



# Survey on Costs and Disputes Funding in Africa

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# Preface



It is indeed my pleasure to introduce the Survey on Costs and Disputes Funding in Africa released by the Africa Arbitration Academy (AAA) with generous support from the African Legal Support Facility (ALSF). This 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 survey is important given the value it provides to investors desirous of understanding the costs of disputes in Africa and will also be beneficial to users interested in the efficiency of dispute resolution process in the continent. By providing cross-cultural and independent views, readers of this survey will understand the current state of affairs in domestic and international dispute resolution in Africa. When we designed the survey, there was much that we wanted to know – there is an ongoing call for improving the efficiency of dispute resolution in Africa and understanding the costs and funding of disputes. We also wanted to know, based on the views of practitioners, using measurable objective criteria, which African jurisdictions are the most cost-effective and what key costs-saving measures can be introduced to make dispute resolution in Africa more efficient.

As research bears out, few empirical studies have documented the costs of dispute resolution. The reason for this is clear - companies are hesitant to provide data to researchers because of the significant 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 survey, indubitably, provides an empirical ballast and sheds light on how

businesses and stakeholders may approach costs of disputes in Africa – something which until now, was rarely explored. Also unexplored is an empirical data on third-party funding in Africa. The survey demonstrates that practitioners in Africa are familiar with third-party funding and other types of external funding mechanisms in litigation and arbitration. Most respondents have a positive perception of third-party funding, so there is a great potential for the development of third-party funding market in Africa – not least because of its access-to-justice producing effect.

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

Notably, the authorship of this survey report was made possible through the collective efforts of the team members, whose profiles are captured herein. Whilst the privilege of steering the team has been mine, a debt of gratitude is owed to the team members who assisted in designing the survey and writing this report.

We would like to thank Professor Dr. Mohamed Abdel Wahab for his important contributions, to ALSF for their generous support to the project and to all survey respondents and institutions that contributed to the success of this publication. We hope the survey will be useful to you and your practice, and we expect it to provoke further in-depth research on costs and dispute funding in Africa.

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# Executive Summary



In recent times, the increasing cost of resolving disputes has become very concerning. The astronomical cost of filing claims has given rise to a situation in which impecunious claimholders may be deprived of access to justice. Even companies with deep pockets now seek innovative ways of managing the costs of their dispute portfolios. More so, given the current economic realities in different countries, budgets for legal departments of small companies in general, are shrinking, and large corporates with ostensibly 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?

Furthermore, the most important considerations for prospective investors seeking to do business in Africa, is the costs of resolving disputes, and the factors that contribute to increasing costs. Governments, professional bodies and arbitral institutions are also interested in understanding users' perceptions on litigation and arbitration costs, as such perceptions are important for designing an efficient dispute resolution process.

The '2021 Survey on Cost and Dispute Funding in Africa' collates views from a diverse pool of participants including sole practitioners, associates and partners of law firms, in-house counsel, academics, third-party funders, representatives of arbitral institutions and other users of arbitration in Africa. It explores and evaluates the cost of disputes in Africa and identifies the different initiatives or models that may be introduced by governments and institutions to make dispute resolution more affordable and accessible.



## Cost of resolving disputes in Africa

- Majority of the Respondents agree that the choice of dispute resolution methods will impact the cost of disputes.
- More than half of the Respondents believed 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.
- 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 believe that the lack of subject-matter expertise of judges impacts litigation costs.
- 57% of the Respondents believe that mediation is a more cost-effective dispute resolution option than arbitration and litigation.



## Dispute Resolution Funding Options

- Dispute resolution funding is a trending phenomenon; its availability and legality vary, depending on the jurisdiction and enabling laws in that jurisdiction. Given the cut in the legal aid budget size in different jurisdictions, other funding options are, discernibly, open to deal with impecuniosity or cash-flow constraints – (a) legal expense insurance, (b) third-party funding, (c) loans, and (d) attorney financing (contingency and conditional fee arrangements).
- 71% of Respondents confirmed that 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 third-party funding is not legally regulated and not commonly used in their jurisdictions, while 21% of Respondents are not aware of third-party funding.
- Out of the funding options available in the various jurisdictions, legal aid, contingency and third-party funding are the most popular options.



## Factors impacting Dispute Resolution

- Many Respondents selected enforceability as the main consideration when negotiating dispute resolution clauses (21%) and this was closely followed by costs (20%).
- The Respondents are divided on the impact the Covid-19 pandemic on litigation and arbitration costs with 35% of Respondents voting in favour of no-impact and 25% of Respondents indicating that the pandemic has led to an increase in litigation and arbitration costs in their jurisdictions. Notably, 19% of Respondents stated that COVID-19 has decreased litigation and arbitration costs.
- The Respondents noted that the duration of legal proceedings in court cases is between 3-5 years (40%) while the average time for arbitration proceedings was pegged at 1-3 years by about 36% Respondents - thus confirming the fact that arbitration is indeed more efficient. Further, 60% of Respondents agree that delay in court proceedings drives up litigation costs.
- In comparing the cost of institutional arbitration to *ad hoc* arbitration, about 48% of Respondents believed that institutional arbitration is more expensive than *ad hoc* arbitration, while 31% of Respondents opted for “no significant difference”.
- When asked whether the system of hourly billing contributes disproportionately to litigation or arbitration costs, a significant majority of Respondents (68%) think hourly billing increases costs.



## 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 confirms this. As such, 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 the expertise that meets global standards. Respondents' choice of Nigeria and Kenya was driven by the fact that there is an availability of experienced

Nigerian and Kenyan arbitrators who are well known world-wide and sit in arbitrations involving different subject matters in various African countries. Additionally, because of the nature of disputes in African countries, Respondents are more comfortable if an arbitral panel is composed entirely of arbitrators who understand a specific country and the cultural issues central to or particular to the parties and the dispute.

- South Africa, Nigeria, Kenya, Rwanda and Egypt were ranked by the Respondents as the most cost-efficient African jurisdictions for international arbitration.
- Some Respondents revealed that they had conducted international arbitration in Kenya that took two (2) years to be finalized. Others expressed that the presence of streamlined institutional arbitrations in Egypt, Rwanda, Nigeria, Ghana and South Africa has made the process faster, hence saving time taken to conclude proceedings and in effect, reducing costs. Notably, Respondents stated that having the parties and tribunal domiciled in the same continent ensured cost efficiency without compromising on the quality of awards.
- Kigali, Cairo and Nairobi were identified as the most accessible cities owing to good transport connectivity. Respondents expressed their faith in the 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.
- 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 suggested that the use of technology (including artificial intelligence) can be introduced to make dispute resolution in Africa cost-efficient.
- Majority of the Respondents indicated that (a) there should be more jurisdictional recognition of third-party funding 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.

# Methodology



This is a structured online survey, composed of 30 open and closed questions which were circulated to Respondents across all regions of Africa and some non-African countries. The Respondents provided their answers using an online survey portal. Majority of the Survey responses were from 25 African countries (4 African regions) and 11 non-African countries.

The survey is aimed at properly retrieving accurate data from target Respondents including parties to disputes, legal practitioners, arbitrators, arbitration practitioners, arbitral institutions, third party funders etc., on litigation and arbitration costs, the impact of costs on dispute resolution, and the funding mechanisms available to parties in different African jurisdictions. The survey results are based on the individual experiences of the Respondents and familiarity with the dispute resolution systems in Africa.

An online questionnaire method was adopted because it is faster, economical and has a wider reach without territorial limitations. The design was made with user-friendliness in mind, and employs simple interface to motivate Respondents in completing the survey. Also, the survey portal significantly reduced the possibility of non-response errors, thus, increasing accuracy of the survey outcomes.



## Respondents

A total of 300 individuals responded to the survey, which was launched in July 2021. The highest number of responses from African countries were from Nigeria (77); Kenya (49); Egypt (37); Mozambique (27) and non-African countries were from England (11), United Arab Emirate (3); Jordan (2); Saudi Arabia (1); Switzerland (1), China (1), Bahrain (1); France (2); Spain (1); and Brazil (2).

Given the confidentiality concerns and the significant investment of time required in responding, the response rate is quite good. Responses to the qualitative questions shows that those who took the survey did so thoughtfully and reflect a fair representation of the different regions and legal traditions in Africa.



Figure 1: Table showing the number of respondents by Country.

No	Country	No of Respondents
1	Nigeria	77
2	Kenya	49
3	Egypt	37
4	Mozambique	27
5	Rwanda	11
6	United Kingdom	11
7	Tanzania	10
8	Ethiopia	7
9	Ghana	6
10	Uganda	6
11	South Africa	5
12	UAE	3
13	Zimbabwe	3
14	Ivory Coast	3
15	Cameroon	3
16	Senegal	3
17	France	2
18	Jordan	2
19	Tunisia	2
20	Morocco	2
21	Brazil	2
22	Benin	1
23	Zambia	1
24	Guinea	1
25	Lebanon	1
26	Libya	1
27	Liberia	1
28	Malawi	1
29	Sierra Leone	1
30	Spain	1
31	Bahrain	1
32	China	1
33	Angola	1
34	Saudi Arabia	1
35	Switzerland	1
36	Sudan	1

Figure 2: Column showing Respondents by African regions

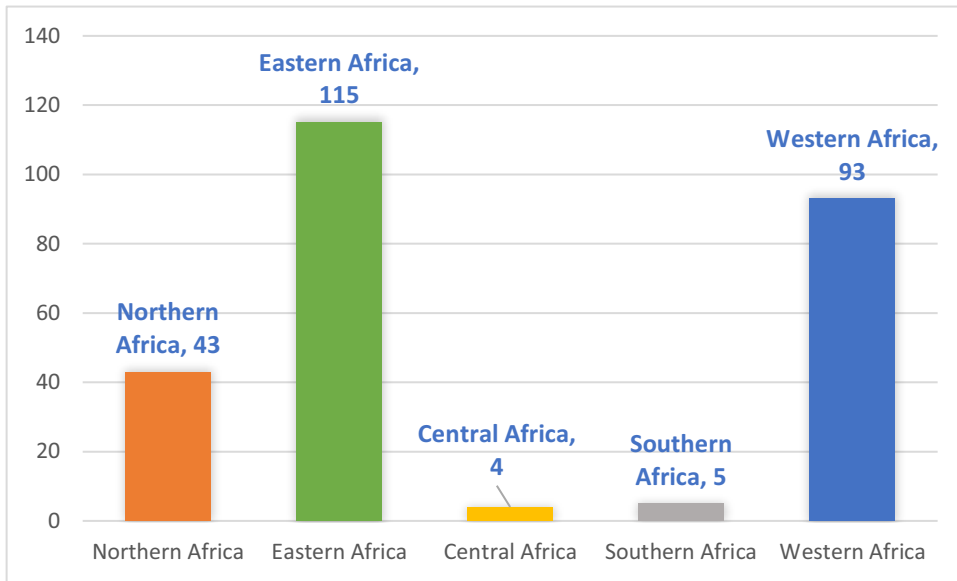
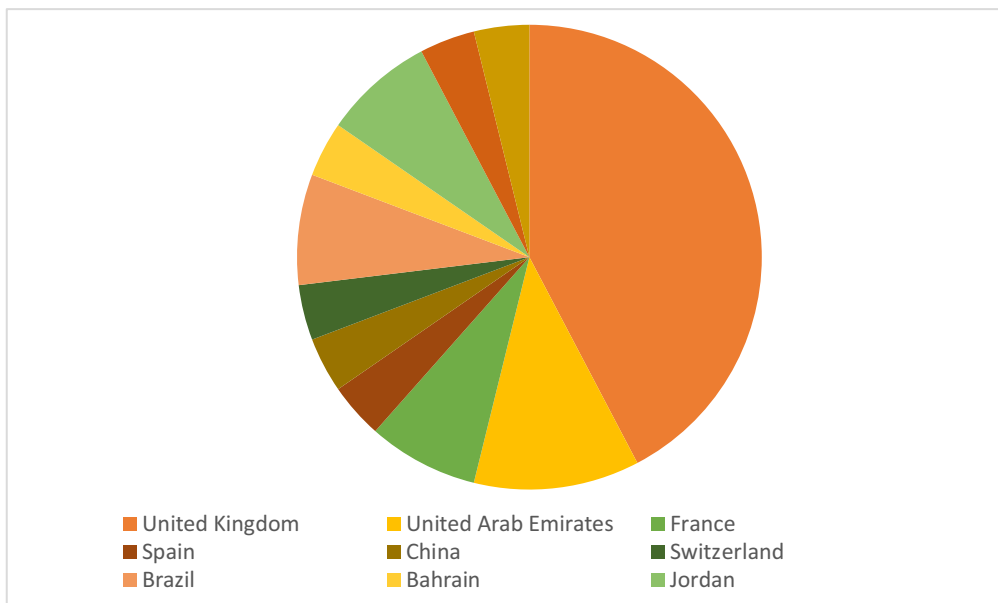
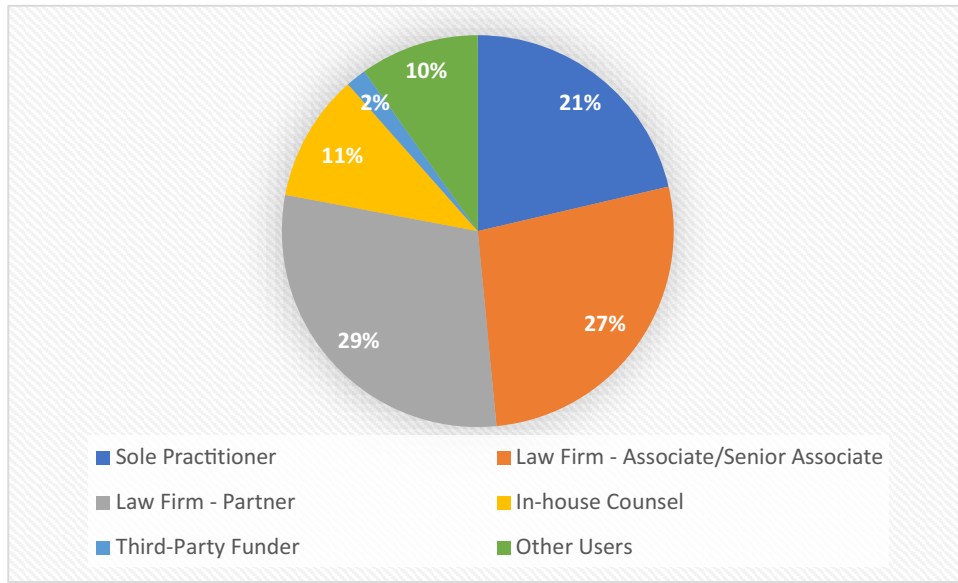


Figure 3: Pie Chart showing Respondents from non-African Countries.



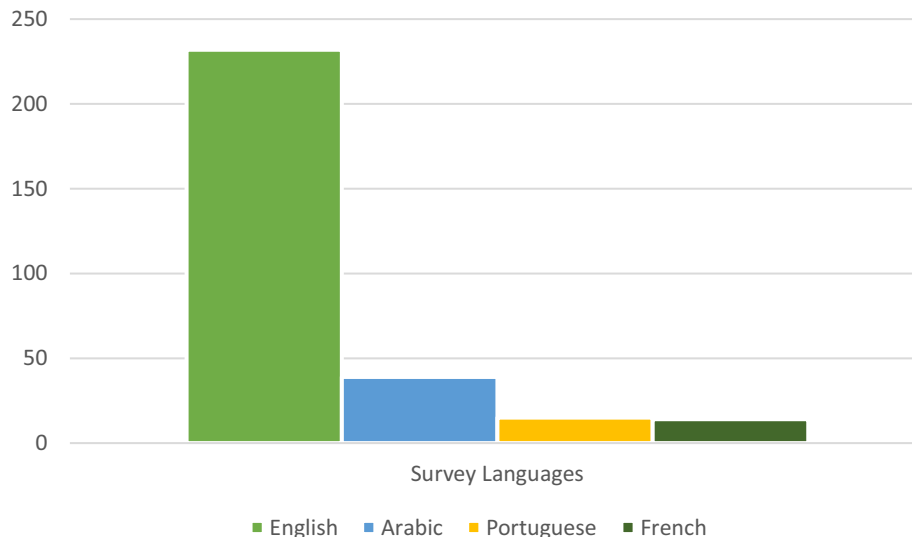
**Figure 4: Pie Chart showing profession of Respondents**



## Survey Languages

The survey was designed in 4 different languages - English, French, Arabic and Portuguese. This was to make certain that there is easy comprehension of the survey questions and to ensure inclusivity and diversity of opinions by the respondents. The survey format includes both quantitative and qualitative questions. 232 respondents completed the English version of the survey; 39 respondents completed the Arabic version; 15 Respondents completed the Portuguese version and 14 Respondents completed the French version. The way data collection was designed and administered contributes to the data quality.

**Figure 5: Column showing Respondents by language**



# Findings of the survey



## Part A Costs of resolving disputes in Africa

### 1 Litigation Costs vs. Arbitration Costs

One of the perceived advantages of arbitration as the preferred dispute resolution mechanism over litigation is its inexpensiveness. Traditionally, it was considered that arbitral proceedings take less time to conclude, resulting in reduced costs and expenses for parties. However, that attractiveness is waning as the costs of discovering, screening, and presenting detailed factual and technical evidence in arbitral proceedings can be unavoidably steep, such that valid and meritorious claims may never be commenced or conveniently proven.

This part of the Survey examines whether users of litigation and arbitration in Africa, consider the latter to enjoy an advantage over the former regarding costs. The Respondents were asked several questions and we have analyzed their responses below. The results show that some Respondents are generally skeptical of arbitration costs, particularly in large value claims.

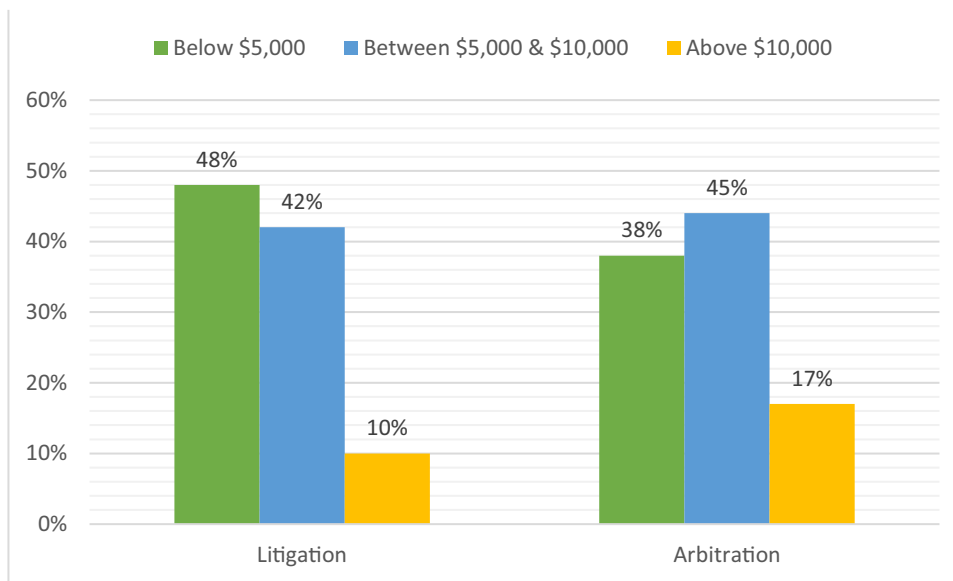
#### A. Respondents were asked to state, in general terms, the typical costs (excluding counsel fees) incurred in arbitration and litigation claims

##### (i) Claims with a value below USD\$100,000

As seen in Figure 6 below, majority of the Respondents (48%) were of the view that the costs incurred in litigation is less than \$5,000 where the claim value is below \$100,000; whilst majority of the Respondents (45%) consider the costs incurred in arbitration to be between \$5,000 and \$10,000 where the claim value is below \$100,000.

On the same question, 10% of the Respondents considered the costs incurred in litigation to be above \$10,000, while this figure rises to 17% in arbitration

**Figure 6: Column showing Respondents' perception of litigation and arbitration costs for claims below USD\$100,000**



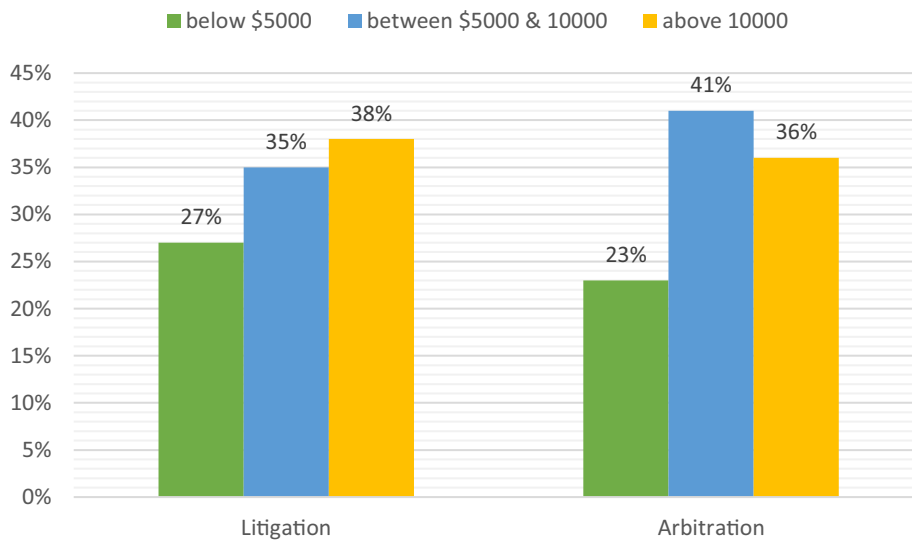
claims. Thus, majority of the Respondents believed that Litigation is cheaper than Arbitration for this category of claims.

#### **(ii) Claims with a value of USD\$100,000 and above**

In response to the question on litigation and arbitration costs in claims above \$100,000, Figure 7 demonstrates that majority of the Respondents (38%) considered the costs in litigation claims to be above \$10,000; whilst majority of the Respondents (41%) considered arbitration costs under this heading, as between USD\$5,000 and USD\$10,000.

It is important to note that there is no significant difference between the Respondents who considered litigation costs as between USD\$5,000 & USD\$10,000 and those who considered the costs as above USD\$10,000. This is similar to the responses regarding arbitration – which showed that litigation and arbitration costs under this heading, are even-stein.

**Figure 7: Column showing Respondents' perception of litigation and arbitration costs for claims above USD\$100,000**

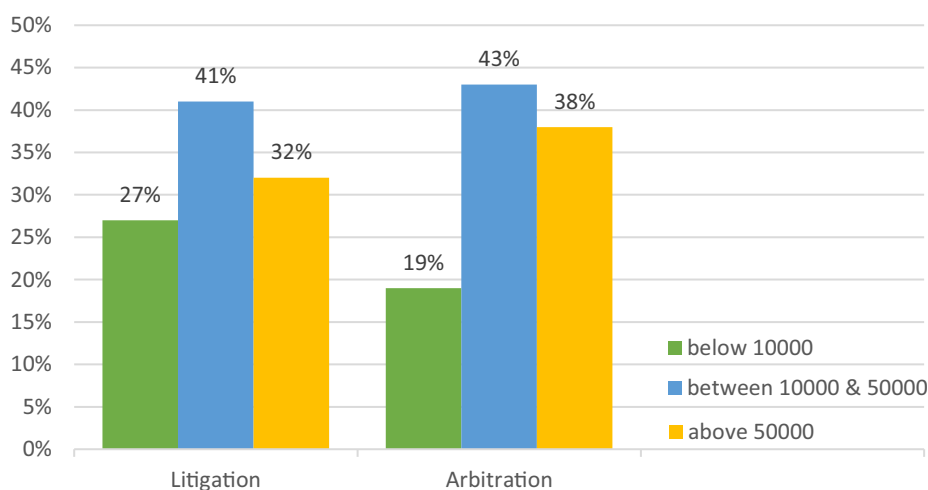


**(iii) Claims with a value of USD\$1,000,000 and above**

Regarding claims under this heading, Figure 8 below, shows that majority of the Respondents considered litigation and arbitration costs to be between \$10,000 and \$50,000. However, 32% of the Respondents considered litigation costs to be above USD\$50,000 while the value for arbitration costs is 38%.

As is clear to see from Figure 8, regarding claims with a value of USD\$1,000,000 and above, Respondents considered litigation claims to be cheaper than arbitration claims.

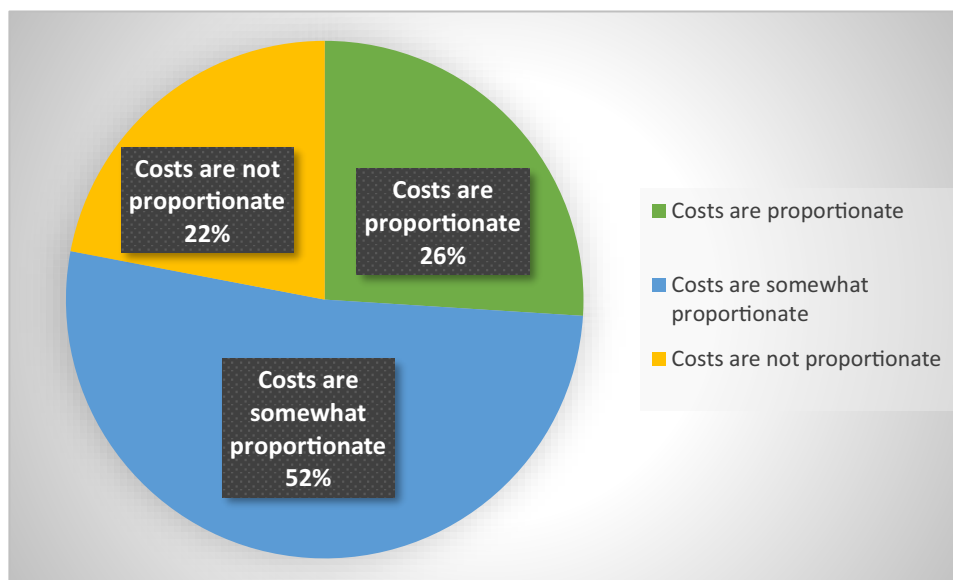
**Figure 8: Column showing Respondents' perception of litigation and arbitration costs for claims above USD\$1,000,000**



## Proportionality of Litigation and Arbitration costs to the value in dispute

The Respondents were asked whether litigation and arbitration costs are generally proportionate to the value in dispute. An overwhelming majority, specifically 52% of the Respondents were of the view that the costs incurred in litigation and arbitration proceedings are somewhat proportionate to the value of the claim in dispute. In this regard, it is worth noting that only 22 % of the Respondents find costs to be disproportionate to the value in dispute. Details of the responses are represented in Figure 9 below.

Figure 9: Pie Chart showing Respondents' perception on proportionality of Litigation and Arbitration costs to the value in dispute



The results in Figure 8 are consistent with the responses analyzed in Figures 6 - 8 above. We note that the responses are not clear-cut and that as the value of the **claims** in dispute increases, so do the costs incurred. For example, majority of the Respondents (45%) considered the costs incurred in arbitration to be between \$5,000 and \$10,000 where the claim value is below \$100,000. Same majority of the Respondents (41%) considered arbitration costs where the claim value is below \$100,000, as between USD\$5,000 and USD\$10,000. Where the claim value is above \$1,000,000, majority of the Respondents considered arbitration costs as being between \$10,000 and \$50,000. The implication from this data is that there is no increase in costs despite increase in claim value. This shows that costs are not proportionate or disproportionate with values of claims.

## 3

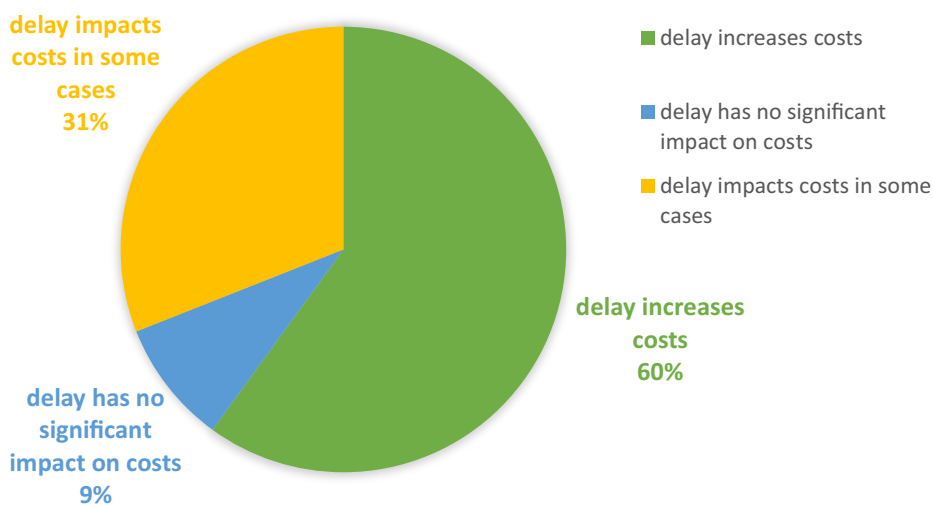
## Factors impacting litigation costs

### 3.1 Impact of delay in court proceedings on litigation costs

One of the key measures of the effectiveness and efficiency of the adjudicatory process is timeliness of adjudication, and it is one of the core values recognized by the International Framework for Court Excellence. It is doubtless that delays affect both the fairness and the efficiency of the judicial system, impede the public's access to courts, and in effect, weakens democracy and the rule of law. Also important for the effective and efficient administration of justice is reducing or sidestepping costs triggered by court delays. It is on this score that Respondents were asked to confirm whether delays in court proceedings impact litigation costs. For clarity, the extent of the increase in litigation costs caused by delay in court proceedings has not been considered in this Survey.

From the findings in Figure 10 below, the overwhelming response (60%) is that delay in court proceedings affects litigation costs. Some Respondents (31%) voted however that delay impacts costs only in some cases, while fewer Respondents (9%) voted that delay has no significant impact on costs.

Figure 10: Pie Chart showing Respondents' perception on the impact of delay on litigation costs



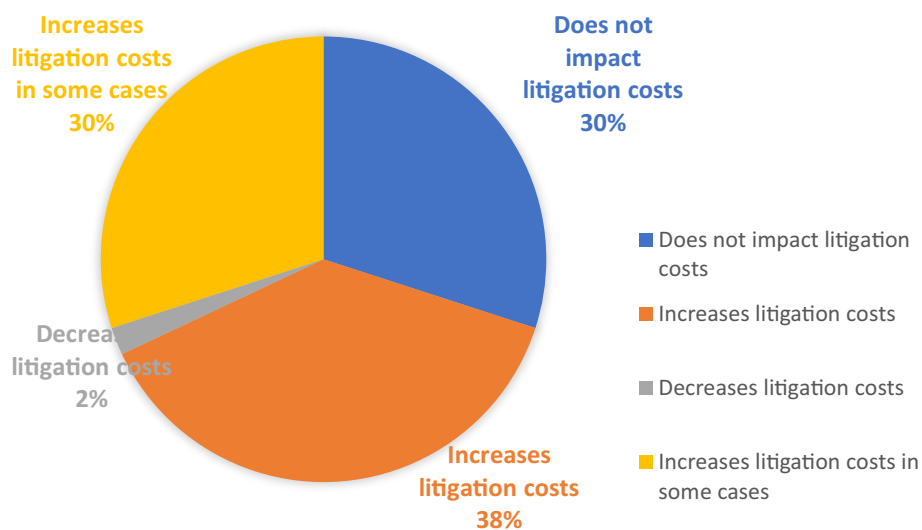


### 3.2 Lack of subject-matter expertise of Judges

Another important consideration for the effective and efficient administration of justice is the technical expertise of the judge or his / her familiarity with the subject matter of the dispute. The Respondents were asked whether the lack of subject-matter expertise of the judges impacts litigation costs. The responses captured in Figure 11 below, shows that the lack of subject-matter expertise of judges increases litigation costs generally. However, there is a close call between the number of Respondents who considered that lack of subject matter expertise of judges does not increase litigation costs and those who believe that the increase only occurs in some cases.

It bears noting that the extent of increase in litigation costs occasioned by the lack of subject matter expertise of judges was not considered in this Survey.

Figure 11: Pie Chart showing Respondents' perception on the impact of lack of subject-matter expertise of judges on costs



## 4

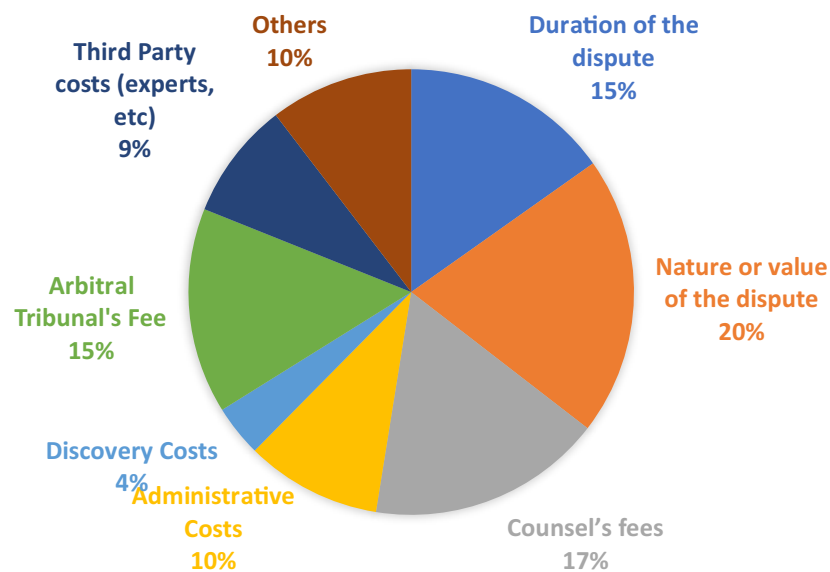
### Factors that drive up Arbitration costs

In the past few decades, arbitration has become a mainstay in resolving disputes and its use is burgeoning in Africa. Despite its advantages over litigation, arbitration is increasingly being criticized due to its rising costs. Given the need to sustain the attractiveness of arbitration as a dispute resolution mechanism of choice

in Africa, it is necessary to consider the factors that drive up costs.

Respondents were asked to select the factors that drive up arbitration costs in their jurisdictions. As seen in Figure 12 below, the most significant factors ranked from highest to lowest are: the nature or value of the dispute; counsel fees; duration of the dispute; and Arbitral Tribunal's fees. The least significant factors are discovery costs and others.

**Figure 12: Pie Chart showing Respondents' perception on factors driving up the arbitration costs**



## 5 Impact of COVID-19 pandemic on Litigation and Arbitration Costs

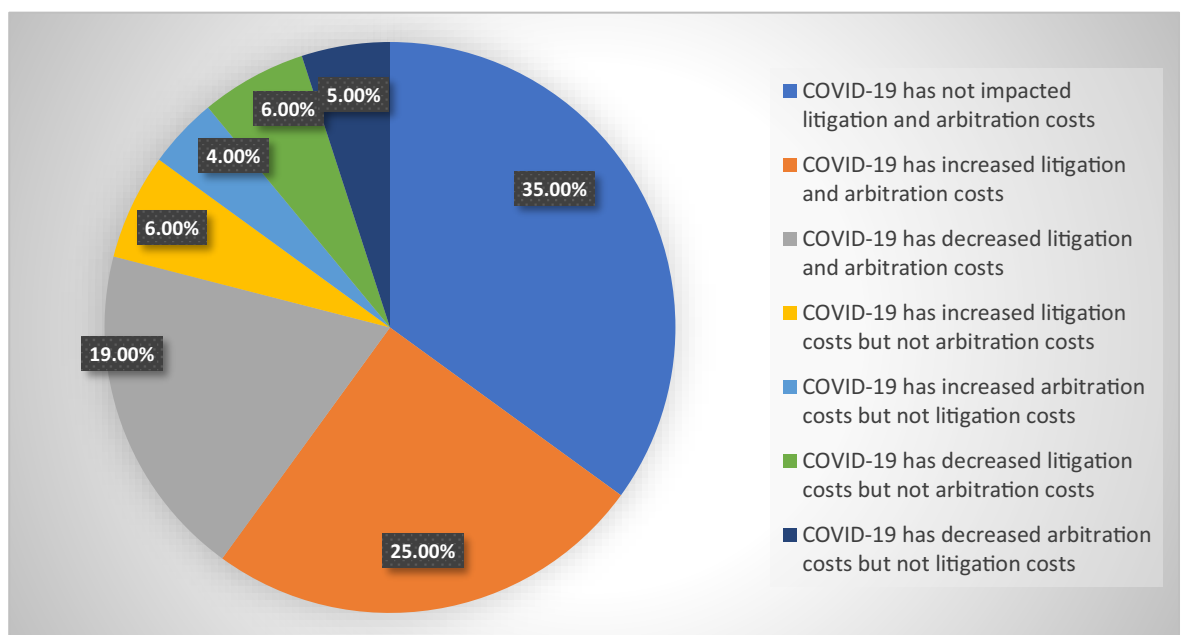
The rapid spread of the unprecedented COVID-19 pandemic has affected all facets of life including the dispute resolution landscape. Its economic shockwaves are profound, and the impact was felt from Nairobi to Lagos as large swaths of the economy were grounded to a halt. Parties to disputes and other stakeholders were forced to develop and adopt virtual methods of conducting proceedings for both litigation and arbitration. As this was not foreseen, it is important to consider whether the COVID-19 pandemic has significantly impacted litigation and arbitration costs.

The survey findings reveal that the majority of Respondents believed COVID-19 has not impacted litigation and arbitration costs. This is closely followed by those

who believe that COVID-19 has increased costs in both litigation and arbitration while the third level of Respondents believed that COVID-19 has decreased arbitration and litigation costs.

Considering the impact on the cost of litigation and arbitration separately, the numbers are far smaller as Respondents have voted almost 50-50 in favour of either an increase or decrease in litigation and arbitration costs respectively. Figure 13 below contains a breakdown of these findings.

**Figure 13: Pie Chart showing Respondents' perception on impact of COVID-19 pandemic on litigation and arbitration costs**



## 6

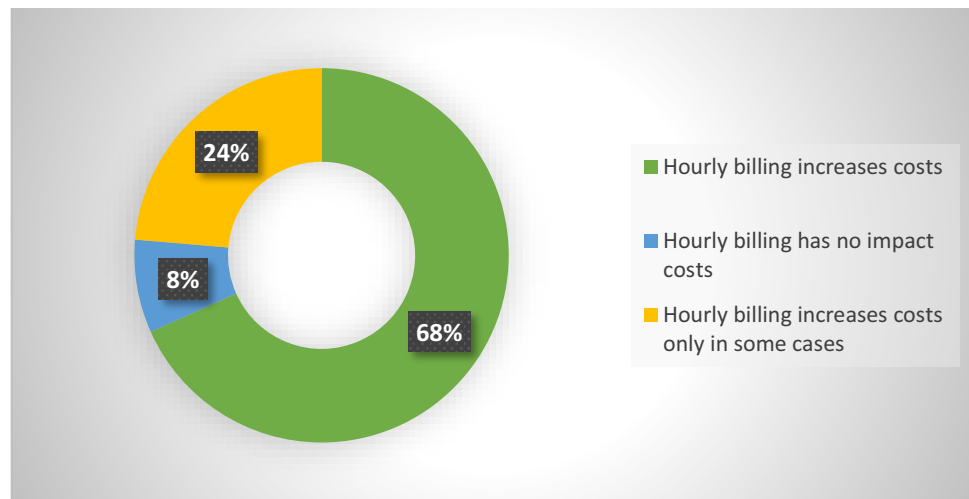
## Impact of Hourly billing system on Litigation or Arbitration costs?

The rapid spread of the unprecedented COVID-19 pandemic has affected all facets of life including the dispute resolution landscape. Its economic shockwaves are profound, and the impact was felt from Nairobi to Lagos as large swaths of the economy were grounded to a halt. Parties to disputes and other stakeholders were forced to develop and adopt virtual methods of conducting proceedings for both litigation and arbitration. As this was not foreseen, it is important to consider whether the COVID-19 pandemic has significantly impacted litigation and

arbitration costs.

The survey findings reveal that the majority of Respondents believed COVID-19 has not impacted litigation and arbitration costs. This is closely followed by those

**Figure 14: Pie Chart showing Respondents' perception on impact of hourly billing on litigation and arbitration costs**



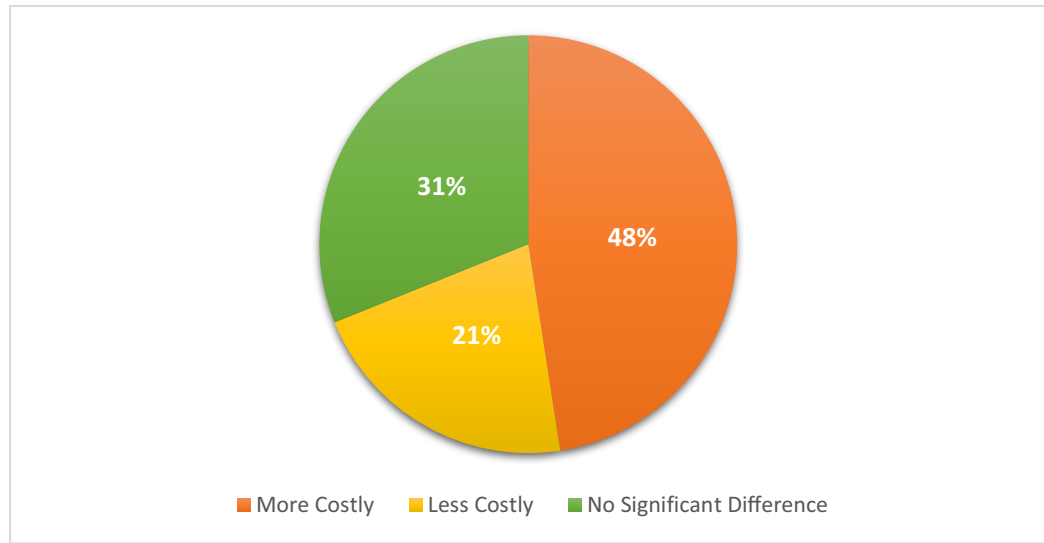
## Institutional Arbitration v. *Ad hoc* Arbitration

Arbitration proceedings may be administered by an arbitral institution or conducted on an ad-hoc basis (i.e. without an institution administering the dispute). Financial efficiency of the proceedings is one of the reasons that parties choose ad hoc arbitration. However, the argument that ad hoc proceedings are more economical than the ones administered by an arbitral institution may not always be accurate. To confirm the perception, based on the experience of the Respondents, a question was asked whether institutional arbitration is more expensive than ad hoc arbitration.

In affirming the general perception above, majority of Respondents (48%) voted that institutional arbitration is more expensive than ad hoc arbitration. 31% of Respondents considered that there is no significant difference between the two, while 21% consider institutional arbitration to be cheaper than ad hoc arbitration.

It is likely that majority of the Respondents considered the additional costs associated with institutional arbitrations. Specifically, the administrative costs charged by the arbitral institutions administering the dispute which are calculated differently depending on the institution handling the dispute and the methodology adopted.

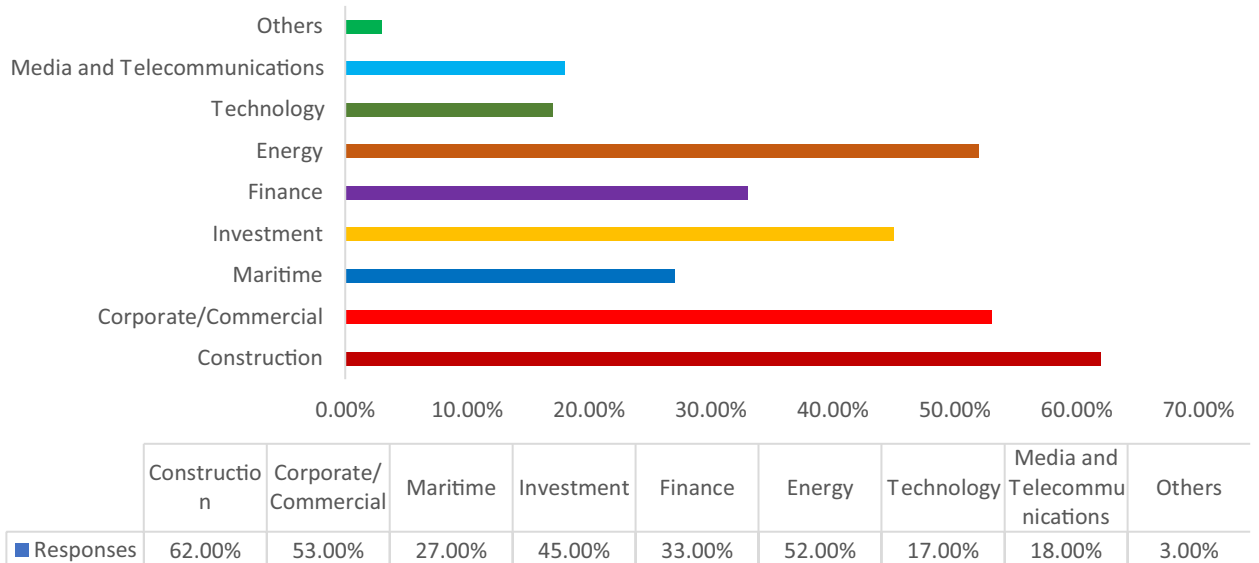
**Figure 15: Pie Chart showing Respondents' perception on cost of Institutional Arbitration v. *Ad hoc* Arbitration**



## Sectors where disputes are more expensive

Having compared litigation and arbitration costs, it is important to identify the sector where disputes are more expensive. As shown in Figure 16 below, Respondents believed that construction sector disputes attract the highest costs in comparison to all other sectors. Following the construction sector are disputes relating to corporate/commercial and energy and investment sectors respectively. The sectors where disputes are least expensive are technology, media & telecommunication and others.

**Figure 16: Bar Chart showing Respondents' perception on sectors where disputes are more expensive**



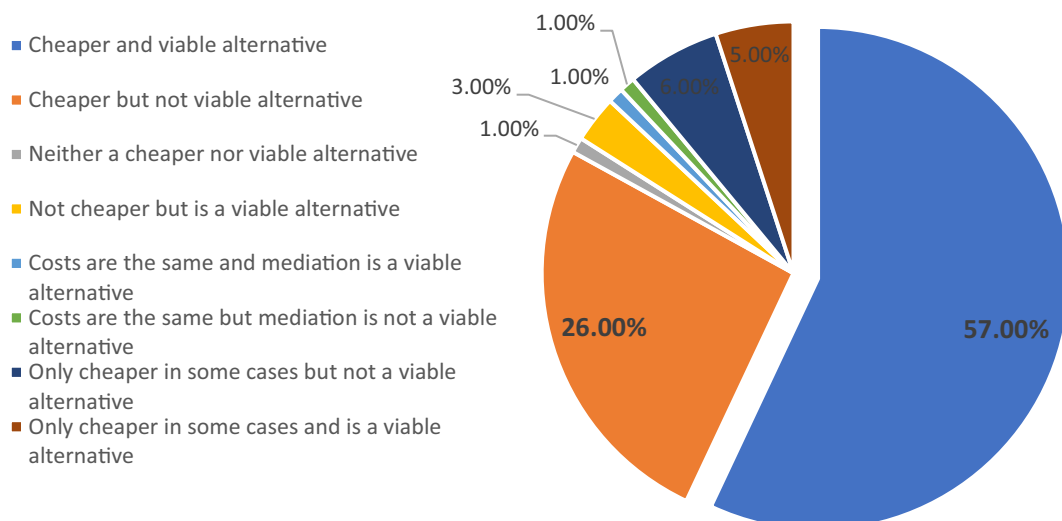
## Mediation as a cheaper and viable alternative to Litigation and Arbitration

Mediation, as a dispute settlement mechanism, has gained traction in recent years. Different jurisdictions in Africa have started establishing court-affiliated ADR centres, where court cases that are amenable to ADR are referred by the courts to mediation. At the global level, mediation is also gaining popularity through the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) (adopted on 20th December 2018) which seeks to ensure the enforcement of international commercial settlement agreements resulting through mediation. While it was opened for signature on 7th August 2019, the Singapore Convention has only been ratified by a few countries so far. Notably, only a few African countries have signed the Singapore Convention.

Given the general perception on the rising costs of litigation and arbitration, it is important to consider whether mediation is in fact a less expensive and a viable alternative to litigation and arbitration. The Respondents were asked whether they considered mediation to be a cheaper and viable alternative dispute resolution method to litigation and arbitration.

As shown in Figure 17, most Respondents (57%) considered mediation to be both a cheaper and a more viable alternative to both litigation and arbitration. It is also worth noting that even where Respondents consider mediation not to be a viable alternative, a significant number of Respondents (26%) still consider mediation to be a less-expensive alternative.

**Figure 17: Pie Chart showing Respondents' views that Mediation is a cheaper and viable alternative to Litigation and Arbitration**



## Part B Dispute Resolution Funding Options



One of the most important considerations for parties when selecting a dispute resolution mechanism and planning a case strategy is cost. With the increasing cost of disputes particularly in arbitration, costs have remained a major concern with practical implications. These include limiting the ability of a claimant with an otherwise strong legal position from being able to procure the required services (including counsel, experts etc.) and in many cases, shutting such claimant out altogether. In the aftermath of the COVID – 19 pandemic and the resultant economic effects, this challenge has become even more profound.

Indeed, there are good reasons why an individual or corporate involved in a dispute will require funding options to pursue its claim or defend an adverse case. For an impecunious party, having access to funding could be and is usually critical to their ability to be successful in adversarial proceedings. However, due to balance sheet related reasons, a temporary liquidity crunch, or simply the desire of having a non-recourse financing option, even buoyant parties could also and often opt for funding options. This inevitably brings up the issue of access to justice, a major pillar in the administration of justice. The use of Third-Party Funding (TPF) has therefore become increasingly popular, with courts across the major arbitration seats giving judicial approval to funders as a means to improving access to justice.

Across the world, many governments have legal aid budgets to support impecunious parties with a view to providing opportunity to the right resources in contentious proceedings. This makes access to justice the primary consideration for seeking third party funding and is a good option for the overreaching principles of equality of parties and justice. However, such public sector provisions are neither adequate, nor easily accessible particularly in Africa where there are significant financing and budget constraints.

While discussions along these lines have barely reached their maturity, indeed regulation and commercial funders are still very much at their nascent stages in Africa. This survey seeks to provide a comprehensive overview of the dispute resolution funding options available in Africa. Through the lens of the Respondents across the continent, we highlight the availability and suitability of the available options in the context of access to justice.

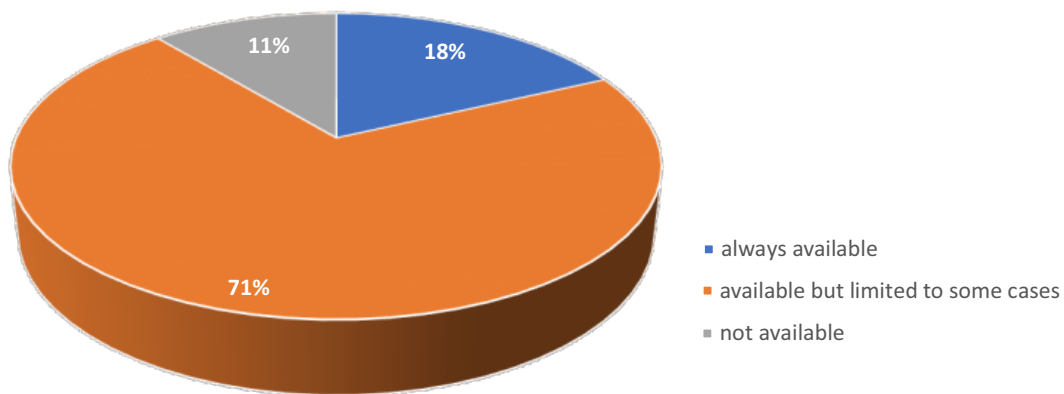
As we shall soon see, the Respondents were asked a number of questions under this theme. Specifically, in relation to whether dispute funding options exist, are accessible or are effective in their respective jurisdictions.

## 1 Availability of legal aid in African jurisdictions

Legal aid is the provision of assistance to people who are unable to afford legal representation and access the court system. It is regarded as central in providing access to justice by ensuring equality before the law. The Respondents were asked to confirm whether legal aid is available in their jurisdictions. From the results shown below, 18% of the Respondents noted that legal aid is always available in their jurisdiction, while 11% indicated that it is not available. Notably, a significant number of Respondents (71%) from countries including Senegal and the Ivory Coast, indicated that legal aid is only available in limited cases.

This shows that the vast majority of African countries have legal aid only for specific types of cases. It is important to note that most of the Respondents who indicated that legal aid is always available are from north African countries such as Egypt, Tunisia and Morocco.

**Figure 18: Pie Chart showing Respondents' perception on availability of legal aid in African jurisdictions**



## 2 Claim funding options available in African jurisdictions

There is a menu of funding arrangements available to a claimholder who seeks external financing of a claim. The claimholder may approach a specialized funder or financial institution for a loan, either of the traditional sort or non-recourse financing, where repayment is contingent upon the success of the case. In addition, a legal claim can be transformed into a financial asset, which can potentially be monetized or used as collateral in order to secure finance. These funding options include legal expense insurance; loan; contingency fee arrangement; conditional



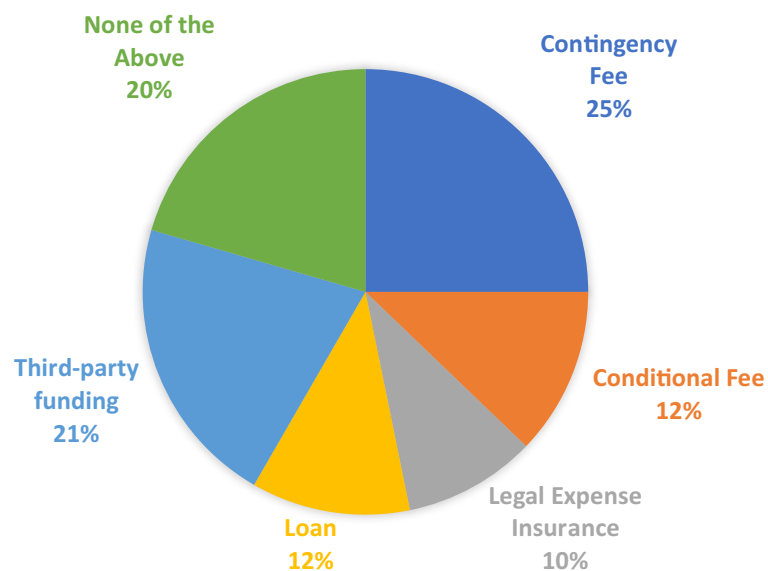
fee arrangement and TPF. What is common to all alternative financing models is the provision of external capital to cover arbitration or litigation costs. Each funding type has its own the distinct characteristics and by analyzing them, a corporation can identify which model is best suited for its claim funding shortfall.

The results in Figure 19 below show that there is a variety of funding options for litigation and arbitration claims in Africa. Notably, contingency fee arrangements between counsel and clients are commonplace as 25% of the Respondents affirmed availability of this option in their jurisdictions. South Africa, Malawi and Zambia are some of the countries where Respondents confirmed contingency fee arrangements are available.

While there is currently no regulatory framework for TPF in Africa and despite the common law prohibitions of champerty and maintenance, 21% of the Respondents confirmed that TPF is available in their jurisdictions. This is an important development and great potential for the future of the funding market in Africa. Conditional fee arrangements and loans also feature prominently in the outcome of the survey. 12% of Respondents noted that conditional fees and loan arrangements are available in their jurisdiction to fund litigation and arbitration costs.

In relation to legal expense insurance, 10% of Respondents indicated its availability in their respective jurisdictions. Importantly, 20% of the Respondents indicated that none of these commercial funding options are available in their jurisdiction. This represents about a quarter of the Respondents and demonstrates a gap in the disputes funding market in Africa.

**Figure 19: Pie Chart showing Respondents' perception on the claim funding options available in African jurisdictions**



## 3

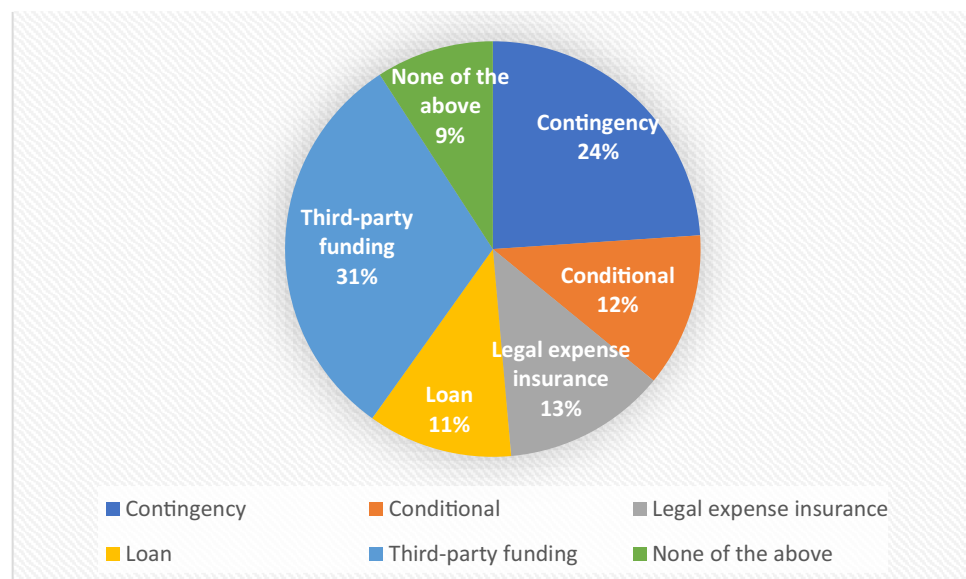
## Preferred Claim funding option by Respondents in Africa

Here, the survey seeks to obtain the views of the respondents as to their preferred funding option where there is a meritorious claim without funds to prosecute the claim. As is clear from the results in Figure 20 below, 24% of Respondents indicated that they would opt for contingency arrangements while 11% preferred to obtain claim financing by way of loans. Conditional fees and legal expense insurance also featured with 12% and 13% respectively, and 9% of the Respondents would not consider any of these options.

What is most striking from the outcome of the survey under this section, is that the majority of the Respondents (31%) indicated a preference for TPF. This clearly shows a huge appetite for TPF in Africa particularly when compared with the statistics on availability of the funding option in Africa. The outcome clearly indicates that TPF is the preferred funding option for Respondents on the continent. The review of individual responses show that Nigeria and Kenya are at the forefront of the quest for TPF regarding their disputes.

From a regional perspective, East Africa has also come out strongly in the results, as countries such as Kenya, Rwanda and Tanzania show great desire for TPF as a funding option. The same is true of West Africa, especially in countries like Nigeria and Ghana.

Figure 20: Pie Chart showing Respondents' preferred claim funding option



## 4

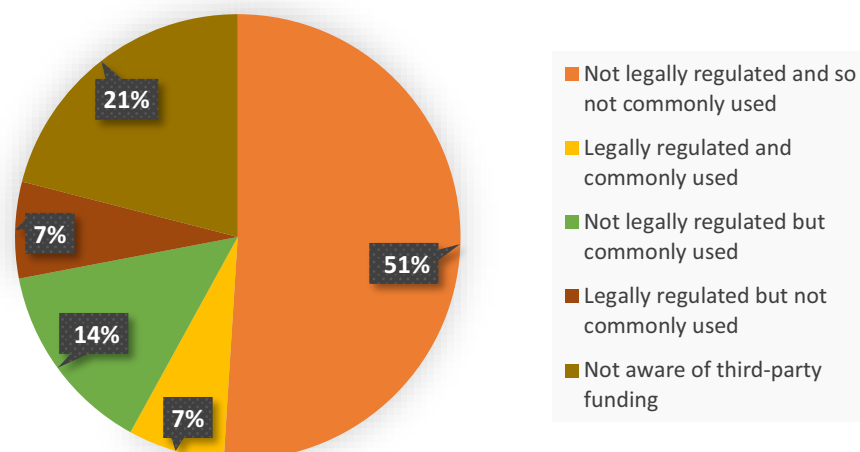
## Regulation of Third-party funding in African jurisdictions

Under this heading, the survey seeks to identify the regulation of TPF in Africa as well as the popularity of its use on the continent. As the results show, the predominant view, held by 51% of the Respondents is that TPF is not commonly used given that it is not legally regulated. However, 14% of Respondents indicated that it is commonly used notwithstanding its non-regulation. Additionally, only 7% of Respondents noted that TPF is legally regulated in their jurisdictions and commonly used, while 7% of Respondents indicated that TPF although legally regulated is not commonly used. Finally, 21% of Respondents are not aware of TPF.

In terms of specific outcomes, common law countries, notably Nigeria and Kenya lead the pack with majority of Respondents from these jurisdictions indicating that TPF is not legally regulated and is not commonly used in both Jurisdictions. This is consistent with the outcome from civil law countries such as Egypt and Ivory Coast. By the percentage of Respondents indicating the common use of TPF despite its non-regulation, and the statistics for the lack of its use due to non-regulation, it is clear that affirmative legislation is imminent in the respective jurisdictions in Africa allowing TPF.

Currently, Nigeria and Sierra Leone are the only African countries that are seeking to introduce permissive statutory framework in the legislative bills to amend their arbitration laws. Figure 21 below shows responses on regulation of TPF in African jurisdictions.

Figure 21: Pie Chart showing responses on regulation of TPF in African jurisdictions



## Part C Factors Impacting African Disputes

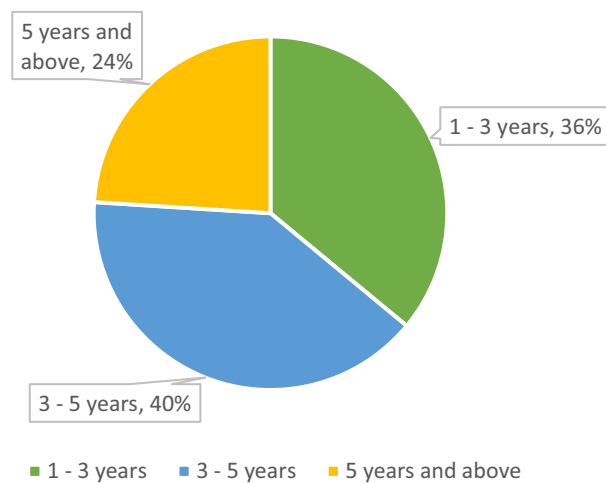


### A Duration of litigation and arbitration proceedings

A key barometer for measuring the effectiveness and efficiency of Courts and tribunals, is timeliness of adjudication. The relationship between the time taken to adjudicate cases and perception of whether justice has been served is one of dated antiquity – often encapsulated in the maxim “justice delayed is justice denied”. This maxim essentially reiterates the generally accepted notion that timeliness of adjudication is central to the efficiency and effectiveness of the judicial system. It is generally accepted that delays affect both the fairness and the efficiency of the judicial system, discourages resort to courts, and in effect, weakens the rule of law. Ensuring timeliness, thus, entails eliminating delays to the normal course of the adjudicatory process. In this regard, the respondents were asked to comment on the average duration of court and arbitration proceedings in their jurisdictions.

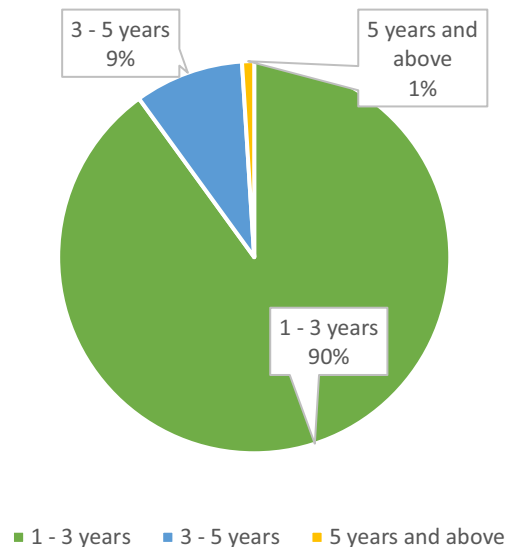
As shown in Figure 22, with respect to court proceedings, 40% of the Respondents believed that on average, court proceedings take 3 - 5 years to complete. 36% of the Respondents were of the view that on average, court proceedings take 1 - 3 years and 24% of the Respondents were of the view that court proceedings take at least five 5 years and more. It is important to note that majority of respondents who completed the Arabic Questionnaire (from Egypt, Libya, Sudan, and Morocco) state that court proceedings take 1 – 3 years, showing efficiency of proceedings in these countries.

**Figure 22: Pie Chart showing responses on duration of court proceedings in Africa**



Conversely, Figure 23 below shows that there was a larger consensus among the Respondents when asked a similar question in relation to arbitration proceedings. 90% of Respondents were of the view that arbitration proceedings take 1 - 3 years to completion. 9% of Respondents were of the view that such proceedings take 3 - 5 years and only 1% of Respondents state that arbitration proceedings take 5 years and more.

**Figure 23: Pie Chart showing responses on duration of arbitration proceedings in Africa**

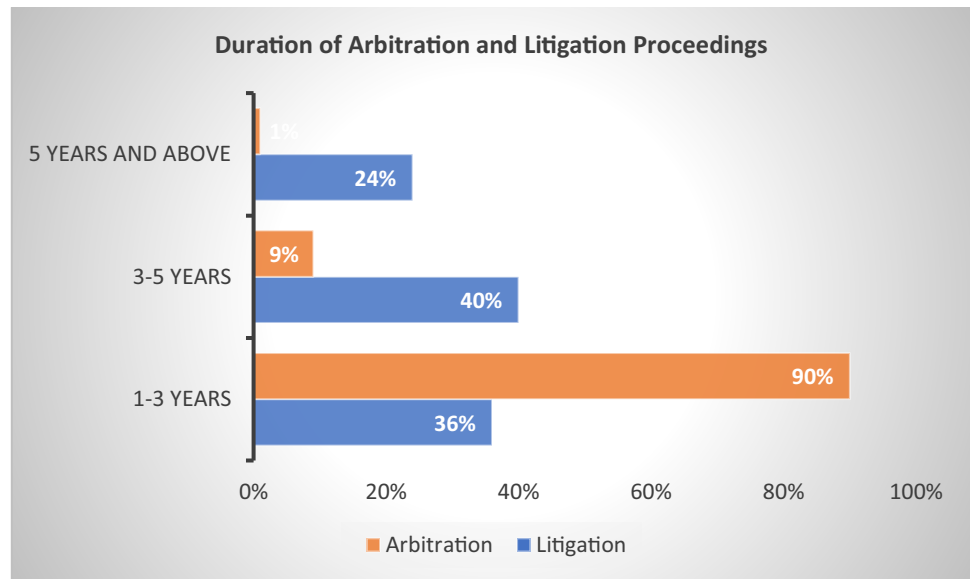


It is plain to see that practitioners across several African jurisdictions agree with the common perception that arbitration proceedings enjoy greater time efficiency. This is likely to be the result of several factors including:

i (i) local courts are plagued by a huge backlog of cases attributable to several factors such as lack of subject matter expertise of judges; inadequate training of judicial officers and staff, and limited investment in and funding of judicial infrastructure including technology to assist with electronic case management system; and

i (ii) in arbitration proceedings, the parties enjoy a greater flexibility to specify the rules of procedure which will govern their proceedings. In exercising this right, the parties will provide for, in their arbitration agreement, or identify rules which set out the timelines for which the parties must file their documents, conduct the hearing and have the award delivered. Court proceedings do not enjoy such flexibility and the progress of matters is susceptible to several delays.

Figure 24: Bar Chart showing comparison in duration of litigation and arbitration proceedings in Africa



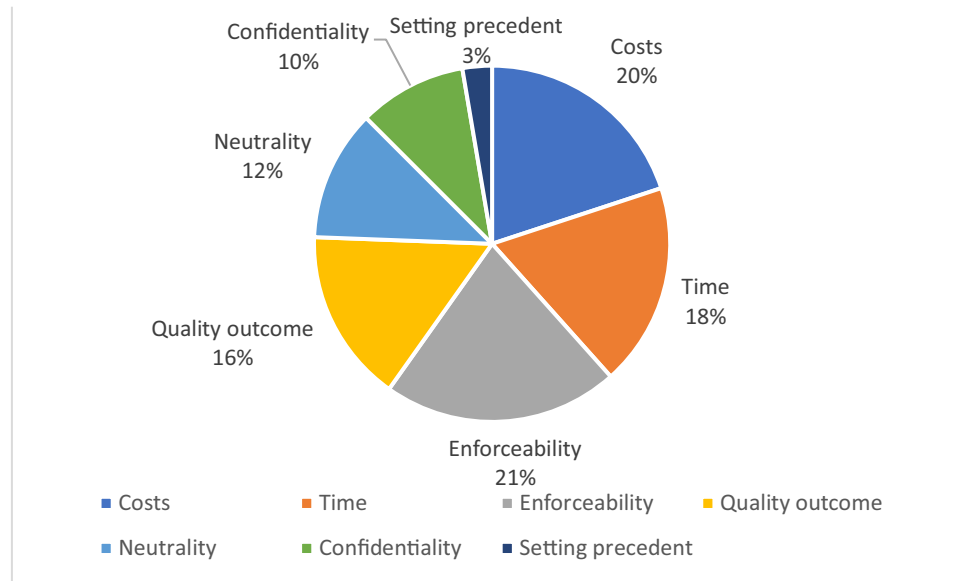
## B

## Main considerations when negotiating dispute resolution clauses

Respondents were asked to indicate the main considerations when negotiating dispute resolution clauses. Their responses are demonstrated in Figure 25 below. As seen in this chart, the main consideration for parties is the enforceability of the outcome of the proceedings. The second factor considered by the parties is costs, closely followed by the time taken to resolve disputes. Interestingly, many of the respondents (except for those in the Arabic speaking countries) do not consider the quality of the decision as a priority since it was the fourth highest factor considered by the parties. These responses demonstrate a bias towards resolving disputes through arbitration since as is discussed in this Report, arbitration is viewed as a more cost effective and efficient dispute resolution mechanism.

Interestingly, the second highest factor of concern to most Respondents that completed the Arabic questionnaire is not costs but the quality of the outcome. Neutrality and costs were considered equally as the third highest factors when negotiating dispute resolution clauses. It appears that the time (duration of proceedings) is not a top priority for practitioners in Arabic speaking countries. It is arguable that the Respondents in these jurisdictions do not consider duration as a factor given, as reported above, most of the respondents were of the view that both court and arbitration proceedings are expeditiously determined - being completed within 1 - 3 years.

Figure 25: Pie Chart showing main considerations when negotiating dispute resolution clauses



## Part D Driving Efficiency in African Disputes



Efficiency is one of the cardinal elements that drives cost in international disputes. Arbitration in particular has grown increasingly expensive with sophisticated and high-stake disputes emerging. What is of utmost interest to parties is the efficiency of the dispute settlement proceedings with a view to achieving a favorable outcome at reasonable cost. This part of the survey seeks to receive the views and perspectives of Respondents on the efficiency of international arbitration in Africa.

Under this theme, the Respondents have been asked questions relating to how disputes in Africa can be more efficient and the cost-saving measures that can be introduced by government and institutions to improve efficiency of the process. We also look at the top cost-effective African jurisdiction for resolving disputes and asked the Respondents on what in their views are the critical success factors for efficiency.



### The key cost-saving measures for Africa related disputes

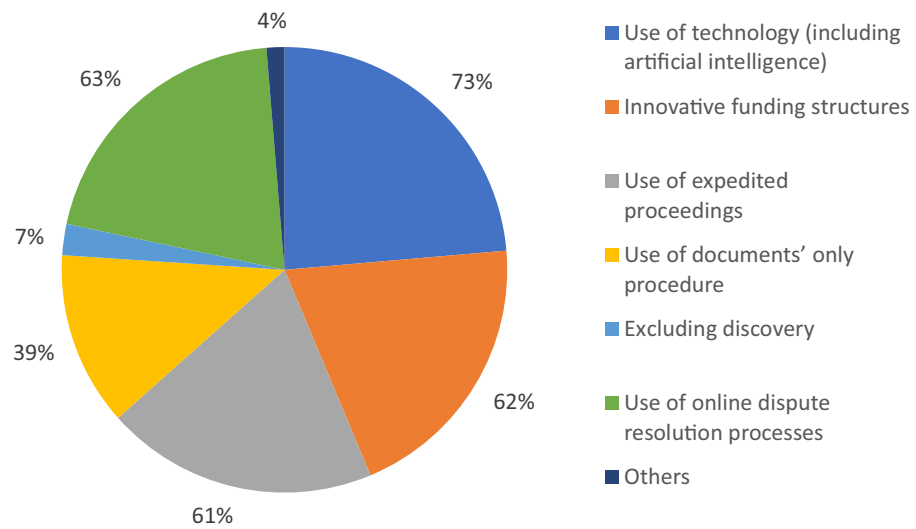
The results shown in Figure 24 below indicate that 73% of the Respondents believed that the use of technology (including artificial intelligence) is a key driver of efficiency in dispute resolution in Africa. Use of online dispute resolution (closely associated with the use of technology), accounts for about 63%, the use of expedited proceedings and innovative funding structures closely follow with 61% and 62% respectively.

Figure 26 also shows that 39% of the Respondents preferred limiting written procedure and the use of document's only procedure. Developing arbitrators' scale of fees, enforcement of awards and mediation also featured, albeit less prominently.

What is clear from the results of this survey is 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 confirm this fact. As such, efficiency will be driven by technology and 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.



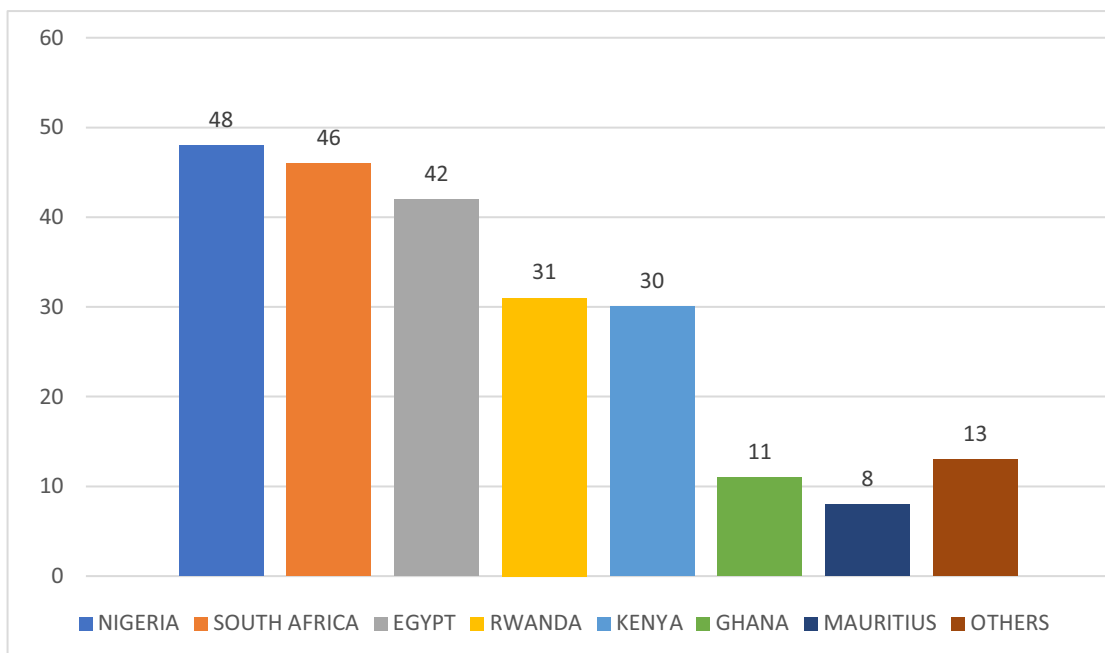
Figure 26: Pie Chart showing key cost-saving measures for efficiency of African disputes



## 2 What are the three most cost-efficient jurisdictions for international arbitration in Africa?

Under this heading, the Respondents were asked to indicate three African jurisdictions that are most cost-efficient for international arbitration. The main jurisdictions selected by the Respondents are - Nigeria (48), South Africa (46), Egypt (42), Rwanda (31), Kenya (30), Ghana (11), Mauritius (8) and others (13) - including Ethiopia (2), Mozambique (3) Zimbabwe (2) Senegal (1), Uganda (1), Benin (1), Namibia (1) respondents.

Figure 27: Pie Chart showing jurisdictions considered cost efficient for arbitration Africa



**The Respondents advanced the following reasons for their choices in Figure 27 above:**

**(a) Friendliness of the seat:** This relates to several aspects of court intervention/court support for the arbitration process, role of the court to recognize and enforce an arbitral award and generally the legal infrastructure of a jurisdiction. An arbitration friendly seat means the neutrality and impartiality of the local legal system; national arbitration law; and track record for enforcing agreements to arbitrate and arbitral awards. Thus, legislation plays a key role in development of an arbitration friendly seat. All the choices listed in Figure 21 above have ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and adopted the UNCITRAL Model Law; an essential step to an arbitration jurisdiction achieving a level of acceptance internationally.

Respondents chose Kenya, highlighting that the arbitration systems are well laid out in their legal framework, particularly the Constitution of Kenya 2010, the Arbitration Act of 1995 (which mirrors Model law with amendments) and the Nairobi Centre for International Arbitration Act 2013.

South Africa was selected for its legal framework, which includes the International Arbitration Act of 2017 – with provisions modeled after the UNCITRAL Model Law and further aligns the country's national law with the New York Convention. The Act supports both tribunal and court ordered interim measures (Article 17 of Schedule 1).

Mauritius was highlighted as a stable, accessible, reliable, efficient, and neutral arbitration seat with an international arbitration law, set forth in the International Arbitration Act 2008 (based on UNCITRAL Model Law) and a supportive judiciary system.

In Nigeria, the principal legislation that governs arbitration is the Arbitration and Conciliation Act 1988, Laws of the Federation of Nigeria 2004 Cap A18 (ACA) which is the federal statute modelled on the UNCITRAL Model Law. Section 34 of the ACA provides for the policy of minimal judicial intervention in arbitration matters.

The Egyptian courts are generally viewed as arbitration friendly. The Egyptian Arbitration Law No 27 of 1994 (EAL) is principally derived from the UNCITRAL Model Law (1985) with some variations.

Therefore, Respondents chose jurisdictions with strong, modern arbitration laws and judicial systems that are supportive of the arbitral process; most of which are countries with established democratic governments, which offers stability.

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**(b) Availability of subject matter-expert arbitrators:** there are several arbitrators in the Africa with the requisite qualifications, expertise and experience to arbitrate both local and international disputes. The Respondents believe that South Africa, Egypt, Kenya and Nigeria have arbitrators with the necessary experience and expertise in line with global standards.

Additionally, because of the nature of dispute in African countries, Respondents are more comfortable if an arbitral panel is composed entirely of arbitrators with an understanding of specific country and cultural issues central to the dispute. This means appointed arbitrators can fully appreciate the cultural foundations that are particular to the parties and their dispute.

Respondents' choice of Nigeria and Kenya as being a cost-effective jurisdiction was driven by the fact that there is an availability of experienced Nigerian and Kenyan arbitrators who are well known world-wide and who sit in arbitrations on different subject matters in African countries. They state that this therefore reduces the costs of having a seat outside Africa.

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**(c) Presence of well-established independent arbitral institutions:** Reputation, recognition, and experience of arbitral institutions are important for their survival in the market. Respondents selected jurisdictions they believed had well established and functional arbitral institutions among them: Egypt due to the presence and prestige of the Cairo Regional Centre for International Commercial Arbitration - CRCICA, the Arbitration Foundation of Southern Africa in South Africa - AFSA, the Lagos Court of Arbitration and Lagos Chamber of Commerce International Arbitration Centre (LACIAC) in Nigeria, Nairobi Centre For International Arbitration (NCIA) in Kenya, and the Kigali International Arbitration Centre (KIAC) in Rwanda. These institutions have a strong reputation from users within their jurisdictions and most importantly throughout the African continent.

Respondents drew attention to the fact that these institutions were strategically located in cities that were big economic hubs in Africa, therefore government of these states are obligated to make arbitration friendly laws to attract the flow of foreign direct investments. This was in addition to availability of modern technology in the institutions and good transportation system making them accessible from all over Africa and beyond. These arbitration centres have skilled, experienced, and knowledgeable arbitrators on their panels. Additionally, these institutions also have hearing rooms equipped with appropriate furniture, internet connectivity, microphones, stenograph, audio/visual, transcription equipment. Respondents explained that these arbitral institutions have their arbitration rules which impose time limits within which arbitration proceedings should have been completed; thereby saving on costs.

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**(d) Costs of the arbitration - fees**

Some of the factors which lead to an increase in the costs of arbitration, as stated by the Respondents, are nature of the dispute, counsel's fees, administrative costs, discovery costs, and third-party costs. Respondents specified that the overall costs of arbitration including Arbitrators fees and expenses, and even administration costs were reasonable in these jurisdictions.

Arbitral institutions provide well organized and expedited proceedings thereby being cost effective. Respondents further explained that the scale of arbitration fees/costs in institutions in Rwanda, Nigeria, Egypt, Kenya and Mauritius are relatively low as compared to others hence they are cost effective.

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#### **(e) Time taken to conclude a matter**

Some Respondents revealed that they had conducted an international arbitration in Kenya that took two (2) years to be finalized. Others expressed that the presence of streamlined institutional arbitration in Egypt, Rwanda, Nigeria, Ghana and South Africa made the process faster, hence saving time taken to conclude proceedings and in effect, reducing costs. Notably, Respondents stated that having the parties and tribunal domiciled in the same continent ensured cost efficiency without compromising on the quality of awards.

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#### **(e) Location/Accessibility**

Kigali (Rwanda), Cairo (Egypt) and Nairobi (Kenya) were mentioned as the most accessible cities owing to good transport connectivity. Respondents expressed their faith in the 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.

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#### **(f) Technology**

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 the costs. Egypt, South Africa, and Nigeria were also featured by respondents as having good internet connectivity and facilities. Majority of the Respondents suggested the use of technology (including artificial intelligence) as a cost-saving measure that can be introduced to make dispute resolution in Africa cost-efficient.

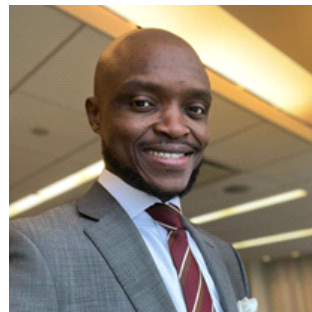
# Team Members



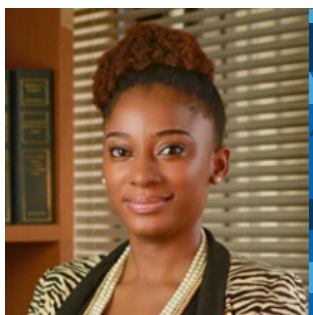
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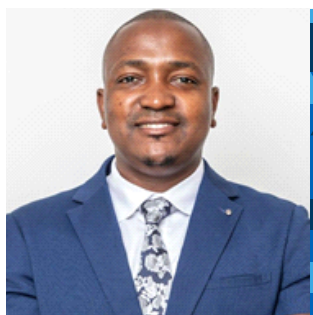
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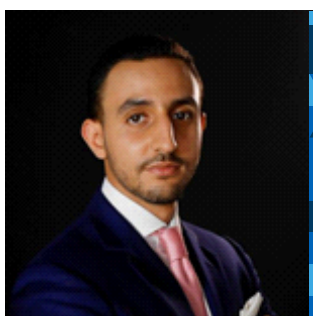
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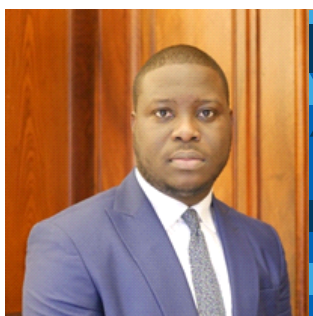
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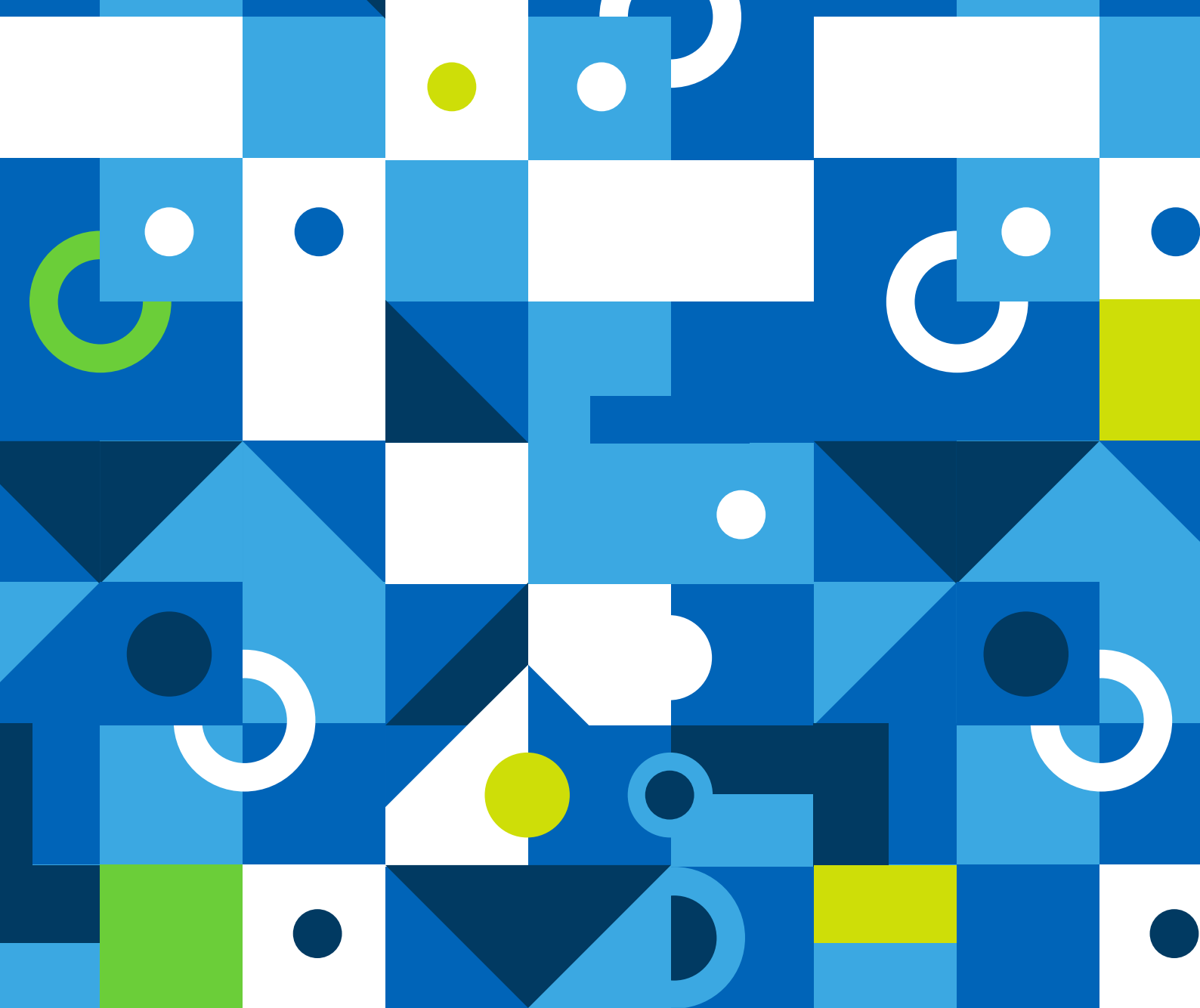


# Africa Arbitration Academy Model Bilateral Investment Treaty for African States



To be published in May 2022

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# Survey on Costs and Dispute Funding in Africa

