

# Dispute Resolution

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## Arbitration on top or a comeback for the courts?

A key discussion point at the inaugural Johannesburg Arbitration Week was the expansion of the use of international arbitration to resolve commercial disputes in Africa. In many instances this has been at the expense of the courts, with parties increasingly preferring to arbitrate rather than litigate.

### Benefits of arbitration

The shift in preference towards arbitration is likely to be attributable to a greater awareness and understanding of the differences and benefits of arbitration when compared with litigation. These include:

- **Independence and neutrality:** In many African jurisdictions there are concerns that judges may not be sufficiently independent, particularly if the state is a party to the arbitration and judges are appointed by the state. By contrast, international arbitration offers an impartial forum where arbitrators are appointed by the parties or private arbitral centres and national laws and rules require their independence and neutrality. Parties can also challenge the appointment of an arbitrator if there are concerns about their independence.
- **Speed:** Some African jurisdictions are blighted by substantial court delays and parties believe that arbitration can address this. Respondents to the African Arbitration Academy's 2022 survey (AAA Survey) on disputes in Africa estimated that arbitrations were generally concluded within 1–3 years, compared with 3–5 years for litigation. The parties and tribunal in an arbitration can agree timeframes and deadlines and can also seek to proceed on an expedited or emergency basis, which is likely to result in a much faster resolution of the dispute than court litigation.
- **Confidentiality:** Arbitration proceedings and documents are generally kept private and so parties may choose to arbitrate to benefit from greater confidentiality than in court litigation, avoiding public and commercial scrutiny.
- **Standardisation:** There has been increasing standardisation of laws and rules for arbitration across Africa such as in the Organisation for the Harmonisation of Business Law in Africa and Southern African Development Community regions. Most countries in Africa have arbitration legislation based on, or adjacent to, the UNCITRAL Model Law. This has helped to improve understanding of and confidence in the process. By contrast, court rules and systems vary substantially between jurisdictions and parties may be concerned about litigating under incompatible or unfamiliar court systems.
- **Limited right of appeal:** There are only limited grounds on which arbitration awards can be appealed or challenged. When compared with the tiers of appeal court available in litigation, parties seeking finality and certainty in concluding disputes may choose to arbitrate instead.
- **Enforcement:** Due to the existence of international agreements like the New York Convention on enforcement of arbitral awards, it can be easier to secure international enforcement of an arbitral award than a court judgment. Growing awareness of this advantage (for example with Malawi, Ethiopia and Sierra Leone all becoming signatories to the convention in recent years) may have contributed to the growth in popularity of arbitration.

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- **Flexibility:** When compared to rigorous and rigid court rules, arbitration can offer more flexible processes. Parties have autonomy to negotiate and reach agreement on various matters, allowing disputes to proceed under specifically tailored timeframes and procedures. The parties can agree things like the hearing location, language, applicable rules, number of arbitrators and which country's courts will have supervisory authority over the arbitration, all tailored to their own needs and circumstances. For example, the China-Africa Joint Arbitration Centre offers adapted rules that take into account the different legal and cultural approaches to arbitration from Chinese and African parties.
- **Specialist expertise:** In litigation parties generally have no influence over the appointment of a judge who may or may not have specific subject-matter expertise. This is a concern for parties as the AAA Survey found that 38% of respondents held concerns over the lack of subject-matter expertise of judges. By contrast, arbitration allows for the appointment of arbitrators with specific knowledge or expertise and the parties can even agree particular qualifications, seniority or experience that an arbitrator must have. This can be especially helpful in complex and technical disputes.

**Consequences**

The shift in preference for arbitration may not be permanent. If court funding improves and delays decrease, users may prefer to return to court litigation with its tightly

regulated, transparent and tested rules and procedures. Some users may also prefer the approach of the court, which tends to be more interventionist and investigatory than arbitral tribunals or want broader scope for appeal.

The growth of arbitration could provide a positive impetus for change and reform for both arbitration and litigation. For example, in light of concerns that Nigerian court delays were impeding the effective progression of arbitration where the support of the courts was needed, in 2023 Nigeria introduced new legislation and rules designed to streamline and expedite arbitration-related court proceedings. Similarly, one criticism sometimes levelled at arbitration is that its confidential nature is not always appropriate for the resolution of disputes involving state entities, as such matters should be subject to open and public review and scrutiny as they are in court litigation. In response, arbitration has adapted, for example South Africa's International Arbitration Act 15 of 2017 now requires international arbitrations involving a public body to be held in public and the Arbitration Foundation of Southern Africa has the discretion to publish anonymised arbitration awards. There is therefore scope for the sharing of best practices and innovations between arbitration and litigation to the benefit of all parties.

The growth of international arbitration could also inspire more jurisdictions to revisit and revise their domestic arbitration legislation, seeking greater harmonisation and compatibility which could further reduce pressures and delays on courts.

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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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