AfCFTA And International Arbitration: A New Era For Dispute Resolution In Africa?

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I INTRODUCTION

The African Continental Free Trade Area Agreement ('**AfCFTA**')[4] represents a transformative step in Africa's economic and legal landscape. Designed to create a single market for goods and services, facilitate free movement of people, and boost intra-African trade, the AfCFTA aims to position Africa as a unified economic powerhouse.[5] However, as trade and investment flows increase on the continent, so does the number of disputes. The AfCFTA's Protocol on the Rules and Procedures on the Settlement of Disputes ('**AfCFTA Protocol**')[6] introduces a new framework that aims to localise dispute resolution and reduce Africa's reliance on foreign arbitration venues and institutions.

A critical question arises: Can AfCFTA dispute resolution establish Africa as a self-sufficient arbitration while ensuring investor confidence, especially in key sectors such as the extractive industry? With substantial foreign investments in Africa, including Australian

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4 *African Continental Free Trade Agreement*, date of adoption 21 March 2018 (entered into force 30 May 2019) ('AfCFTA') <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>; Daniel Ngumy and Shemane Amin, 'Harnessing the AfCFTA to Drive Regional Trade and Investment in East Africa' (Paper, 2025, ALN Tanzania) <https://aln.africa/wp-content/uploads/2025/02/Harnessing-the-AfCFTA-to-Drive-Regional-Trade-and-Investment-in-East-Africa-Investing-in-Tanzania-Business-Legal-Landscape-ALN-Tanzania.21.02.2025.pdf>.

5 Emilia Onyema, 'Commercial Disputes under the AfCFTA Area: The Case for Regional African Arbitral Centres' (online, International Bar Association, 14th November 2021) <https://www.ibanet.org/commercial-disputes-under-afcfta-area>.

6 Part IV of the AfCFTA is titled "Dispute Settlement" and establishes a Dispute Settlement Mechanism (DSM). Article 20 of the AfCFTA provides for creation of the AfCFTA Protocol on the Rules and Procedures on the Settlement of Disputes, 2019. Pursuant to Article 20 and Article 3(1) of the AfCFTA Protocol, the DSM applies only to the settlement of disputes arising between State Parties. Available at: https://shorturl.at/nJUXs

mining companies, understanding AfCFTA's dispute resolution framework is essential.[7] Article 3 of the AfCFTA Protocol states that the framework applies to disputes between State parties. However, its broader impact on international arbitration in Africa warrants examination, including the opportunities it presents and the challenges it must overcome to succeed. This article explores this framework, its implications for international arbitration, and the hurdles it must overcome to succeed.

II The AfCFTA Dispute Resolution Framework: A Shift Toward Regional Arbitration?

One of AfCFTA's most notable contributions is its establishment of a structured dispute resolution mechanism mirroring the World Trade Organization ('**WTO**') dispute settlement system, including consultations, panel proceedings, and appellate review.[8] While arbitration under the AfCFTA Protocol requires mutual consent from the parties (Article 27), its effectiveness will depend on how stakeholders engage with and implement the framework in practice.

This new framework emerges against a backdrop of historical dependence on foreign institutions. International arbitration in Africa has traditionally been dominated by foreign institutions such as the International Chamber of Commerce ('**ICC**'), the London Court of International Arbitration ('**LCIA**'), and the International Centre for Settlement of Investment Disputes ('**ICSID**').[9] A significant portion of ICSID cases involve African states or investors under bilateral investment treaties ('**BITs**'), reinforcing reliance on external dispute resolution mechanisms.[10]

The AfCFTA aims to shift this dynamic by promoting African arbitral institutions, such as the Cairo Regional Centre for International Commercial Arbitration ('**CRCICA**'), the Lagos Court of Arbitration ('**LCA**'), the Kigali International Arbitration Centre ('**KIAC**'), the Nairobi International Arbitration Centre ('**NIAC**'), the Tanzania Institute of Arbitrators ('**TIArb**') and the Arbitration Foundation of Southern Africa ('**AFSA**'), among others. These institutions are actively working to position Africa as a competitive arbitration hub.[11]

A key aspect of the AfCFTA Protocol's implementation is the development of a robust African arbitration ecosystem, fostering the use of African arbitral institutions and arbitrators. By localising dispute resolution, the AfCFTA has the potential to elevate African arbitration institutions to a more prominent role in global dispute resolution, ensuring that disputes involving African states and businesses are resolved within Africa.[12] It presents a significant opportunity to strengthen regional arbitration by increasing demand, enhancing credibility, and reducing the costs associated with resolving disputes in foreign jurisdictions.[13] However, while the African arbitration institutions are growing in stature, achieving broader global acceptance remains a challenge.

III The Impact On Foreign Investors and Investor-State Arbitration

Investor-State Dispute Settlement ('**ISDS**') has long been a contentious issue in Africa, particularly in the extractive sector. Many African states argue that traditional ISDS mechanisms disproportionately favour foreign investors and undermine state sovereignty.[14] This concern is especially pronounced in the mining sector,

7 Uche Ewelukwa Ofodile, 'Dispute Settlement Under the African Continental Free Trade Agreement: What Do Investors Need to Know?' (Blog Post, Kluwer Arbitration Blog, 29 September 2019) <https://shorturl.at/vo8Qh>

8 Onyema (n 3).

9 Talkmore Chidede, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (Tralac Blog, 11th December 2018) <https://rb.gy/uyb1b5>.

10 South Africa ratified the AfCFTA on 31 January 2019 and is the only country in Africa that has formally rejected international investment arbitration.

11 Gregory Travaini, 'Arbitration Centres in Africa: Too Many Cooks?' (Blog Post, Kluwer Arbitration Blog, 1 October 2019) <https://shorturl.at/2AsKy>; Poupak Anjomshoaa, 'LIDW 2024: The Rise of African Arbitration – Is Africa Leading the Way?' (Blog Post, Kluwer Arbitration Blog, 16 May 2024) <https://shorturl.at/k4SUx>.

12 UNCTAD Policy Brief No. 105, African Continental Free Trade Area: Design of Dispute Settlement Mechanism Should Reflect Preferences and Realities of All Its Member States (UNCTAD/PRESS/PB/2022/13, 9th December 2022) <https://shorturl.at/e1Lee>.

13 John Ngisi, 'International Arbitration in Africa: Lessons for The Lusaka International Arbitration Center' (online, DLA Piper, 7 February 2024) <https://shorturl.at/54rFK>.

14 See Tafadzwa Pasipanodya and Javier García Olmedo, '21st Century Investment Protection: Africa's Innovations in Investment Law Reform' (online, International Bar Association, 24 November 2021) <https://www.ibanet.org/africas-innovations-in-investment-law-reform>.

one of the most arbitration-intensive industries in Africa. Governments have frequently challenged arbitration awards rendered by ICSID and other foreign institutions. They assert that these decisions often encroach on national sovereignty and economic policy.[15]

The AfCFTA Protocol on Investment[16] moves away from conventional ISDS by prioritising mediation as the primary dispute resolution mechanism and requiring that investor-state arbitration be administered under any arbitration rules adopted by African institutions or Dispute Resolution Centres, in line with Article 27 of the AfCFTA Protocol.[17] This shift reflects broader global trends, such as the European Union's consideration of a permanent investment court system, signaling a move toward more regionally controlled and structured dispute resolution frameworks.[18]

However, these reforms come with challenges. Requiring investors to exhaust domestic remedies before initiating arbitration may lead to delays and legal uncertainty. Judicial interference remains a concern, as some African courts have a history of intervening in arbitration proceedings. Additionally, questions persist about the institutional capacity of African arbitral institutions to effectively handle complex, high-value disputes. For investors – particularly from regions like Australia, where mining companies have a significant presence in Africa – these changes may raise concerns about enforceability, neutrality, and predictability, potentially impacting Africa's attractiveness as an investment destination.

IV Comparing AfCFTA Arbitration With Other Regional Mechanisms

While AfCFTA arbitration aims to create a structured dispute resolution framework, it does not exist in isolation. Other regional initiatives, such as OHADA arbitration[19] and COMESA's dispute resolution framework,[20] provide alternative paths for dispute resolution within Africa. OHADA has a well-established arbitration court, the Common Court of Justice and Arbitration ('**CCJA**'), which already administers investment and commercial disputes in francophone Africa. The CCJA operates under a unified set of arbitration rules and has developed significant jurisprudence since its establishment. Its decisions are directly enforceable across all 17 OHADA member states without requiring separate enforcement proceedings, providing a level of certainty that the nascent AfCFTA mechanism currently lacks.

COMESA, on the other hand, integrates arbitration into its trade framework but lacks a centralised arbitration institution. The COMESA Court of Justice primarily addresses trade disputes between member states and has limited experience with investor-state disputes. The COMESA Investment Agreement provides for ISDS through various arbitration rules (ICSID, UNCITRAL, or regional arbitration centres), offering more flexibility but potentially less consistency than the OHADA system. The potential for overlap or conflict between these systems raises important jurisdictional questions. For disputes involving parties from countries that belong to multiple

15 For instance, member states of the South African Development Community recently amended the Annex 1 to the Protocol Finance and Investment to, inter alia, remove ISDS by international arbitration, and rather require the use of domestic courts and tribunals. South Africa has also reportedly enacted a legislation, *Protection of Investment Act 22 2015* (South Africa) which limits ISDS to mediation or arbitration via domestic courts, tribunals or statutory bodies.

16 Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment 2023, adopted 19 February 2023; Chidede (n 6); Robert Wheal, Elizabeth Oger-Gross, Tolu Obamuroh and Opeyemi Longe, 'Institutional Arbitration in Africa: Opportunities and Challenges – Africa's Arbitration Options and Caseloads Continue to Rise' (online, White & Case LLP, 17 September 2020) <https://shorturl.at/VUbTh>.

17 Alexander Gernest & Letizia Busso, 'The AfCFTA's Investment Protocol: The Bell Tolls for First-generation Intra-African BITs and Their More Conventional Investor Protections' (online, Steptoe, 1 July 2024) <https://shorturl.at/z84Rg>.

18 Article 49(1) of the Protocol is reminiscent of the European Union (the 'EU') Member States' adoption of the Agreement for the Termination of all Intra-EU Bilateral Investment Treaties, Document 22020A0529(01), entered into force 29 August 2020.

19 OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires; https://www.ohada.com/) is the Organisation for the Harmonisation of Business Law in Africa. It was established by the Treaty of Port Louis (Mauritius) in 1993 and became effective in 1995.

20 COMESA (Common Market for Eastern and Southern Africa; https://www.comesa.int/) is a regional economic community established in 1994 as a successor to the Preferential Trade Area for Eastern and Southern Africa (PTA). It is one of Africa's largest regional economic organisations.

regional frameworks (for example, a dispute between a Rwandan investor and the Democratic Republic of Congo, both members of AfCFTA and COMESA), which dispute resolution mechanism would take precedence? The AfCFTA framework does not explicitly address these jurisdictional overlaps, potentially creating legal uncertainty for investors and states alike.

Understanding how AfCFTA arbitration interacts with or competes against these existing mechanisms will be critical to its effectiveness and long-term success. Harmonisation efforts between these regional systems, or clear jurisdictional rules, may be necessary to avoid fragmenting Africa's dispute resolution landscape.

V Challenges in Implementing the AfCFTA Arbitration Framework

Despite its potential, the AfCFTA arbitration framework faces key obstacles.

Judicial Intervention and Enforceability: For the AfCFTA framework to gain credibility, African judiciaries must adopt a pro-arbitration stance, recognising the finality and binding nature of arbitral decisions. A notable example is the recent case of *Technoservice Limited v. Nokia Corporation & Another*[21] in Kenya, where the Court of Appeal of Kenya upheld an ICC arbitration agreement, rejecting claims that the ICC arbitration was biased, costly, and slow. Such judicial support is crucial for AfCFTA arbitration's success.

Despite this progress, concerns persist about court interference and uneven enforcement of awards across Africa. While the New York Convention provides a legal foundation for recognising foreign arbitral awards, its application remains uneven in practice. The *Technoservice Limited* decision reinforces the enforceability of arbitration agreements in Kenya, but for broader success, stakeholders need to implement judicial training, capacity building, and clearer legislative guidelines on arbitration enforcement. These steps are essential to fostering a consistent, arbitration-friendly legal environment across AfCFTA member states.

Institutional Capacity and Funding: For African arbitration centres to become viable alternatives to well-established foreign institutions, they require greater financial support, technical expertise, and standardised rules to enhance efficiency, predictability, and legitimacy. Strengthening infrastructure and attracting top-tier talent are essential to ensuring these institutions can handle complex, high-value disputes.[22] A major challenge remains the funding and administrative capacity of African arbitral institutions. Without sufficient financial backing and recognition from both states and the private sector, these institutions may struggle to compete with global arbitration centres. To ensure the success of the AfCFTA arbitration framework, regional arbitration centres must receive sustained investment and institutional support. Without this support, parties may continue to favour foreign arbitral institutions over African alternatives.[23]

Balancing Investor Protection with State Sovereignty: AfCFTA arbitration must strike a balance between ensuring investor confidence and respecting African states' regulatory autonomy. If investors perceive the framework as unpredictable, they may seek alternative dispute resolution mechanisms. This could potentially undermine AfCFTA's objectives.

VI Conclusion: Strengthening AfCFTA Arbitration for the Future

The AfCFTA presents a historic opportunity to reshape Africa's arbitration landscape. By fostering regional arbitral institutions, reducing reliance on foreign dispute resolution mechanisms, and harmonising arbitration laws, it has the potential to position Africa as a major arbitration hub. However, significant challenges remain. Ensuring judicial support for arbitration, minimising state interference, and enhancing African arbitration institutions to handle complex disputes will be essential. Additionally, addressing investor concerns regarding transparency, enforceability, and neutrality is critical for long-term success.

To maximise its effectiveness, AfCFTA arbitration should consider several strategic improvements. Judicial

21 *Technoservice Limited v. Nokia Corporation & another*, Court of Appeal of Kenya at Nairobi [2024] KECA 1429. See *Technoservice Limited v. Nokia Corporation*, ICC Case No. 23513/FS, <https://rb.gy/qprkrs>.

22 Francis Ojok, 'The Efficiency of the AfCFTA Dispute Resolution Mechanism: An In-Depth Analysis' (Blog Post, Kluwer Arbitration Blog, 11th 2023) <https://shorturl.at/cY7X8>.

23 Onyema (n 2).

training programs should be implemented to promote an arbitration-friendly approach among African courts. Harmonisation of arbitration enforcement standards across AfCFTA member states will reduce uncertainty for investors. African arbitral institutions should engage in cross-border collaborations and capacity-building initiatives to enhance their credibility and expertise. Efforts should also be made to promote African arbitrators and practitioners on the international stage, strengthening the continent's arbitration ecosystem. For AfCFTA arbitration to thrive, African states must fully commit to its implementation, recognising arbitration as a key pillar of economic integration. If these hurdles are addressed, AfCFTA arbitration has the potential to attract greater investment, reinforce the rule of law, and position Africa as a leader in international dispute resolution.