SOAS University of London

Pinsent Masons

broderick | bozimo & company
dispute resolution lawyers | since 1971

SOAS Arbitration in Africa Survey Report

Africa-connected Arbitration Perspectives on Major Global Issues

CONTENTS

Prior to the pandemic, arbitration proceedings and events were based on in-person models with a strong emphasis on in-person socialisation. We wanted to understand the impact of the pandemic on the arbitral practice of the respondents.

Introduction

This third SOAS Arbitration in Africa survey builds on the reports from our 2018 and 2020 surveys and aims to present the views of African arbitration practitioners of the impact of two major global and two Africa specific events on their arbitration practices. These events are the covid-19 pandemic, climate change, the Africa continental free trade area, and the increase in infrastructure projects. Our findings from this 2022 Report contributes our 'African voices' to these issues.

This Report sets out the context of the events mentioned above; the Executive Summary of our main findings; the methodology we adopted for this survey, its scope and the respondents to our questionnaire. The detailed findings of the survey then follow before the conclusion.

Context of the 2022 Survey

The World Health Organisation on 11 March 2020 declared the COVID-19 pandemic which led to different drastic measures by national governments worldwide to stem the transmission and infection rates of the (SARS CoV-2) virus.[1] Such measures included national border closures and internal lockdowns over extended periods. Such measures impacted the traditional manner in which arbitration was conducted and led to new ways of working and conducting arbitrations generally, along with the creation and adoption of new tools, protocols and guidelines, to ensure business continuity for the international arbitration community. Prior to the pandemic, arbitration proceedings and events were based on in-person models with a strong emphasis on in-person socialisation. We wanted to understand the impact of the pandemic on the arbitral practice of the respondents.

Finding: The data supports the anecdotal evidence that participants involved in arbitration in Africa for the most part continued their arbitrations during the Covid-19 pandemic through virtual communications and hearings and believe that most of the changes to their practices necessitated by the pandemic will become permanent.

In 2021, the United Kingdom hosted the 26th United Nations Climate Change Conference of the Parties (COP26) in Glasgow. The conference focused global attention on global warming and the urgent need for the international community to agree and employ climate mitigation and adaptation measures in the race to achieving net zero by 2030.[2] We wanted to understand the level of interest in climate change discourse and the preparations by the African arbitration community on climate mitigation and adaptation.

Finding: Most respondents evidence clear understanding of the impact of climate change on their arbitration practices, and some are already taking some steps towards mitigation and adaptation to the climate risks through, for example, switching to cleaner energy where possible; less travel, and less use of paper; and more reliance on technology. Some respondents do not see the relevance of the climate change discourse to their arbitration practice since, as climate change affects their way of life, their practice will be affected by the changes anyway.

Recent surveys have confirmed that there are a large number of significant construction and infrastructure projects in progress on the continent. For example, the *Africa Construction Trends* report 2021 published by Deloitte in early 2022 reported that Africa currently has 462 large construction and infrastructure projects in the value of USD 521 Billion, with a projection of further growth in the future.[3] Arbitration is specified as the dispute resolution mechanism of choice in commercial contracts such as those regulating the supply of goods and services and also infrastructure delivery. We wanted to understand whether there has been an increase in the number and value of related disputes and how they were resolved.

Finding: Most respondents confirmed that there is an exponential increase in the number and value of construction related projects across the continent. Whilst respondents confirmed that arbitration is the preferred dispute resolution mechanism, they are seeing an increase in references to dispute boards and mediation. Most respondents noted that the laws of African states are primarily chosen as the governing law of such contracts; and views were divided on the use of African technical experts as witnesses in related arbitrations arising from the transactions.

Finally, on the 1st of January 2021, trading under the Africa Continental Free Trade Area (AfCFTA) Agreement commenced.[4] This Agreement is designed to unlock and dramatically increase the volume and value of intra-African trade in goods and services through the removal (and reduction) of trade and non-trade barriers, ushering in a new phase of African integration. We wanted to understand the level of knowledge and engagement of the respondents with the AfCFTA Agreement and its protocols.

Finding: a fair number of respondents are aware of the AfCFTA and its protocols; most respondents believe that there will be an increase in commercial/business disputes resulting from the AfCFTA, and such disputes should be arbitrated; with strong support for the establishment of an African commercial court.

[1] See: https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [accessed 26 July 2022].

[2] For COP26 at Glasgow, see: https://ukcop26.org/ [accessed 26 June 2022].

[3] For Deloitte Africa Trends 2021 Report, see: https://www2.deloitte.com/content/dam/Deloitte/za/Documents/energy-resources/za-African-Construction-Trends-2021-V8.pdf [accessed 26 June 2022].

[4] On the AfCFTA, see: https://au.int/en/cfta [accessed 26 June 2022].

Executive Summary

The key findings from the survey are as follows:

Practitioners from across the world are involved in arbitration in Africa:

- 58.5% of the respondents are domiciled in an African country.
- 41.5% of the respondents are domiciled in a non-African country from Europe, the Middle East, Asia, and North America.
- Respondents have acted in the capacities of arbitrator, counsel, administrator, tribunal secretary, expert, and disputant.

Covid-19 pandemic impacted on arbitration practitioners in Africa-connected disputes:

- Most respondents continued their arbitrations during the Covid-19 pandemic period.
- Most respondents relied on virtual and telecommunications as part of their business continuation tools.
- Most respondents thought that the changes in their working methods necessitated by the pandemic would become permanent.

Practitioners in Africa-connected disputes understand the impact of climate change on their practice:

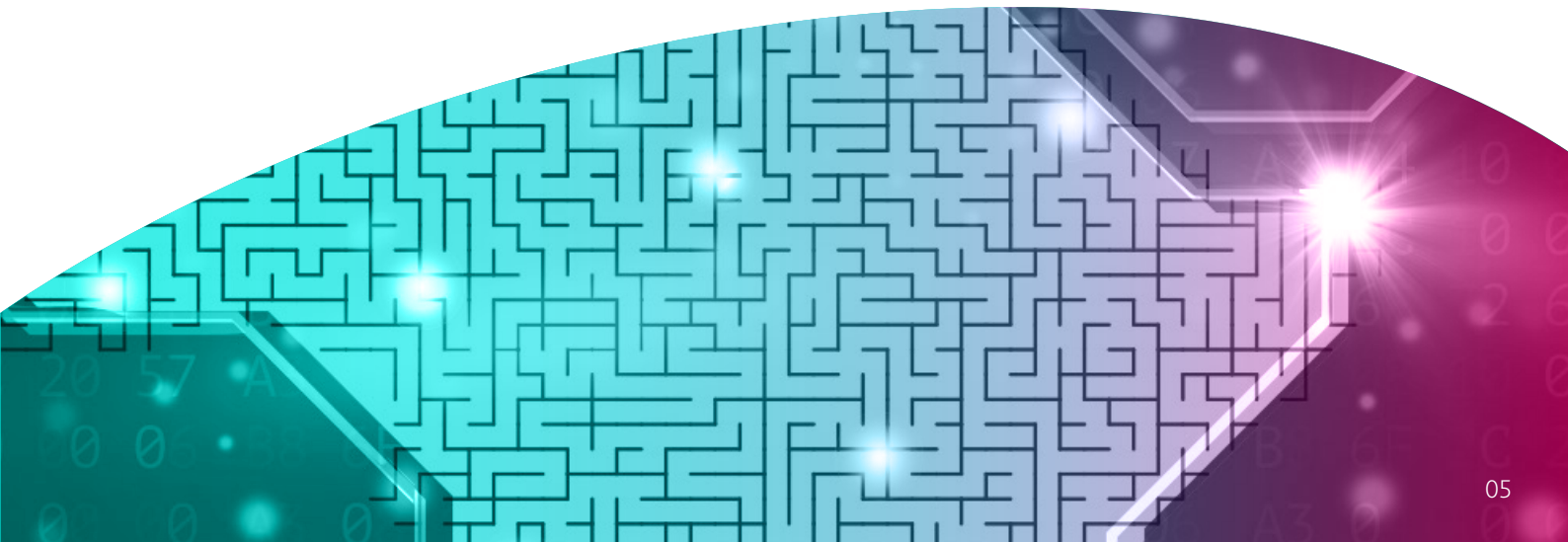
- Most respondents believe their practice will be impacted by climate change.
- Most respondents have adapted their practice to mitigate the impact of climate change.
- Some respondents believe that such mitigation measures will increase the cost of doing business for them.

Practitioners in Africa-connected disputes confirm the growth in construction and infrastructure projects in Africa:

- Most respondents agree that arbitration remains the preferred dispute resolution mechanism in construction-related disputes across Africa.
- Most respondents note that the laws of African states are usually chosen to govern construction contracts.
- Most respondents note that with the exception of legal experts, Africans rarely act as forensic or technical experts in arbitrations over construction disputes.

Practitioners in Africa-connected disputes expect an increase in intra-Africa disputes:

- Most respondents expect an increase in intra-Africa commercial disputes arising from increased intra-Africa trade in goods and services encouraged by the AfCFTA.
- Most respondents believe that such disputes should be arbitrated.
- Most respondents were supportive of the establishment of an African commercial court at the continental level.



Methodology

We published an online questionnaire of 42 closed and open (but with word-count limited text boxes) questions in the English and French languages and thereafter in the Portuguese and Arabic languages. The online questionnaires were available for the completion of respondents over an eight-week period. A total of 194 individuals responded to the survey in the four languages: Arabic (31 responses); English (140 responses); French (20 responses); and Portuguese (3 responses).[5]

Following the data collection, we had two roundtable discussions hosted by our sponsoring law firms, Pinsent Masons LLP, in London on 20 June 2022 and Broderick Bozimo and Co., in Abuja, on 15 July 2022. At these roundtable discussions, we explored with practitioners with experience of the African dispute resolution market, the themes and our preliminary findings from the questionnaire. Participants at the roundtables, corroborated, challenged or provided different insights from the information gathered from our online questionnaire. These comments are incorporated into this report.

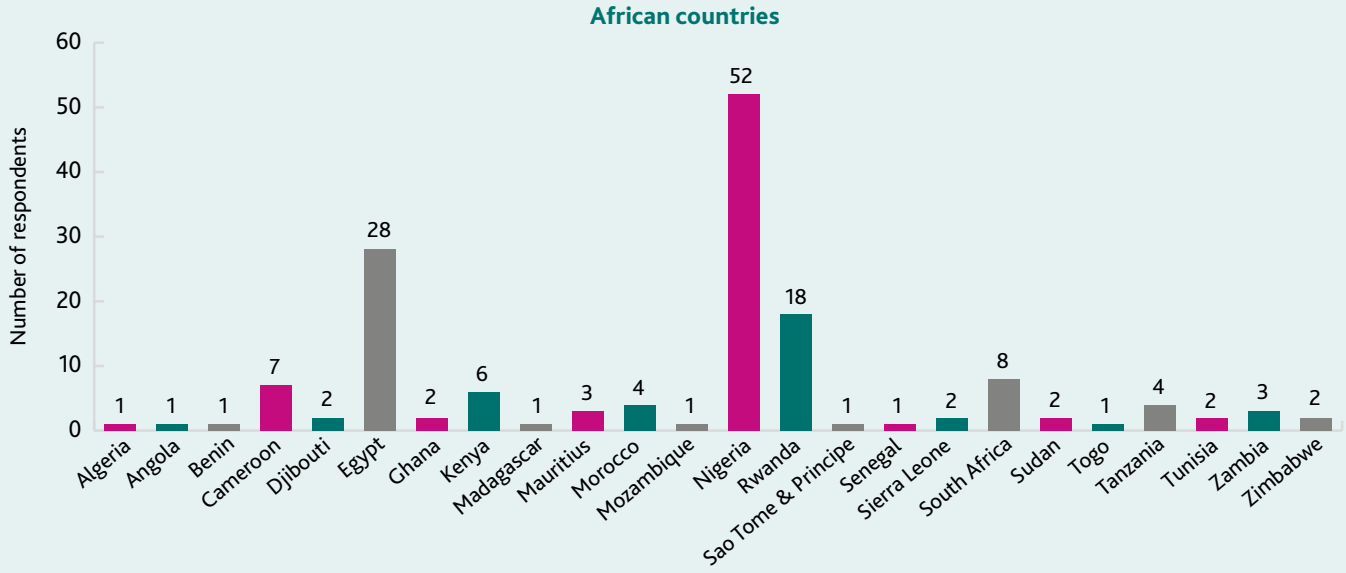
Scope of the Survey

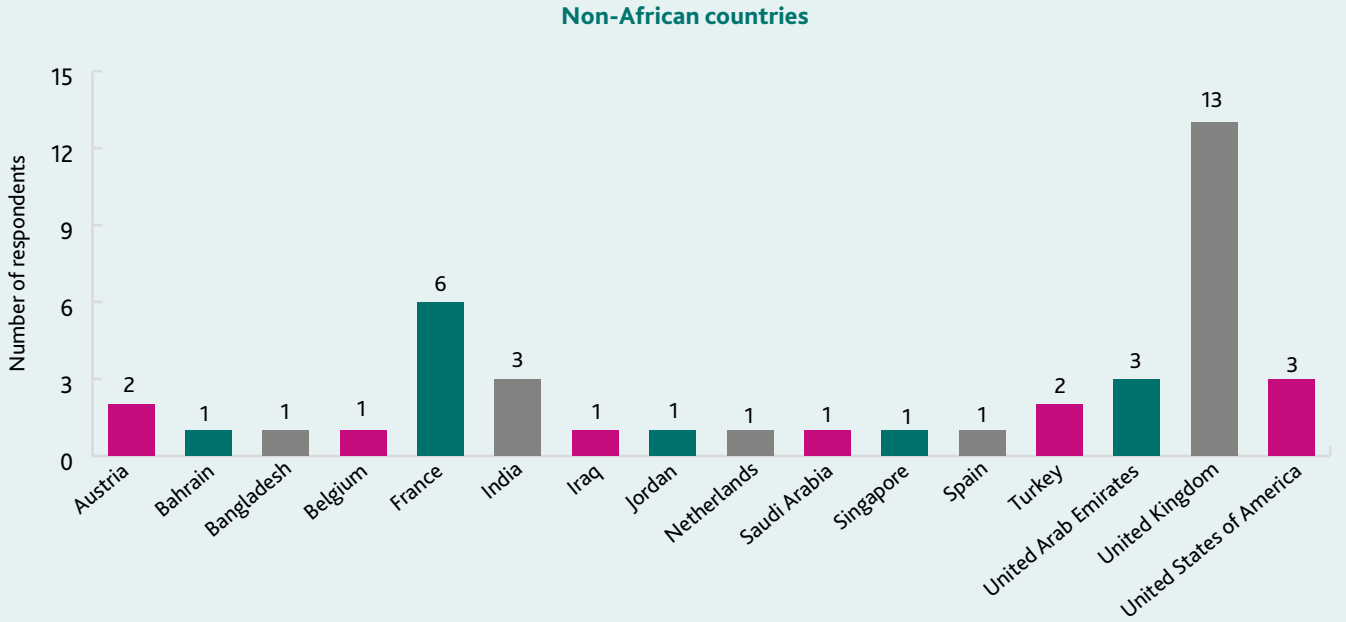
The description of 'arbitration in Africa' for purposes of our 2022 online questionnaire was very widely drawn to include those who had participated in arbitration where the seat, project, or hearing, was in Africa, or where one of the parties was African. This definition was designed to capture the majority of Africa-connected arbitrations. Accordingly, the survey covers disputes that may have been for all purposes African, but with the arbitration taking place outside Africa or seated in Africa. It also implies that the experiences of respondents could either have been international, regional or purely domestic.

[5] There was a total of four (4) void responses with text that was not decipherable.

Respondents

The 194 respondents were from 24 African and 17 non-African countries. This represented a wider spread of respondents from across both African and non-African countries, when compared to our previous surveys.





[6] Algeria (1); Angola (1); Benin (1); Cameroon (7); Djibouti (2); Egypt (28); Ghana (2); Kenya (6); Madagascar (1); Mauritius (3); Morocco (4); Mozambique (1); Nigeria (52); Rwanda (18); Sao Tome & Principe (1); Senegal (1); Sierra Leone (2); South Africa (8); Sudan (2); Togo (1); Tanzania (4); Tunisia (2); Zambia (3); Zimbabwe (2).

[7] Austria (2); Bahrain (1); Bangladesh (1); Belgium (1); France (6); India (3); Iraq (1); Jordan (1); Netherlands (1); Saudi Arabia (1); Singapore (1); Spain (1); Turkey (2); United Arab Emirates (3); United Kingdom (13); United States of America (3).

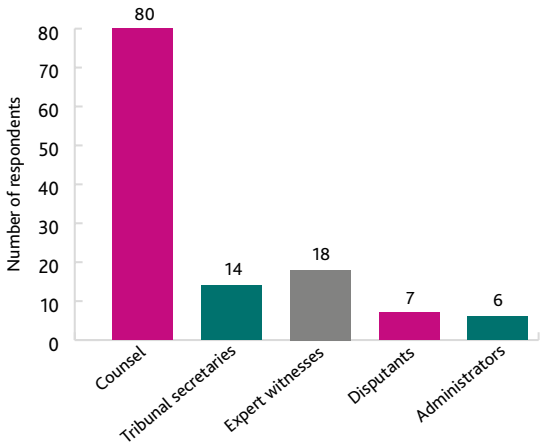
[8] There were 191 respondents to our 2018 survey from 29 countries across Africa, the Middle East, Europe and Asia; and 350 respondents to our 2020 survey from 34 countries across Africa, Asia, Middle East, North America and Europe.

There is a marked increase in the domicile of respondents to our 2022 online questionnaire when compared to our 2018 and 2020 responses.[9] In 2022, we have more non-African respondents from 16 countries in Europe, Asia, Middle East and North America compared to respondents from 8 non-African countries in our 2020 survey. There was however, a slight decrease in the domiciles of the African respondents who came from 24 African countries when compared to 26 African countries in our 2020 survey.

194 respondents participated in arbitration in Africa over 2019-2021, which for purposes of this Report, we shall refer to as the 'Covid-19 period'. 75 respondents had acted as arbitrators; 80 as counsel; 14 as tribunal secretaries; 18 as expert witnesses; 7 as disputants; and 6 as administrators. Some respondents had acted in multiple capacities in different Africa-related matters for example, as both arbitrator and counsel. In addition, experiences varied greatly, with some respondents having acted in very few cases and others in many cases.[10]

This is an important finding which confirms that in African disputes, a good number of participants act in several capacities in arbitration and a phenomenon such as 'double hatting' (where an arbitrator also acts in another capacity such as counsel or expert witness) also applies to African disputes.

Participation in arbitration in Africa over 2019-2021



[9] For example, our 2020 Arbitration in Africa survey online questionnaire attracted respondents from 26 African countries and 7 non-African countries.

[10] Some have done as few as 1-5 cases and very few have done 20+ cases while many more respondents had done 6-10 cases.

Impact of COVID-19 Pandemic on Arbitration in Africa

In this Part of the questionnaire, we wanted to understand whether arbitration in Africa was impacted by the Covid-19 pandemic, and if it was, how it was impacted.

182 respondents answered this question. Of these, 102 (56%) of the respondents agreed that their arbitration practice was negatively affected by the pandemic while for 80 (44%) respondents, their practice was not negatively affected by the pandemic.

There were significant differences in the responses from the different language groups. For the English-speaking respondents, 81 said their practice was negatively affected by the Covid-19 pandemic, while for 52 respondents, their practice was not negatively affected by the pandemic. For the French speaking respondents, 10 said that their practice was negatively affected, while the other 10 said that their practice was not negatively affected by the pandemic, making for an even split. For the Arabic speaking respondents, 9 said their practice was negatively affected, while 17 said their practice was not negatively affected by the pandemic. For the 3 Portuguese respondents, the practices of 2 were negatively affected, while that of 1 respondent was not negatively affected.

This is an interesting finding against the background that over the Covid-19 period, most states around the world were in lockdown, and there were very limited international flights or even travel. In addition, most local businesses and offices were shut in most African states during the period.

The reasons given by respondents for their experience included the fact that they moved their practices to remote working and resorted to virtual hearings and video conferencing; adopted increased reliance on remote communication and emails; and adapted to virtual hearings; all of which were necessary to ensure business continuation. However, for almost all the respondents, there was very limited travel outside their location or country. It therefore appears that these shut-downs did not hugely impact negatively on arbitrations in most African states.

For some respondents, their clients suspended ongoing transactions, while some experienced delays in signing the award since, though the hearings were virtual, the tribunal members were in different locations and could not travel. This was mentioned by some Arabic language respondents. In some countries, scheduled hearings were stopped *in limine*, and in some countries, some respondents experienced difficulties with telecommunications services connections. And for some other respondents, scheduled in person hearings in certain African arbitral centres were moved to other arbitral centres in Africa with facilities for the conduct of virtual hearings.

Of the 35 respondents that noted that they participated in arbitration as disputants, 46% of them participated in arbitration during the pandemic in sixteen different African countries.[11]

This data supports the anecdotal evidence that participants involved in arbitration in Africa for the most part continued their arbitrations during the Covid-19 pandemic period, primarily through virtual telecommunications and hearings.[12] The data also supports the identified challenges with the weak telecommunications infrastructure in some African states, with a corresponding negative impact on business continuity. This also highlights the need to address this weakness if African countries are to become more widely used as seats or hearing venues for major international arbitrations.[13]

[11] These are: Benin, Cameroon, Egypt, Ivory Coast, Kenya, Libya, Madagascar, Morocco, Nigeria, Rwanda, South Africa, Sudan, Tanzania, Togo, Tunisia, and Zambia.

[12] Similar to global measures as found in the 2021 Queen Mary/White & Case survey at: https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf [accessed 26 July 2022].

[13] See for example, McKinsey's Reimagining and Reopening Africa of May 2020 at: https://www.mckinsey.com/featured-insights/middle-east-and-africa/reopening-and-reimagining-africa [accessed 26 July 2022].

Virtual Hearing Protocols

As noted above, most of our respondents had participated in arbitration in Africa during the pandemic period. We therefore, wanted to know if they used any virtual hearing protocol, in particular, the African Arbitration Academy Virtual Hearing Protocol ("AAA Protocol"), which was developed for use in Africa-seated disputes. Its authors note that the Protocol, "takes into account the specific challenges and circumstances that may arise in relation to remote hearings in Africa," and identified these as being, logistics and pre-hearing arrangements, documents and presentation of evidence, security and privacy consideration for the virtual telecommunications platform.[14]

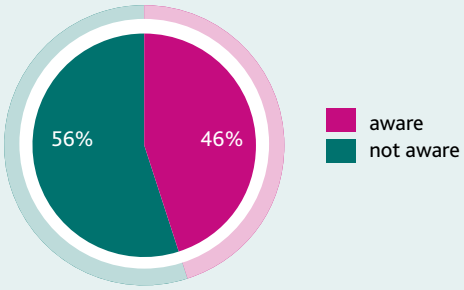
Of the 182 respondents, 46% stated that they are aware of the AAA Protocol, while 56% were not aware of the Protocol.

Of the 88 respondents who are aware of the Protocol, 37.5% had actually used the AAA Protocol; and 91% of these found the suggestions made in the Protocol useful. Respondents found the suggestions on the pre-hearing arrangements; communication between the tribunal members, parties, and witnesses through online video; filing notes/documents online; and Tribunal-issued Cyber Protocol; particularly useful.

Given that the AAA Protocol was formulated specifically for use in Africa seated arbitrations or dispute resolution hearings, it will be necessary to further investigate why only 46% of our respondents are aware of the Protocol.

24% of the respondents also referred to or used the following virtual hearing protocols: ICC Checklist for a Protocol on Virtual Hearings and Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings;[15] Seoul Protocol on Video Conferencing in International Arbitration;[16] CIArb Guidance Notes on Remote Dispute Resolution Proceedings;[17] CIArb Framework Guideline on the use of Technology in International Arbitration;[18] IAF Protocol on Virtual Hearings for Arbitrations issued by Indian Council of Arbitrators;[19] AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties;[20] HKIAC Guidelines for Virtual hearings;[21] International Council for Online Dispute Resolution (ICODR) Guidelines for Virtual Arbitration;[22] and relied on the provisions of different arbitration rules.

Awareness of the African Arbitration Academy Virtual Hearing Protocol (AAA Protocol)



These responses evidence clearly the relevance of the various virtual protocols as guidelines to arbitration practitioners and the fact that the African arbitration community very much welcomes and uses them. The diversity of the protocols and guidelines referenced by our respondents also allude to the spread of colleagues across the world who participate in Africa-related arbitration.

[14] The text of the Africa Arbitration Academy Virtual Hearing Protocol is available at: https://www.africaarbitrationacademy.org/protocol-virtual-hearings/ [accessed 26 July 2022].

[15] Available at: https://iccwbo.org/publication/icc-checklist-for-a-protocol-on-virtual-hearings-and-suggested-clauses-for-cyber-protocols-and-procedural-orders-dealing-with-the-organisation-of-virtual-hearings/ [accessed 26 July 2022].

[16] Available at: https://sccinstitute.com/media/1708389/seoul-protocol.pdf [accessed 26 July 2022].

[17] Available at: https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf [accessed 26 July 2022].

[18] Available at: https://www.ciarb.org/media/17507/ciarb-framework-guideline-on-the-use-of-technology-in-international-arbitration.pdf [accessed 26 July 2022].

[19] Available at: https://indianarbitrationforum.com/wp-content/themes/iaf/assets/IAF-Protocol-on-Virtual-Hearings-for-Arbitrations-Oct-2020.pdf [accessed 26 July 2022].

[20] Available at: https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf [accessed 26 July 2022].

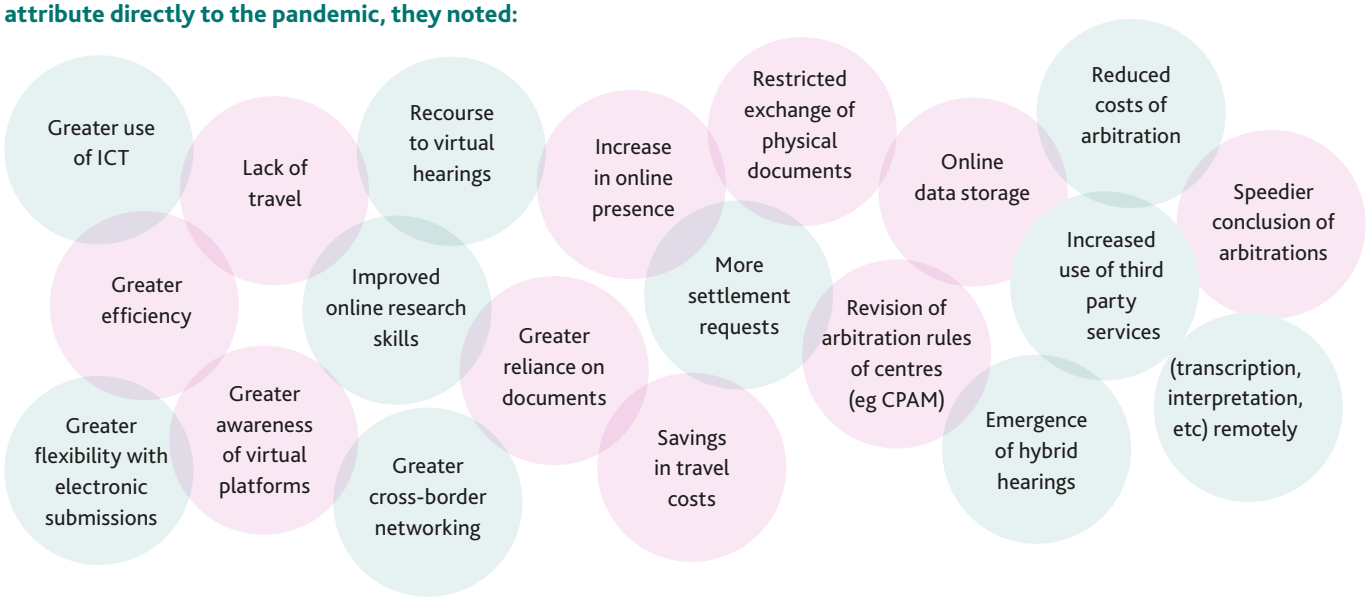
[21] Available at: https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/services/HKIAC%20Guidelines%20for%20Virtual%20Hearings.pdf [accessed 26 July 2022].

[22] Available at: https://icodr.org/ [accessed 26 July 2022].

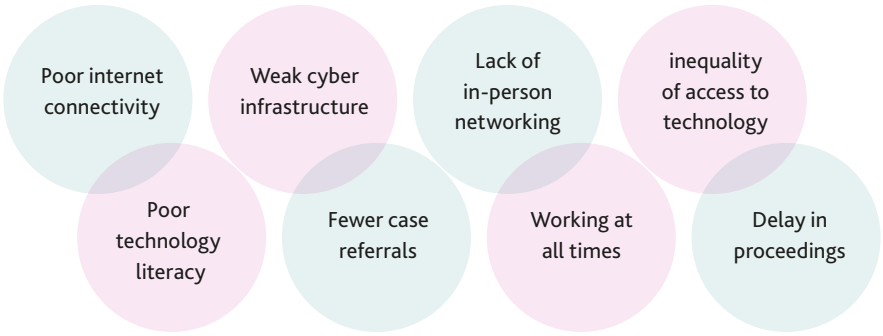
Other Pandemic-Induced Changes to Arbitral Practice in Africa

We are aware that the responses to the pandemic across different countries of the world led to subsequent changes in how work and business is conducted. We wanted to know if the pandemic had similar impacts on how arbitration in Africa is conducted and on the practices of African arbitration practitioners.

On changes to the arbitral practices of the respondents and the conduct of arbitration in Africa, which respondents attribute directly to the pandemic, they noted:



Respondents also noted some challenges that may be specific to the continent:



Respondents said:

> [The pandemic] has accelerated the modernisation of arbitration practice in Africa, forcing practitioners, centres and parties to recognise the urgent need to modernise their equipment and the way they work.

> The pandemic has also facilitated the participation of African practitioners in training and conferences, both as active participants and students. This has helped, in my view, to level the playing field with European or American practitioners and will, in the medium term, help to develop arbitration practice in Africa.

> The 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. This has the potential to change the way African parties (states, private parties) approach the issue of counsel selection.

> The development of practice notes, codes, protocols and guidelines; and increasing adoption of innovative technology, practices and scheduling.

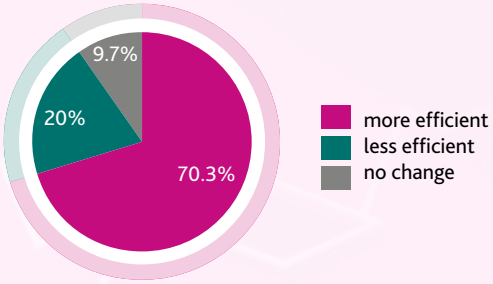
> In the traditional mode the number of participants may have been limited due to space and travel costs constraints, with the online mode, as many as necessary/ permissible participants may join the proceedings without those constraints.

> An improved knowledge in, and use of technology in the arbitral process. I have had to purchase, install and deploy a number of technological solutions that has improved the efficiency and effectiveness of my arbitration practice.

> It normalized the use of hybrid features combining physical and virtual proceedings to the convenience of the parties and tribunals. There were fewer adjourned or delayed hearings due to limited physical movement.

Of the 144 respondents who answered the question on the efficiency of the changes wrought by the pandemic on the conduct of arbitration, 70.3% noted that these changes made arbitration more efficient. However, for 20% of these respondents, such changes made arbitration less efficient; while 9.7% of respondents did not see any changes to their arbitration practice that were attributable to the pandemic.

Efficiency of the changes wrought by the pandemic on the conduct of arbitration



For the 70.3% respondents who considered that the pandemic made arbitration more efficient, they gave the following reasons: faster hearings; less travel; less paper; better use of technology; increase in the use of virtual meetings; greater use of online documents management systems; time efficiency; easier to schedule meetings; faster proceedings and hearings; availability of more parties to attend virtual hearings.

While for the 20% of respondents who considered that the changes made arbitration less efficient, the reasons included: increased cost; insufficient technological infrastructure; unstable internet connections; fewer arbitration cases.

In response to our question on whether respondents thought these changes to their arbitration practices would become permanent, the majority of respondents answered in the affirmative that these changes would be permanent in their arbitration practices.

Some notable comments:

> **Going forward, there will be stronger demand from clients to avoid in-person hearings for procedural matters and less significant hearings. However, there is likely to continue to be a preference for in-person hearings at the merits phase.**

> **more time efficient depending on connectivity and other infrastructure required to hold virtual hearings.**

At the two roundtables focus group discussion, some participants noted that members of the international arbitration community have resumed travel and in person activities which may be an indication that some of these changes, particularly reliance on virtual meetings and events, may not become permanent. Some other participants noted that the pressures of climate change and mitigation will invariably lead to greater reliance on technology for virtual meetings and events. It was also observed that individuals are social beings and need the in-person interaction as a community.

Respondents noted that one major change that will remain permanent in their arbitration practices is the move to digital communication. That parties are increasingly aware of the importance of technological means of communication, cybersecurity, and confidentiality issues of technology sources and systems. They however, noted that for more efficient virtual hearings, there is the need to improve the quality of the internet service provision across African states. Respondents also noted the need for greater confidence in African arbitrators and their ability to function in the digital space.

The Covid-19 pandemic was indeed chaotic with huge human and other costs,[23] but it also accelerated the use of technology by those who do Africa related arbitration. This is through increased use of emails for document exchanges, remote or virtual hearings, and e-filings for documents. As already noted, these positive changes in respondents' greater reliance on technology also laid bare some weaknesses in the technological infrastructure available in some African jurisdictions. This weakness is one of the issues outside the control of arbitration practitioners.

Another important weakness identified by the respondents is the impact of these changes on the cost of conducting arbitration through the increase in the cost of providing the technology to be used for the proceedings. We also note that this issue of cost may also exclude those practitioners who may not be able to invest in the technological infrastructure required to effectively participate in the eco-system of virtual arbitrations. However, it does not appear that most African arbitration practitioners are deficient in technological skills to participate in this new digital world.

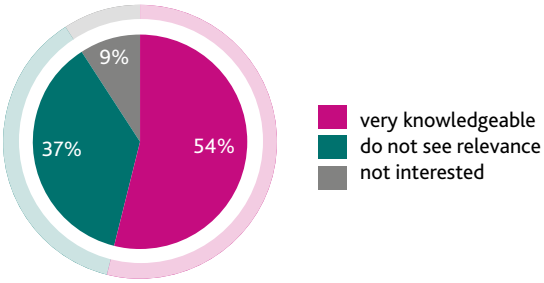
[23] WHO estimates over 6 million deaths as at 25 July 2022, on which see: https://covid19.who.int/ [accessed 26 July 2022]. And the IMF estimates more than $12.5 Trillion as cost of the pandemic and response measures on which see: https://www.reuters.com/business/imf-sees-cost-covid-pandemic-rising-beyond-125-trillion-estimate-2022-01-20/ [accessed 26 July 2022].

Climate Change and Arbitration in Africa

With the recent conclusion of the COP26 Negotiations in Glasgow,[24] and the increased awareness of climate change and its drivers, we wanted to understand the level of interest and engagement of the African arbitration community of climate change issues and how this may affect their arbitration practice.

Of the 183 respondents who answered the questions under this section of the questionnaire, 54% noted that they are very knowledgeable of climate change issues; while 37% know about the issues but do not see their relevance to them or their practice; and 9% do not know about the issues and are not particularly interested.

Knowledge of climate change issues



Comments from respondents who are not interested in the issue of climate change primarily focus on the fact that global warming and its consequences is not an 'arbitration issue' but one that impacts all peoples. This, we acknowledge, may be a fair point.

Those respondents that are very knowledgeable about climate change issues, believe their arbitration practice is already impacted by climate change. Some examples of such impact are: unstable internet connections in severe weather conditions which disrupt their virtual hearings and meetings; increased ESG-related disputes;[25] and increase in resource-control related conflicts.

One respondent notes that:

> **countries such as Mozambique, Mauritius and Madagascar are being buffeted by cyclones, which will have an impact on the built infrastructure, contracted insurance, etc and may generate disputes.**

In 2019, Lucy Greenwood launched the Campaign for Greener Arbitrations to minimise the impact of international arbitration on the environment and this has led to the Green Pledge and a series of Green Protocols. We asked respondents to share what they are personally doing to reduce their carbon footprint. Respondents' carbon emission reduction actions included: reduction in travel; reduced printing and photocopying; increased use of locally produced goods; use of less and cleaner energy; priority given to emails; recycling of paper; purchase of carbon credits from UNICEF to offset business trips; and less use of the car (where possible); and education of staff on issues of climate change.

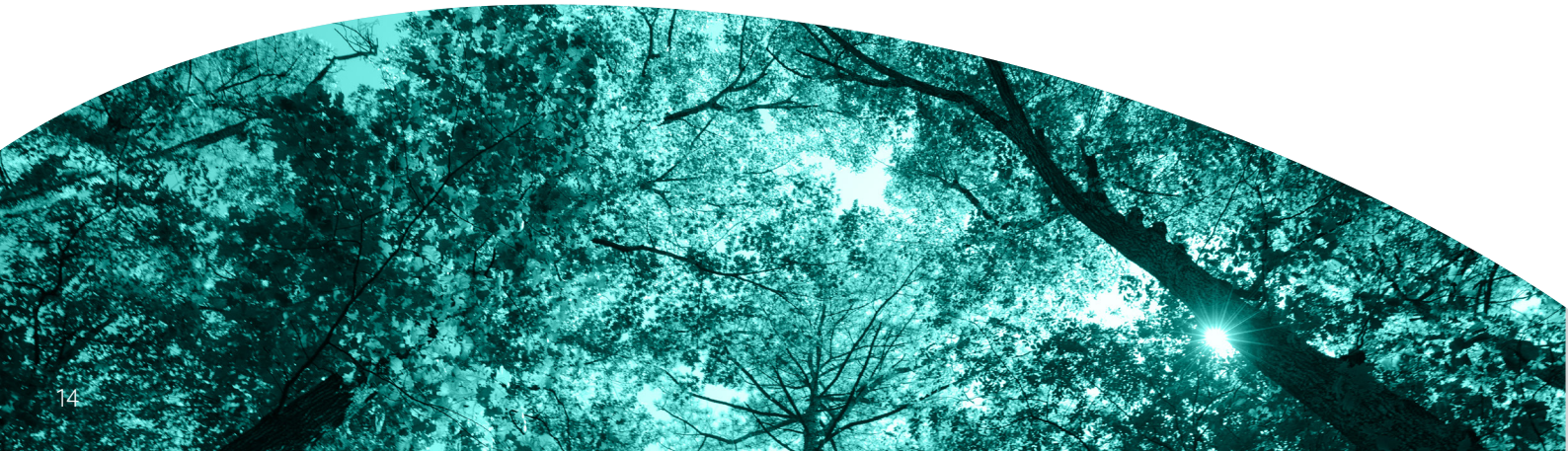
We then asked the respondents to share actions that the African arbitration community can take to support climate change adaptation and mitigation. On the steps that the African arbitration community can take to adapt and mitigate climate change, respondents' suggestions included:

1. More hearings and conferences should be held virtually.
2. Promote the use of the African Arbitration Academy Virtual Hearing Protocol.
3. Reduce travel and printing.
4. Raise awareness of climate change issues with members of the community.
5. Engage in advocacy and organise a conference on the topic.
6. Adopt protocols for the resolution of ESG-related disputes.
7. Fund research on this issue and disseminate its findings to the African arbitration community members.

[24] For details see, https://ukcop26.org/ [accessed 26 July 2022].

[25] ESG refers to Environment, Social Governance issues.

[26] Green Arbitration Protocols are available at: https://www.greenerarbitrations.com/global-session-invitation [accessed 26 July 2022].



One respondent cautioned:

> **With Africa accounting for around 4 percent of the total carbon footprint it is essential not to over play this in Africa. This does not exonerate Africa from responsibility; however, the greater effort must surely come from elsewhere, inclusive of technology and IP transfer. This is the only way that Africa's inevitable growth trajectory will fall in line with the understandings and required actions to meet the sustainable development goals. Equitable energy transition must not simply become a mere slogan."**

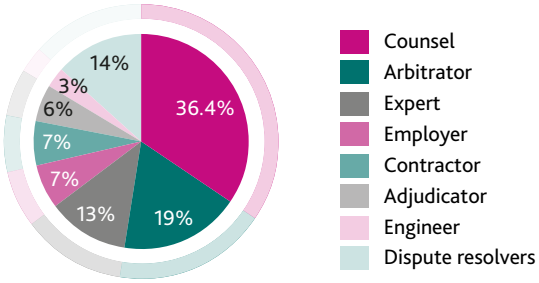
Most respondents evidenced clear understanding of the impact of climate change on their arbitration practices and some are already taking some measures towards mitigation and adaptation to the climate risks. At one of the roundtable focus group discussions, one participant noted that clients drive the changes law firms are making to reduce their carbon footprint. This is an important comment which again reveals the leverage clients have with their legal advisers. All these positive steps are with the hope by respondents that climate change, prevention and mitigations will also lead to an increase in advise work and disputes related to the environment, for them.

Construction and Infrastructure Projects and Arbitration in Africa

According to the Deloitte's *Africa Construction Trends Report* (2021) which "tracks infrastructure and capital projects activity across Africa", there has been an increase in the number and value of infrastructure projects in Africa with suggested figures in the amount of USD 521 Billion for 462 projects.[27] In light of this, we sought to find out whether these transactions are leading to more complex construction disputes in Africa and how African disputes practitioners are engaging in these disputes.

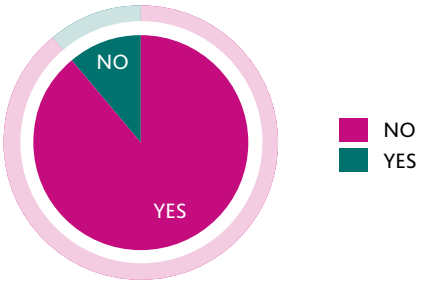
132 respondents said they have been involved in construction or infrastructure projects in Africa. The majority (36.4%) of these were involved as counsel, (19%) as arbitrator, (13%) as expert, (7%) as employer, (7%) as contractor, (6%) as adjudicator, (3%) as engineer. A further 14% of the respondents described themselves as 'dispute resolvers'.

Primary profession



We wanted to know if this increase in construction and infrastructure projects also led to an increase in the numbers of disputes from such transactions. Of the 100 respondents who answered this question, 89% noted that disputes in the construction and infrastructure sector in Africa were on the rise while 11% answered this question in the negative.

Construction and infrastructure



The basis of this view by the respondents included: their personal involvement in several ongoing infrastructure/construction projects across the continent; involvement in disputes due to non-compliance by the contractor or lack of payment by the owner (often the state); physical evidence of many infrastructure projects from increased urbanisation across Africa.

[27] Deloitte Africa Construction Trends Report, 10th edition, 2021 is available at: https://www2.deloitte.com/za/en/pages/energy-and-resources/articles/africa-construction-trends-2021.html [accessed 26 July 2022].

Preferred Dispute Resolution Mechanism

On the preferred dispute resolution mechanism for construction and infrastructure disputes, respondents chose arbitration 36% of the time, mediation 19.4% times, dispute boards 15.5% times, litigation before national courts 14.6% times, and adjudication 14.2% times.

It appears that in these types of disputes, parties rely more heavily on arbitration with the use of mediation and disputes boards gaining ground. One respondent noted, in relation to dispute boards, that, "dispute boards are recommended by finance banks such as the African Development Bank."

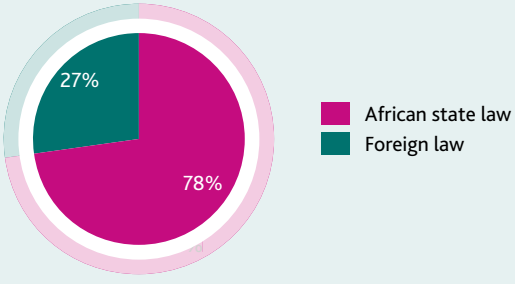
At one of the roundtables focus group discussion, some participants noted that there is an increase in the use of dispute boards though this may be limited by the lack of finality or disruption of the flow of funds (unlike the situation in adjudication in the UK); that it is that element of finality of the arbitration award that respondents find very attractive in arbitration as the preferred dispute resolution mechanism for the resolution of disputes from construction and infrastructure projects.

Choice of Applicable Law

We are told at various conferences that parties to construction and infrastructure contracts tend not to choose the laws of African countries as the substantive or proper law of such contracts. We wanted to find out from those who actually prepare the relevant contracts or determine disputes based on such contracts, whether this is the position from their own practice.

Of the 78 respondents that answered this question, a majority of 73% noted that parties to these contracts choose the laws of African states as applicable or governing law while for 27% such contracts are governed by foreign law.[28] An important clarification was provided by some respondents that the laws of African states are generally chosen where the state is party to such contracts, and in domestic construction contracts. This presumes that in contracts involving international parties contracting with a non-state employer, the preference is for foreign law (or standard form contracts).

Do parties choose the laws of African States as the applicable law in construction and infrastructure contracts?



Respondents also expressed the view that parties to construction and infrastructure contracts consider the following factors in choosing the applicable law: the place of performance of the contract or location of the project; nationality of the investor; views of financial institutions; neutrality of the law; legal certainty; and familiarity with the law by the legal advisors of the parties.

Respondents noted that there were a number of reasons why parties to such contracts declined to choose the laws of African states and instead chose foreign laws (or standard form contracts). Respondents cited a lack of trust in the institutions and laws of African states; and the lack of predictability of these laws, as the cause. Some respondents also noted that for public works contracts, the law may be imposed by the contracting state and the non-African party can accept the law of the African state as substantive law but in return, will want to choose the seat of the arbitration to be outside Africa.

Construction and infrastructure projects are usually complex, multi-partied, and for international projects, may cut across two or more countries. There are also domestic small or medium sized projects which may be less complex. There are a number of specialist contract forms that are often used for such transactions, and with which parties, their representatives and funders will be familiar. Such contracts will set out clearly defined dispute resolution processes. For example, the FIDIC forms of contract were referenced by some of the respondents.[29] The FIDIC forms of contract include a standard tiered dispute resolution clause which provides for Dispute Avoidance /Adjudication Boards (DAABs), attempts at amicable settlement and with ICC arbitration, as the default form of final dispute resolution if the parties do not agree otherwise. The standard ICC arbitration clause provides for Paris as the seat of arbitration.

Our finding from the qualitative comments by our respondents confirm the view that foreign law or industry-based contracts are used primarily for international construction and infrastructure projects, while domestic laws may be used for small and medium sized domestic projects. This may explain the preference for African arbitrations to have foreign non-African seat on projects with an international element.

[28] Used to mean the law of a non-African state.

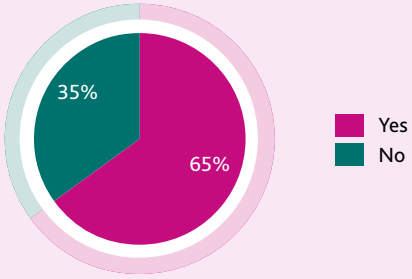
[29] On the International Federation of Consulting Engineers (FIDIC), see, https://fidic.org/ [accessed 26 July 2022].

Use of Technical Experts of African origin

We are also aware of the rise in the use of technical experts in international arbitration. In addition to quantum (or damages) and delay (or programming) experts, there are a number of expert disciplines which may be relevant to the dispute resolution process, from economics to material sciences. There has also been a rise in the number of businesses dedicated to providing such services in support of dispute resolution generally.[30] From anecdotal evidence, it does not appear that many African specialists operate in these spaces, and we wanted to know whether this view is correct from those who use such services.[31]

Of the 97 respondents who answered the question on whether technical experts of African origin participate in their arbitrations, 65% answered in the affirmative that from their own experience, parties to disputes arising from these contracts choose technical experts of African origin. 35% answered in the negative, that is, that technical experts of African origin are not chosen to provide evidence in their arbitrations.

Do parties in construction and infrastructure disputes appoint experts of African origin?



The reasons given by the respondents for this lack of appointment of African technical experts included: African experts not being well known; Africans not appointing African experts because of lack of trust;[32] Investors and host states preferring to appoint experts from the global north; lack of experience; and fear of bias by the African expert.

Example of comments from respondents:

> **... on the large construction and infrastructure disputes I have worked on and know of, 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.**

Our finding corroborates the information from Deloitte's Africa Construction Trend report referenced above on the increase of construction and infrastructure transactions in Africa in both volume and value. Unsurprisingly, we have found that there is also a corresponding increase in construction related disputes. Despite this increase, there has not been a corresponding increase in the engagement of African advisors or technical experts, when disputes over these transactions arise.

Our finding that the vast majority of disputes arising from such transactions are resolved through arbitration again is corroborated by data from elsewhere,[33] while there is increase in the diversity of dispute resolution processes adopted in the resolution of disputes arising from such transactions. The few responses on these other mechanisms imply a need for additional exposure of African dispute resolution practitioners to these mechanisms to enable them to develop relevant knowledge and skills for use in those types of dispute resolution mechanisms.

We note that mediation was quite popular with our respondents for the resolution of disputes arising from construction and infrastructure transactions though respondents are concerned about enforcement issues. Our findings show very little support for litigation of these disputes though courts enjoy strong enforcement powers. Our respondents note this is primarily because of the delays experienced in the court systems and lack of subject-matter expertise by some of the judges.

[30] For example, Secretariat, FTI Consulting, HKA, etc.

[31] We note that some respondents note that from their own experience, in relation to the application of the law of an African state, an African legal expert will usually be called.

[32] It was not clear from the responses if this was lack of trust in their expertise or abilities or otherwise.

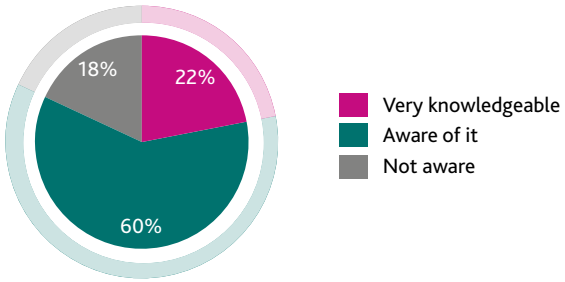
[33] See for example, the Queen Mary/Pinsent Masons, 2019 International Arbitration Survey: International Construction Disputes available at: https://arbitration.qmul.ac.uk/research/2019/ [accessed 26 July 2022].

AfCFTA and Dispute Resolution in Africa

One of the most significant milestones achieved by the African Union ("AU") over the reporting period is the commencement of trading under the Africa Continental Free Trade Area Agreement ("AfCFTA") on 1 January 2021,[34] as part of the implementation of the AU's Agenda 2063 titled the *Africa We Want*.[35] We wanted to understand the depth of knowledge of, and engagement with, the AfCFTA by our respondents and their thoughts on any possible impacts of the trading bloc on their arbitration practices.

Of the 176 respondents that answered the question under this section, 22% noted that they are very knowledgeable about the AfCFTA Agreement and its current Protocols.[36] A majority of 60% noted that they know about the AfCFTA but have not engaged with the Agreement or its Protocols; while 18% noted that they are not aware of the AfCFTA and its Protocols.

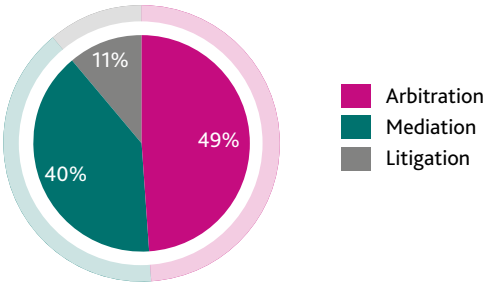
Which statement best descibes your knowledge of the AfCFTA



A majority of 78% of the respondents think that trading under the AfCFTA will lead to more intra-Africa business and that such closer trading will result in an increase in commercial disputes. This supports the views of various think tanks that the implementation of the AfCFTA will significantly increase intra-Africa trade in goods and services.[37]

We note that the Dispute Settlement Protocol of the AfCFTA provides various processes for the resolution of disputes. However, these are limited to disputes arising between the state parties to the AfCFTA and not between commercial parties or a commercial party and a state.[38] We wanted to know how disputes arising out of the expected increased in intra-Africa economic or business transactions between private entities engaged in such transactions should be resolved. Respondents in 49% of the time were of the view that such business or commercial intra-African disputes should be resolved primarily through cross border arbitration. Interestingly in 40% of the time, respondents thought that such disputes should be resolved by mediation evidencing a clear appetite for mediation as a means of dispute resolution of Africa-related disputes. Only in 11% of the time did respondents suggest that litigation should be used.

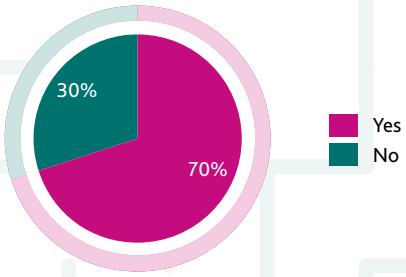
How do you think such business-to-business disputes should be resolved?



Exploring the thorny issue of the ease of enforcement of the final awards from such arbitration proceedings across African states, we asked if respondents thought an African commercial court should be established to deal with intra-African cross border commercial or business disputes.

Views differed on whether Africa should set up an African commercial court. Of the 174 respondents who answered this question, a majority 70% answered in the affirmative while 30% answered in the negative.

Do you think we should have an African International Commercial Court to deal with intra-African cross-border disputes?



[34] For more details on the AfCFTA, see: https://au.int/en/cfta

[35] For information on the AU's Agenda 2063, see: https://au.int/en/agenda2063/overview [accessed 26 July 2022].

[36] These are the Trade in Goods, Trade in Services, and Dispute Settlement protocols.

[37] See for examples, the views from UNCTAD at: https://unctad.org/news/afcfta-could-boost-maritime-trade-africa [accessed 26 July 2022]; and the Worldbank at: https://www.worldbank.org/en/topic/trade/publication/free-trade-deal-boosts-africa-economic-development [accessed 26 July 2022].

[38] See the text of the AfCFTA from page 55 for the Protocol on Rules and Procedures on the Settlement of Disputes at: https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf [accessed 26 July 2022].

The comments below by some respondents reflect the general tenor of the views expressed by our respondents on the question of the establishment of an African commercial court:

In support, it was noted that,

> **... if it will lead to greater speed and avoid problems of the recognition/enforcement and annulment of awards. Good, if the court has independent and competent judges and far from political influences.**

> **This would be an independent body from governments and it would give a safer commercial environment to cross-border businesses.**

Comments supporting the contrary view included:

> **there is not yet a pan-African culture or linguistic familiarity, so there would be no recourse to this court unless it was compulsory.**

> **An African commercial court will raise questions of how judges are appointed and their impartiality and the cost of setting up such a court; enforcement of their decisions/judgments.**

> **The members of the Court will most likely be appointed by their countries. This may negatively impact upon the confidence of disputants before the Court in the independence and impartiality of court members, even where they do not sit on disputes involving businesses from their countries.**

Our findings show the need for continued sharing of information on the AfCFTA developments by the AfCFTA Secretariat with the African arbitration community. There is strong support for the establishment of a continental commercial court though respondents had reservations on how such a court will be constituted and operate and how its decisions will be enforced in African states. This issue requires further detailed investigation.

Conclusion

Our findings in our 2022 survey reveal that:
Practitioners involved in disputes or transactions with an Africa-connection for the most part continued their arbitrations during the Covid-19 pandemic through virtual communications and hearings and believe that the changes induced to their practice by the pandemic will become permanent fixtures of their practice.

Most respondents clearly understand the impact of climate change on their arbitration practices, and some are already taking steps towards mitigation and adaptation to the climate risks.

Most respondents confirmed that there is an exponential increase in the number and value of construction and infrastructure projects across the African continent; and that arbitration is the preferred dispute resolution mechanism though, they are seeing an increase in references to dispute boards and mediation.

Most respondents confirmed that the law of African states is primarily chosen as the governing law of construction and infrastructure contracts in these states and that there is also reliance on standard form contracts such as the FIDIC suite of contracts.

Most respondents confirmed that African technical experts are not generally used as experts in arbitrations arising from construction and infrastructure projects in Africa.

A fair number of respondents are aware of the AfCFTA and its protocols and those respondents expect the AfCFTA to drive an increase in intra-African trade in goods and services and, by extension, disputes. The majority of respondents think that such disputes should be resolved through arbitration.

Most respondents were supportive of the establishment of an African commercial court though some worry about the logistics of constituting such a court and the enforcement of its decisions.

The Team

The Lead Investigator is Emilia Onyema, who is a Professor of International Commercial Law at SOAS University of London where she teaches international commercial arbitration, international investment law, and commercial law in a global context. She is qualified to practice law in Nigeria, as a Solicitor in England & Wales, Fellow of the Chartered Institute of Arbitrators and an independent arbitrator. She convenes the SOAS Arbitration in Africa conference series and leads the SOAS Arbitration in Africa biennial survey research project. Her research interrogates the development of arbitration in Africa with focus on the development of international arbitration in Africa and the engagement of Africans in international arbitration.

Umran Chowdhury, LLM (SOAS University of London) provided research assistance and supported the collection of the data.

The online questionnaire was translated into the French language by Umran Chowdhury (SOAS University of London).

The online questionnaire was translated into the Arabic language by Maged Shebiata (SOAS University of London).

The online questionnaire was translated into the Portuguese language by Ana Coimbra Trigo and Mariana França Gouveia of PLMJ law firm: https://www.plmj.com/en/services/practice-areas/

Survey financial Sponsors

Pinsent Masons LLP, London: https://www.pinsentmasons.com/locations/africa#2

Broderick Bozimo & Co., Abuja: https://broderickbozimo.com/