

Kluwer Arbitration Blog

2022 SOAS and AAA Surveys on Arbitration in Africa

Umran Chowdhury (Dr. Kamal Hossain and Associates) · Thursday, January 19th, 2023

The results of two surveys on arbitration in Africa-related disputes were released in 2022. Both surveys drew responses from the continent's diverse regions and legal systems. Respondents were given the choice to answer questions in either English, French, Arabic, or Portuguese. In April 2022, the African Arbitration Academy released its [Survey on Costs and Disputes Funding in Africa](#) ("AAA Survey"). The AAA Survey has been published in four languages and the Blog has previously featured a [post](#) by Abayomi Okubote and Adetola Adebessin identifying some key findings. In October 2022, the School of Oriental and African Studies of the University of London published its biennial [SOAS Arbitration in Africa Survey](#) ("SOAS Survey"). The SOAS Survey is also published in four languages.

Both surveys examine the impact of the global pandemic on arbitration in Africa. The AAA Survey focused on costs, funding, and efficiency in arbitration from an empirical standpoint. The biennial SOAS Survey released its 2022 findings with a focus on African perspectives on major global developments, such as climate change, infrastructure, the global pandemic, and the [African Continental Free Trade Area \(AfCFTA\)](#). The following discusses the diversity of respondents, the comparative advantage of arbitration in terms of cost, the factors influencing the drafting of arbitration agreements, issues of efficiency during the pandemic, construction arbitration, and relevant matters of international law in climate change and trade before concluding with a note on the qualitative and quantitative aspects of both surveys.

1. Diverse outreach and outlook

Previous editions of the AAA survey have testified to the growing participation of Africa's legal community in arbitration. The 2022 AAA Survey drew respondents from 36 countries on questions ranging from legal aid to third party funding.

Meanwhile, the third edition of the SOAS Survey is the most international edition of the survey to date: it saw the participation of respondents from 41 countries, including 24 African countries and 17 non-African countries. Nigeria, Egypt, Rwanda, South Africa and Cameroon were the top five countries to provide the largest number of African respondents. The diverse spread of respondents covered four continents, including Africa, Asia, Europe and North America. The United Kingdom provided the largest number of non-African respondents, followed by France, India, the United States, and the United Arab Emirates.

This diversity signals that Africa is a melting pot of international arbitration, with 58.5% of respondents in the SOAS Survey based in Africa and 41.5% of respondents based outside the continent. African economic growth, with expanding investments in infrastructure, will require efficient services for dispute resolution.

2. Advantages of Arbitration

The AAA Survey noted that “arbitration has become a mainstay in resolving disputes and its use is burgeoning in Africa”. Most respondents believe that litigation takes up to 3-5 years or more in Africa. In contrast, 90% of respondents believe that arbitration usually takes up 1-3 years.

With 60% of respondents in the AAA Survey believing that court delays drive up litigation costs, arbitration emerges as an important alternative. Respondents told the AAA that the value of the dispute was an important factor in the cost of arbitration. For claims with a value above and below \$100,000: arbitration costs range between \$5000 and \$10,000. For claims between \$100,000 and \$1,000,000; the cost of arbitration is lower than litigation. For claims with a value above \$1,000,000: arbitration costs range between \$10,000 and \$50,000.

However, increasing arbitration costs are also causing concern. Aside from the value of the dispute, the AAA identified counsel fees, the duration of the dispute, and tribunal fees as factors which drive up arbitration costs. Given that most respondents preferred ad hoc arbitration over institutional arbitration in the AAA Survey, it should be examined if ad hoc arbitration results in lengthy disputes. On the other hand, institutional rules can set a deadline for arbitral awards to be finalized.

The AAA Survey notes a “huge appetite” for third party funding. In a continent where legal expenses can be a big challenge, third party funding becomes an attractive proposition. The AAA Survey also examined the use of legal aid, legal expenses insurance, attorney fees, and hourly rates.

With infrastructure accounting for a major share of commercial disputes in Africa, the SOAS Survey found that arbitration is the favourite option for dispute resolution in the continent’s construction sector. Africa’s builders see clear advantages in arbitration over other procedures.

3. Dispute resolution clauses

In determining the main reasons for including arbitration clauses in contractual agreements, respondents in the AAA Survey cited enforceability as the top factor, followed by costs, the time taken to resolve disputes, the quality of an arbitral award, neutrality, confidentiality, and setting precedent. This suggests that enforcing an arbitral award in the future weighs heavily on negotiators.

The Seychelles became one of the latest African Union members to join the New York Convention, when it became the 162nd contracting state in 2020. Ethiopia ratified the Convention in 2020. In 2017, Angola became the 157th contracting state. At least a dozen sub-Saharan countries

are yet to join the New York Convention.

4. Efficiency and the impact of the pandemic

In the AAA Survey, respondents were divided on the question of whether the pandemic drove up costs for arbitration. Most respondents believed that the pandemic had a negligible impact on the cost of arbitration, with some believing that it decreased the cost of arbitration. Many respondents, however, believe the pandemic also increased the cost of arbitration. In many jurisdictions in Africa, high speed internet connectivity was lacking and may have affected the law practice of respondents.

Indeed, 73% of the AAA Survey participants believe the use of technology and artificial intelligence during the pandemic brought enhanced efficiency to arbitration in Africa. Online dispute resolution accounted for 63% of arbitrations during the pandemic period. 61% of respondents relied on expedited proceedings.

In the SOAS Survey, respondents testified to the [resilience](#) of Africa-related arbitration during the pandemic. One respondent noted that “[t]he pandemic has accelerated the modernisation of arbitration practice in Africa”. Another said that “[t]he pandemic has acted as an indicator of the talent in Africa and the possibility of continuing to do arbitration in Africa, even in the face of material difficulties”. The pandemic spurred respondents into embracing greater use of technology during virtual arbitrations. Some respondents relied on the AAA’s *Protocol on Virtual Hearings* as guidelines for virtual arbitration.

In terms of problems faced by respondents during the pandemic, respondents told SOAS that in some cases clients had suspended ongoing transactions. The signing of awards got delayed in some cases during the pandemic. Even though proceedings were held virtually, tribunal members located in various countries had to postpone travel plans to sign an award because of travel restrictions during the pandemic. Many respondents experienced difficulties with internet and telecom services. Many scheduled hearings were suspended or stopped *in limine*. In some cases, scheduled in-person hearings in an arbitral centre of an African jurisdiction was shifted to another jurisdiction where the arbitral centre had better facilities for virtual hearings.

5. Construction-related Arbitration in Africa

The construction industry accounts for the most high-value disputes in African arbitration, according to 62% of respondents in the AAA Survey.^[2] Africa has an estimated [USD 521 billion](#) worth of infrastructure projects under development. Foreign investments in energy and transport have increased. China’s Belt and Road Initiative has funded several projects along the eastern coastline of Africa.

The SOAS Survey investigated the continent’s approach to resolving construction disputes. In terms of the most preferred mode of dispute resolution in the construction industry in Africa, respondents chose arbitration (36%), mediation (19.4%), dispute boards (15.5%), and litigation in national courts (14.6%). Respondents reported that African municipal law is commonly chosen as the governing law of contracts.

The survey found that expert testimony in construction-related arbitrations in Africa are often

delivered by non-Africans. One respondent noted that “parties tend to appoint highly experienced construction delay and quantum experts or damages experts, and those are mainly based in international arbitration hubs like London and Paris”. Construction cases in arbitration require strong technical expertise in various fields, including specialists in material sciences and economics, quantum experts, and programming experts. The demand for expert testimony in arbitral cases has led to a burgeoning industry of specialist firms on the sidelines of international arbitration which offer expert services.

6. Climate change

The SOAS Survey asked respondents if climate change had a significant bearing on their practice. While most respondents understood that Africa’s contribution to climate change was negligible, many believe that the influence of their clients in terms of energy and environment related disputes will have an impact on the legal industry. At one of the roundtable discussions held as part of the data collection process for the SOAS Survey, a participant noted that clients are driving changes at law firms towards a greater reduction of carbon footprints. Respondents also called for drafting protocols to govern the arbitration of [Environmental, Social and Governance \(ESG\)-related disputes in Africa](#).

7. Conclusion

The AAA and SOAS Surveys are valuable initiatives which inform us about recent issues that the African legal and arbitral community is facing. Interestingly, the preparation of the SOAS Survey involved the hosting of roundtable focus group discussions to gather as many qualitative responses as possible. In addition, the AAA Survey is an important empirical assessment from a quantitative perspective.

Both Surveys show that arbitration is and will continue to be an important option for resolving commercial disputes on the continent. Both Surveys testify to the robust future of arbitration in Africa as the continent spears ahead with economic growth and progress.

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