

Kluwer Arbitration Blog

Africa Arbitration Academy: Survey on Costs and Disputes Funding in Africa

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The increasing cost of resolving disputes has become very concerning. While this phenomenon is not altogether new, the rising trend in recent times has given rise to a situation in which impecunious claimholders may be deprived of access to justice. Indeed, even companies with deep pockets now seek innovative ways of managing the costs of their dispute portfolios, and given the current economic realities in different countries, budgets for legal departments of small companies in general, are shrinking, and large corporations, with ostensible financial strengths, may lose the gusto to spend, in preparation for the financial aftershock of the pandemic. So, what does this mean for the disputes market in Africa and how do impecunious or solvent parties manage the financial impact of increasingly expensive litigation and arbitration claims?

In April 2022, the [Africa Arbitration Academy \(AAA\)](#) published the [Report of its Survey on Costs and Disputes Funding in Africa](#) (the **Survey**). Launched in July 2021, the project was supported by the African Legal Support Facility (**ALSF**) and is the first Africa-wide survey focusing on costs of resolving disputes, the financing of claims, the impact of the COVID-19 pandemic on litigation and arbitration costs and measures to drive cost- efficiency in African disputes. Based on responses from 25 African jurisdictions, the Survey provides useful insights from sole practitioners, associates, partners of law firms, in-house counsel, academics, third-party funders, representatives of arbitral institutions and other users of litigation and arbitration in Africa.

This blog post provides a summary of the key findings of the Survey and gives a comprehensive overview of the dispute funding landscape in Africa. The Survey also assesses the state of regulation of third-party funding (**TPF**) on the continent.

Purpose of the Survey

Research shows that very few empirical studies have documented the costs of dispute resolution especially in Africa. Some of the reasons for this are obvious – companies are hesitant to provide data to researchers because of concerns about confidentiality, coupled with the difficulty of retrieving data for the time periods sought. In the absence of empirical data, the significant issues relating to litigation and arbitration costs have, thus, been addressed primarily through anecdotes – which are easily dismissible.

The objective of the Survey is therefore two-fold. First, to shed light on how businesses and stakeholders may approach costs of disputes in Africa – something which until now, was rarely explored. Also unexplored is empirical data on TPF in Africa. The survey demonstrates that practitioners in Africa are familiar with TPF and other types of external funding mechanisms in litigation and arbitration. Most respondents have a positive perception of TPF, so there is a great potential for the development of the TPF market in Africa.

Key Findings of the Survey

Cost of Resolving Disputes in Africa

Some of the significant concerns of foreign investors seeking to do business in Africa and international lawyers advising clients on disputes in the continent, is the costs of dispute resolution and the efficiency of the process. Empirical research in this area is nearly non-existent, which bolsters the importance of the Survey.

Majority of the Respondents agreed that the choice of dispute resolution method will impact the cost of disputes, and more than half of the Respondents stated that litigation and arbitration costs are almost at par and that in some instances, arbitration costs may be slightly higher than litigation. When asked about the factors that drive up litigation costs in their jurisdictions, the two most selected factors were “counsel fees” and “duration”, while “nature or value of the dispute” and “counsel fees” were chosen as the factors that drive up arbitration costs. Over 62% of the total Respondents opined that, with respect to arbitration disputes, construction matters are the most expensive, and disputes relating to corporate/commercial matters are the second most expensive.

Furthermore, about 60% of the Respondents stated that delay in court proceedings has an impact on litigation costs in their jurisdictions while approximately 38% of the total Respondents stated that the lack of subject-matter expertise of judges impacts litigation costs. 57% of the Respondents noted that mediation is a more cost-effective dispute resolution option than arbitration and litigation.

Dispute Resolution Funding Options

The Survey shows that dispute resolution funding is a trending phenomenon in Africa. Its availability and legality vary, depending on the jurisdiction and enabling laws in that jurisdiction. Given the cut in the budget size of state funded legal aid in different jurisdictions, other funding options are, discernibly, available to fill the gap that arises from impecuniosity or cash- flow constraints – (a) legal expense insurance, (b) TPF, (c) loans, and (d) attorney financing (contingency and conditional fee arrangements).

71% of Respondents confirmed that state funded legal aid is available in their jurisdictions, but it is limited to certain cases. When asked what other funding options are available for litigation and arbitration in their jurisdictions, the two most selected options are “contingency fee arrangement” (25%) and “third-party funding” (21%). Relatedly, 31% of Respondents chose “third-party funding” as the option to explore where they lack financial capacity to pursue a claim, while 24% of Respondents chose “contingency fee arrangement”.

A total of 51% Respondents noted that TPF is not legally regulated and not commonly used in their jurisdictions, while 21% of Respondents are not aware of TPF. Out of the funding options available in the various jurisdictions, legal aid, contingency fee arrangement and TPF were noted as the most popular options.

Driving Efficiency in African Disputes

Results of the survey show that online dispute resolution and the use of technology (artificial intelligence) is the future in Africa. Indeed, this is not surprising and the experience with the pandemic bolsters these results. Given that efficiency will be driven by technology; the time has come for governments and institutions in Africa to invest in critical technology and related infrastructure to ensure a more efficient dispute resolution system. Respondents believed South Africa, Egypt, Kenya and Nigeria have arbitrators with expertise that meets global standards. Respondents' choice of Nigeria and Kenya was driven by the fact that there is an availability of experienced arbitrators from those countries.

South Africa, Nigeria, Kenya, Rwanda and Egypt were ranked by the Respondents as the most cost-efficient African jurisdictions for international arbitration, while Kigali, Cairo and Nairobi were identified as the most accessible cities owing to good transport connectivity. Respondents expressed their faith in these three cities as good seats and venues with a track record in handling arbitrations and availability of support services. Availability of a variety of good quality affordable hotels for accommodation during arbitral proceedings was also raised as a factor in determining cost efficiency.

Additionally, Respondents favoured South Africa as a jurisdiction with the state-of-the-art facilities. Kenya emerged top for availability of technology and as the hub for East Africa. Respondents suggested that technology coupled with appropriate legal structures would mean less time to conclude an arbitration, hence reducing costs. Respondents pointed to Egypt, South Africa, and Nigeria as having good internet connectivity and facilities. Majority of the Respondents indicated that (a) there should be more jurisdictional recognition of TPF in dispute resolution processes, (b) a unified system of institutional arbitration in Africa should be established, and (c) the use of African institutions for arbitral proceedings makes the processes more cost-efficient.

Conclusion

The Survey provides comprehensive data on costs and disputes funding in Africa. At its core, it shows the huge appetite and market opportunity for TPF and the potential it has in improving access to justice. The Survey also highlights the key drivers for growth in Africa's disputes market and the factors that enable its efficiency. It provides a basis to make a compelling case for increased recognition of TPF in more jurisdictions in Africa – Nigeria is one of the African countries that is seeking to introduce permissive statutory framework for TPF through a new arbitration bill (now awaiting the assent of the President). See previous post on the Bill [here](#).

It is our hope that the survey will contribute to the design and development of an efficient dispute resolution system in Africa. It is also expected that arbitral institutions and governments in Africa will find the survey useful when establishing or revising their rules in relation to costs and disputes

funding.

The full version of the Survey is available in four different languages (English, French, Portuguese and Arabic) [here](#).


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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

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