

Recent and Emerging Trends in Third Party Funding of Africa-Related Disputes

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1. Africa-related disputes are on the rise. They routinely grab headlines for their sheer size and multi-jurisdictional complexities. Take, for example, Nigeria's recent "*unprecedented*" success in the English Courts in one of the world's biggest pieces of litigation, in which Nigeria obtained extensions of time of three and five years to challenge arbitral awards on the basis of fraud (which awards, if enforced, would otherwise be worth \$10 billion).¹ Or the multibillion dollar cluster of arbitrations that East Mediterranean Gas and its shareholders brought against Egypt and Egyptian State-owned entities (**SOEs**) in ICC, ICSID, UNCITRAL, PCA, and CRCICA arbitration proceedings.
2. Just as Africa-related disputes are increasing, so is the demand for litigation funding in relation to those disputes. Harbour sees and reviews dozens of potential Africa-related investment opportunities each year.. This article provides insight into recent and emerging trends in relation to the third party funding of Africa-related disputes, covering: (1) recent trends in the types of investment opportunities that we are seeing; (2) recent trends in terms of what makes an investible case; and (3) expected future trends in dispute funding.

Recent trends in the types of investment opportunities that we are seeing related to Africa

3. The majority of investment opportunities related to Africa that we consider are international arbitrations. These include:
 - a. disputes related to oil and gas, mining, energy production, land and real estate development, joint ventures, and construction;
 - b. investor-State arbitrations under ICSID, UNCITRAL, and ICC rules;
 - c. commercial arbitrations under all the usual international arbitration rules (e.g., ICC, LCIA, and UNCITRAL), seated in the usual well-established seats (London, Paris, and Geneva), and with English or French governing law; and
 - d. commercial arbitrations under local arbitral rules (e.g., AFSA, CRCICA, and CCJA), seated in African seats (e.g., Johannesburg, Cairo, and Dakar), and with OHADA or local national governing laws.
4. Claimants in these arbitrations tend to be foreign companies and individuals with claims against local African companies, States, or SOEs. However, we have also seen a growth in requests for funding from African parties in recent years. These include African companies but also a number of African SOEs, which have claims in relation to foreign investors' breaches of contract. This reflects a wider trend that we have seen recently in relation to the recognition by States, government entities, and SOEs of the benefits of litigation funding (particularly in times of increasing austerity and reduced legal budgets).

¹ See, e.g., "Commercial Court grants 'unprecedented' extension of time based on 'strong prima facie case' that US\$10 billion arbitration award against Nigeria was tainted by fraud, by Mark Howard QC and Tom Pascoe of Brick Court Chambers (available at <https://www.brickcourt.co.uk/news/detail/commercial-court-grants-unprecedented-extension-of-time-based-on-strong-prima-facie-case-that-us10-billion-arbitration-award-against-nigeria-was-tainted-by-fraud>).

5. Many of the requests for funding Africa-related disputes that we receive are for single cases. That is, where claimants or legal teams are seeking funding for claimants' legal fees and disbursements incurred in pursuing single claims, whether brought against one defendant or several.² Such funding is non-recourse, i.e., it is only if the claim succeeds and proceeds are recovered that the funder take its pre-agreed share. Whilst many readers may be familiar with this sort of litigation funding, the clear trend in litigation funding is the use of more diverse products such as:
 - a. the acquisition of claims, judgments, and arbitral awards;
 - b. law firm and claimant portfolios (where a law firm or claimant has multiple claims that need funding);
 - c. working capital facilities (facilities to law firms or insolvency practitioners to fund working capital, enabling them to invest in and grow their businesses); and
 - d. insuring litigation-related risks (including adverse costs, own-side disbursements, own-side solicitor's fees, or even damages capping insurance for defendants).
6. In recent years we have received requests from several leading international arbitration practices to fund portfolios of arbitration claims.³ Those portfolios included several claims against African States and SOEs, and they have typically included a mix of investor-State and commercial arbitration claims. In such situations the law firm usually will have entered into conditional fee or contingency agreements with the various claimants and intend to hedge the attendant risk of those agreements. That is, the funder would pay up to 100% of the value of the legal fees deferred by the law firm under its contingency fee agreement, in exchange for a pre-agreed share of the law firm's success fees.

Recent trends in relation to investible Africa-related disputes

7. When considering whether an Africa-related investment opportunity is investible or not, the usual funding criteria apply.⁴ Chief amongst these considerations has tended to be the prospects of enforcement or recovery.⁵ There are also several recurring themes we see emerging from Africa-related disputes:

² Single case funding also typically provides claimants with indemnities to protect against adverse costs.

³ It is not only law firms but also private equity funds or multinational companies that may have portfolios of claims with Africa-related disputes, and we have also received requests for funding in relation to several such portfolios in recent years.

⁴ Our funding criteria is set out on our website (<https://harbourlitigationfunding.com/working-with-us/what-we-look-for/>) but in summary our criteria are whether: (1) an award or judgment be enforced; (2) the claim has good prospects of success; (3) the claim value is realistic; (4) the budget is realistic; and (5) the legal team has the requisite expertise and is fully equipped to lead the case.

⁵ Recovery is the most important consideration for litigation funders because the funding is non-recourse. That is, a funder only gets paid if monies are recovered. This means that we first ask whether the defendant can pay the damages sought and – if push comes to shove – whether we can enforce an award or judgment against them. A funder will want to see evidence that the defendant has assets in a “safe” jurisdiction with good rule of law and courts that will expeditiously enforce the award or judgment against those assets. Unfortunately, we cannot be confident in the independence or impartiality of the courts in a number of African jurisdictions. This is particularly so when enforcing against States or SOEs.

- a. There is growing confidence amongst businesses and counsel in bringing international arbitration proceedings seated in Africa (and thus more willingness for funders to consider investing in those arbitrations).⁶
- b. Commercial arbitrations related to Africa have tended to be more investible than investor-State arbitrations. This is likely due to there being a greater predictability of outcomes in relation to merits and quantum in commercial arbitration than in investor-State arbitration. There are also usually fewer concerns about unmeritorious set-aside or annulment proceedings in commercial arbitrations (provided that they are seated in pro-arbitration jurisdictions), which tends to cut down the duration of cases.
- c. Africa-related disputes involving extractive industries continue to be attractive from a funding perspective. There is a deep network of trusted international and local counsel and experts with the requisite expertise to lead these claims. We can also be confident in the damages modelling in these claims, which tends to be less speculative than in other sectors (e.g., due to high demand and predictability of commodity markets).
- d. Legal teams and funders continue to learn from one another, and legal teams are increasingly addressing funders' concerns head-on (e.g., by applying rigorous thought to developing an enforcement plan from the outset).

Expected future trends in the funding of Africa-related disputes

8. Overall, we expect that there will be continued growth in the interest in and availability of third party funding for Africa-related disputes.
9. In the short term, it seems inevitable that there will be a rise in disputes related to Covid-19 , given that the pandemic has compounded the economic pressure in many African countries which were already in a recession. This may lead to an increase in joint venture disputes (e.g., in relation to capital commitments) or disputes related to private equity investments. It may also lead to an increase in cross-border insolvency claims.
10. In the medium term, as they become more aware of funding options, claimants and law firms alike will increasingly seek out funding for Africa-related claims. Litigation costs are on the rise for international and local counsel in Africa-related disputes. Companies may increasingly opt for non-recourse funding for first class legal teams. Companies may also prefer to monetise a claim, judgment, or award (e.g., where they have acquired another company with existing claims) or run their claim through a contingency fee arrangement with their firm of choice. Law firm facilities and portfolio funding should also be of increasing interest to law firms that wish to remain both competitive and profitable in winning new work. Interest will thus likely continue to grow in the full suite of litigation funding products in Africa-related disputes.
11. In the long term, there will likely be further liberalisation of third party funding in African jurisdictions. The added certainty that comes with positive legislation could make Africa-related

⁶ See, e.g., the “2020 Arbitration in Africa Survey Report: Top African Arbitral Centres and Seats” by SOAS University of London, finding amongst other things that (1) 88% of respondents would recommend African arbitral centres to users of arbitration and (2) the top five recommended arbitral seats in Africa were Cairo, Johannesburg, Kigali, Lagos, and Cape Town (available at <https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf>).



disputes more investible. It may also result in the emergence of new, homegrown African litigation funders.



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