/The-African-Continental-Free-Trade-Area-Potential-Economic-Impact-and-Challenges-46235>] [accessed 21 July 2021].

⁸ Ibid, at page 30.

⁹ It is expected that such increase in trade will lead to economic development within the continent which will lead to greater human development.

¹⁰ The text of the AU Agenda 2063 is available at: <https://au.int/en/agenda2063/overview> [accessed 21 July 2021].

¹¹ Organization of African Unity (OAU) Treaty Establishing the African Economic Community of 3 June 1991 available at: <https://au.int/en/treaties/treaty-establishing-african-economic-community> [accessed 21 July 2021].

¹² The Lagos Plan of Action for the Economic Development of African (1980-2000) full text is available at: https://web.archive.org/web/20070106003042/http://uneca.org/itca/ariportal/docs/lagos_plan.PDF [accessed 21 July 2021].

¹³ The Protocol on Rules and Procedures on the Settlement of Disputes (from page 55) available at: https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf [accessed 21 July 2021].

¹⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO available at: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [accessed 21 July 2021].

proposal in a paper published by the *World Trade Review* in 2020.¹⁵ The three main proposals I made in this paper were for arbitration to be identified and promoted as the primary dispute resolution mechanism of choice for such disputes; for the designation and promotion of some African arbitral centres as Regional Arbitration Centres; and for the creation of a continental commercial court. I do not propose to rehash the arguments I made in this 2020 publication but to further develop my thinking on the issue of Regional Arbitration Centres.

In 2020, our Arbitration in Africa survey report focused on African arbitral institutions or centres and our findings further strengthened my belief in the need to identify some of Africa's most active arbitral centres as dedicated regional centres for the administration of arbitration references arising from AfCFTA related disputes between private entities. This paper will examine the role of African Regional Economic Communities in the economic development plan of the continent (A); a brief discussion on arbitration of private commercial disputes (B), and the argument for the regional designation of some African arbitral centres (C) to administer private commercial disputes arising from AfCFTA transactions.

A. Regional Economic Communities in Africa

The vision of African integration has always been built on the growth of the Regional Economic Communities (RECs) spread across the continent. As a bottom-up approach, African integration focuses on the integration of the regions that make up the continent which will lead to the integration of the continent. The AU recognises eight RECs which are spread across the continent. These RECs are: the Arab Maghreb Union (UMA)¹⁶; Common Market for Eastern and Southern Africa (COMESA)¹⁷; Community of Sahel-Saharan States (CEN-SAD)¹⁸; East African Community (EAC)¹⁹; Economic Community of Central African States (ECCAS)²⁰; Economic Community of West African States (ECOWAS)²¹; Intergovernmental Authority on

¹⁵ Emilia Onyema, "Reimagining the framework for resolving intra-African commercial disputes in the context of the African Continental Free Trade Area agreement" (2020) 19 *World Trade Review*, 446.

¹⁶ The UMA has five members: Algeria, Libya, Mauritania, Morocco and Tunisia, and website address: <https://maghreb-arabe.org/> [accessed 21 July 2021].

¹⁷ COMESA has 21 members: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, Zimbabwe, and website address: <https://www.comesa.int/> [accessed 21 July 2021].

¹⁸ CEN-SAD has 25 members: Benin, Burkina Faso, Central African Republic, Chad, Comoros, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Gambia, Ghana, Guinea, Guinea Bissau, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tunisia, and website address: <https://ecfr.eu/special/african-cooperation/censad/> [accessed 21 July 2021].

¹⁹ EAC has 6 members: Burundi, Kenya, Rwanda, South Sudan, Uganda, Tanzania, and website address: <https://www.eac.int/> [accessed 21 July 2021].

²⁰ ECCAS has 11 members: Angola, Burundi, Cameroon, Central African Republic, Chad, Republic of Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Rwanda, Sao Tome and Principe, and website address: <https://ceeac-eccas.org/en/#presentation> [accessed 21 July 2021].

²¹ ECOWAS has 15 members: Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo, and website address: <https://www.ecowas.int/> [accessed 21 July 2021].

Development (IGAD)²²; Southern African Development Community (SADC)²³. Every one of the 54 African states fall within one of these RECs while some fall within two or more RECs.²⁴

With each African state falling within the space of at least one REC, businesses located in each state will have access to the arbitration centres located in the REC either closest to them or to which their states belong. The idea is to treat the RECs as geographical spaces in which at least one arbitral centre may be located or identified and promoted for the administration of the arbitration of AfCFTA-related commercial disputes.

B. Arbitration of Private AfCFTA Disputes

In my 2020 *World Trade Review* publication, I examined different types of processes for the resolution of commercial disputes and concluded that for cross border disputes within the continent, arbitration remains the preferred and most appropriate mechanism.²⁵ I acknowledge that in most African countries litigation before national courts is a less expensive process than international arbitration. I also note that arbitration may take a shorter time to conclude as compared to a first instance litigation proceeding before national courts. However, such gains may be wiped out through appeal processes at the enforcement of the award stage which happens before national courts.

From our 2020 Arbitration in Africa survey findings, users of African arbitration are concerned about the cost of arbitration.²⁶ It is important that arbitral centres in Africa remain mindful of this finding. I recognise that excellent arbitrators and arbitral centres may indeed cost more.²⁷ This implies that we need to carefully define ‘excellence’ and understand how arbitrator and centre fees are calculated. In analysing these issues, we need to examine the question of whether arbitrators sitting in African centres should be paid less than their foreign counterparts and whether this is the correct comparison.

The excellent arbitrator is one who not only meets the basic requirements of the applicable arbitration laws and rules,²⁸ but also understands the issues in dispute between the parties, works efficiently and diligently and determines the dispute between the parties in accordance with the arbitration agreement. This definition is very widely drawn to capture the essentials of any arbitration. The descriptors used in this definition attach to the particular individual

²² IGAD has eight members: Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan, Uganda, and website address: <https://igad.int/> [accessed 21 July 2021].

²³ SADC has 16 members: Angola, Botswana, Comoros, Democratic Republic, Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, Zimbabwe, and website address: <https://www.sadc.int/> [accessed 21 July 2021].

²⁴ Examples include: Egypt, Kenya, Morocco, Nigeria, Rwanda, and Tunisia.

²⁵ Emilia Onyema (n 14) at pages 450-456.

²⁶ Emilia Onyema, “2020 Arbitration in Africa Survey Report: Top African Arbitral Centres and Seats” (2020) at page 21, available at: <https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf> [accessed 21 July 2021].

²⁷ Under various arbitral rules, the cost of the arbitration will include the fees of the arbitral centre, the fees and reimbursable expenses of the arbitrators, expert witnesses or tribunal secretary. See for example, article 40 of the UNCITRAL Arbitration Rules (which also includes legal costs of the parties).

²⁸ These are neutrality, impartiality, independence, personal execution of her mandate, relevant qualifications or expertise, availability, etc.

appointed as arbitrator, whether African or not, as a reminder of the personal nature of the arbitrator's mandate.

We recognise that several Africans (similar to their non-African colleagues) that sit as arbitrators meet these criteria. These individuals sit as arbitrators in arbitration references within and outside the continent, and some in Africa-related disputes and disputes that have no connection to Africa. Should such individuals (whether African or not) be paid less for providing the same quality of service when they sit under the rules of African centres? Ideally and as an issue of principle, arbitrators should earn comparable fees for comparative service regardless of where they render their service. However, in practice, this is not the case. Arbitrators sitting under the rules of African arbitral centres generally earn less than they would have earned if they were sitting under the rules of an arbitral centre outside the continent for comparable tasks. Should this outcome be acceptable? In my view, it should not, yet we know that across the board, African arbitral centres pay arbitrators sitting under their rules less. Why is this so? One of obvious reason for this situation is the need for African arbitral centres to make themselves attractive to their users as one outcome of the still very recent advent of institutional arbitration on the continent.

Arbitration as a dispute resolution process is not new to the continent. However, institutional arbitration, as part of the package of modern form of arbitration, is relatively new to the continent. In support of this assertion, Mohamed Abdel Raouf and Dalia Hussein have noted that,

Prior to the establishment of new regional arbitral institutions in Africa, the users (of arbitration) from the continent had very few available arbitral fora to which disputes arising out of their business transactions could be referred.²⁹

The conclusion therefore is that as a concept, all arbitrators should earn comparable fees regardless of the arbitral institution at which they sit. However, with the nascent nature of institutional arbitration in Africa, it will not be practicable for arbitrators sitting under the Rules of arbitral centres in Africa to be paid fees comparable to those of their foreign counterparts.

Having said this, I note that the low fees apply equally to all arbitrators whether African or foreign, sitting under these rules. The international arbitration community will remember the furore caused by the setting aside of the award in *Getma International v Guinea* by the OHADA Common Court of Justice and Arbitration because the arbitrators, contrary to the then arbitration rules of the CCJA, renegotiated their fees with the parties.³⁰ This issue of low fees does not apply under ad hoc references where the arbitrators and the parties agree the rate of fees to be paid to the arbitrators. Anecdotal evidence supports the view that

²⁹ Mohamed Abdel Raouf and Dalia Hussein, "The Cairo Regional Arbitration Centre" in Emilia Onyema (ed) *The Transformation of Arbitration in Africa: the Role of Arbitral Institutions*, Kluwer Law International, 2016, page 61

³⁰ There were several blog posts on the decision. See for example, Catherine a. Rogers, "When Arbitrators and Institutions Clash, Or the Strange Case of Getma v Guinea" (Kluwer Arbitration blog post of 12 May 2016) available at: <http://arbitrationblog.kluwerarbitration.com/2016/05/12/when-arbitrators-and-institutions-clash-or-the-strange-case-of-getma-v-guinea/> [accessed 21 July 2021].

arbitrators sitting under ad hoc references in African countries earn considerably much more than those sitting under institutional references.

C. African Arbitration Centres

The two top African arbitral centres according to our 2020 Arbitration in Africa survey report are the Arbitration Foundation of Southern Africa (AFSA) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA).³¹ CRCICA is the oldest AALCO³² arbitral centre in Africa and was established in 1979.³³ The Arbitration Foundation of Southern Africa was established in 1996 though it only administered domestic cases until 2017 when its international section was established.³⁴ As it relates to Francophone Africa, its busiest arbitration centre is the Ouagadougou Arbitration, Mediation and Conciliation Centre which was founded in 2005.³⁵ If we compare these centres with the ICC³⁶ and LCIA³⁷ for example both of which have celebrated their centenaries, the claim that institutional arbitration is still relatively new to the continent becomes clearer.

Longevity of arbitral centres is a prized possession in arbitration. Feedback from respondents in the 2018 Queen Mary International Arbitration survey show that users are very much persuaded to choose an arbitration institution for its 'general reputation and recognition, high level of administration and previous experience'.³⁸ Reputation and experience comes with longevity of the centre. Users also want to be assured that the centre will be around for some time and will remain in business when their dispute eventuates. This need for some strong degree of assurance by users is important since they may run the risk of their arbitration agreement becoming incapable of being performed if their chosen arbitration centre ceases to exist by the time a covered dispute arises between them.³⁹ At the very least the parties may find themselves unable to agree to a different arbitration centre or ad hoc proceedings, leaving them at the mercy of national courts who may take unpredictable views of their predicament. If we remember that the primary purpose of the parties including an arbitration agreement in their contract is for them not to start with national courts when a dispute arises, such assurances becomes even more reasonable.

Having shown that African arbitral centres are relative newcomers in the arbitral market and African users are already conversant with referring their disputes to foreign seated arbitral centres, the need for African centres to make themselves a little more attractive to users

³¹ See (n 25) at page 12.

³² The Asian-African Legal Consultative Organisation, see: <https://www.aalco.int/about> [accessed 21 July 2021].

³³ See <https://cricica.org/History.aspx> [accessed 21 July 2021].

³⁴ See <https://arbitration.co.za/a-brief-history/> [accessed 21 July 2021].

³⁵ The busiest francophone centre by number of cases (n 25) at page 12. For history of the centre see: <https://www.intracen.org/Ouagadougou-Arbitration-Mediation-and-Conciliation-Centre-of-the-Chamber-of-Commerce-and-Industry/> [accessed 21 July 2021].

³⁶ For the International Arbitration Court of the International Chamber of Commerce (ICC) since 1923, see <https://iccwbo.org/dispute-resolution-services/> [accessed 21 July 2021].

³⁷ The London Court of International Arbitration (LCIA) since 1883, see <https://www.lcia.org/LCIA/history.aspx> [accessed 21 July 2021].

³⁸ Queen Mary/White & Case 2018 International Arbitration Survey: The Evolution of International Arbitration, page 14 and available at: <http://www.arbitration.qmul.ac.uk/research/2018/> [accessed 21 July 2021].

³⁹ For example, in accordance with art. II (3) of the New York Convention.

becomes more obvious. This, they appear to do through among others, charging lower fees for comparable services. For example, the minimum filing fees for arbitration under CRCICA arbitration is USD500⁴⁰ while the minimum fee for filing a case with the ICC is USD5,000.⁴¹

The culture of institutional arbitration is gradually consolidating in some African countries with the caseload of African arbitral centres increasing year-on-year. Therefore, as found by the Queen Mary Survey mentioned above, African centres need to show high levels of administration and experience which will lead to reputation. The major African arbitral centres are acquiring experience on administering arbitration references including complex cases. This will over time, lead to the reputation necessary for users to gain confidence in choosing these centres.

The 2020 Arbitration in Africa survey report identifies the major or top African arbitral centres as: Arbitration Foundation of Southern Africa (AFSA); Cairo Regional Centre for International Commercial Arbitration (CRCICA); Ouagadougou Arbitration, Mediation and Conciliation Centre (OAMCC); OHADA Common Court of Justice and Arbitration Centre (CCJAC); Kigali International Arbitration Centre (KIAC). To these five we can add the following arbitral centres that are also active in the administration of arbitration disputes and can evidence such experience and expertise: Regional Centre for International Commercial Arbitration Lagos (RCICAL),⁴² Lagos Court of Arbitration (LCA); Nairobi Centre for International Arbitration (NCIA); and Tanzania Institute of Arbitrators (TIA).⁴³

Referring back to our idea of Regional Arbitration Centres mapped against the spaces occupied by the RECs, we find the following:

REC	UMA	COMESA	CEN-SAD	EAC	ECCAS	ECOWAS	IGAD	SADC
Arbitral Centres	CRCICA OAMCC	CRCICA KIAC NCIA	OAMCC CCJAC RCICAL	KIAC NCIA TIA	CCJAC KIAC	LCA RCICAL CCJAC OAMCC	NCIA KIAC TIA	AFSA TIA

This map shows that there are at least two identifiable and active arbitral centres that can service the space for each REC. Some RECs will have access to several more arbitration centres than others. This may be a positive outcome if several more disputes arise from those regions.

The next issue to explore is the need to promote these centres to commercial entities on the continent who will participate in the AfCFTA trading bloc. Promotion of these centres to users starts with the promotion of arbitration as an effective dispute resolution mechanism to businesses operating in the AfCFTA area. These businesses need to conclude arbitration agreements in which they appoint one of these centres to administer the arbitration of their dispute when such a covered dispute arises.

⁴⁰ See the CRCICA Cost calculator at: <https://cricica.org/FeesCalc.aspx> [accessed 21 July 2021].

⁴¹ ICC Costs and Payments at: <https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/> [accessed 21 July 2021].

⁴² The Regional Centre for International Commercial Arbitration, Lagos (RCICAL) is the second AALCO arbitral centre in Africa located in Lagos, Nigeria. See: <https://rcical.org/> [accessed 21 July 2021].

⁴³ We note that ICAMA administers ad hoc arbitration cases only. See (n 25) page 12.

Should the centres themselves promote arbitration to the users or should the AfCFTA Secretariat⁴⁴ and the AU support the centres or even independently promote arbitration and the centres to users? For purposes of independence and the promotion of healthy competition, the preferred view is for the AU and the Secretariat of the AfCFTA to promote the inclusion of arbitration agreements and to promote the identified arbitral centres within the RECs to parties and national chambers of commerce as they promote the AfCFTA and its protocols.⁴⁵ A clear endorsement of these arbitral centres by the AU/AfCFTA is not just a vote of confidence but sends a clear signal of support to users who can rely on such endorsement to choose any of the arbitral centres to administer their dispute.

One major reason for this suggestion is to stem the tide of dispute flight from the continent and to also promote intra-African arbitral centres. There is no reason disputants from Ghana and Kenya (for example) cannot agree to arbitrate their dispute before the CRCICA, AFSA or KIAC. This intra-African collaboration is still missing. African parties continue to arbitrate their disputes before non-African arbitral centres which is no longer justifiable with the number of active and experienced arbitral centres we currently have on the continent. It was in 1977 that AALCO noted the need for the “establishment of a network of Regional Centres for Arbitration functioning ... so that the flow of arbitration cases to arbitral institutions outside the ... region could be minimized”. This was the primary reason it set up the regional centres of which three are located in Africa (Cairo, Lagos and Nairobi).⁴⁶ This reason continues to subsist almost 43 years later. The time to make this vision a reality has now come.

Conclusion

The commencement of trading under the AfCFTA and the political will demonstrated by the Heads of state and governments of the AU in pushing through the AfCFTA, and the assistance of the partners of the AU is promising. The same enthusiasm needs to be deployed to ensure that private commercial or business disputes arising between parties to the transactions in the trading bloc are referred to African arbitral centres for arbitration.

As the AU and AfCFTA Secretariat support this suggestion, they then need to continue to remind their member states of the need to modernise their arbitration laws and for the national courts to embrace and support the outcomes of such arbitrations to ensure finality and continued confidence of the users. In this regard, the AfCFTA Secretariat and the AU can engage with the African Arbitration Association⁴⁷ who can support them in devising appropriate support packages and mechanisms for the African users, legislatures and courts.

⁴⁴ The AfCFTA Secretariat website address: <https://afcfta.au.int/en> [accessed 21 July 2021].

⁴⁵ We note that most of the Chambers of Commerce in Africa have an arbitration centre attached to them which they may prefer to promote and support.

⁴⁶ See for more details: <https://www.aalco.int/arbitration> [accessed 21 July 2021].

⁴⁷ The African Arbitration Association is an umbrella organisation of arbitration practitioners and provides in Africa. See: <https://afaa.ngo/> [accessed 21 July 2021].