CorporateLiveWire

LITIGATION & DISPUTE RESOLUTION 2017

VIRTUAL ROUND TABLE

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Introduction & Contents

Litigation & Dispute Resolution Roundtable 2017 features seven experts from around the world. In this roundtable we discover what changes are being implemented in order to ensure a quicker, less costly and more efficient delivery of justice. We also identify which dispute resolution methods our chosen experts largely recommend. Other highlighted topics include: a discussion on the advantages of utilising financial centres for international litigation and arbitration, the impact of digitisation, and how an organisation can effectively utilise risk analysis prior to engaging in a dispute. Featured countries are: Indonesia, Mexico, Nigeria, United Kingdom and United States.

8 1. Can you outline the court and judicial structure in your jurisdiction?

13 2. Have there been any recent regulatory changes or interesting developments?

17 3. Are you noticing any trends in industry-specific litigation or dispute resolution?

20 4. Which dispute resolution method do you find you most commonly recommend and why?

23 5. Have there been any noteworthy case studies or examples of new case law precedent?

26 6. What are the advantages of utilising financial centres such as Dubai, London, Singapore and Qatar for international litigation and arbitration?

28 7. What impact will Brexit have on litigation and dispute resolution both in Great Britain and Northern Ireland and in Europe?

30 8. What dispute prevention mechanisms should an organisation implement?

31 9. How has the increased importance of public perception and non-legal obligations altered the way in which organisations approach litigation?

32 10. How can an organisation effectively utilise risk analysis prior to engaging in a dispute?

34 11. To what extent has digitisation altered the litigation and dispute resolution landscape?

36 12. In an ideal world what would you like to see implemented or changed?

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LUBIS • GANIE • SUROWIDJOJO

MEET THE EXPERTS

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Mr. Odein Ajumogobia SAN a Senior Partner in the leading corporate/commercial law firm of Ajumogobia & Okeke with law degrees from University of Lagos and Harvard Law School respectively, was called to the Nigerian bar in 1979. He is a Fellow of the Chartered Institute of Arbitrators, UK and was a member of the ICC, International Court of Arbitration, Paris (2000-2005).

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MEET THE EXPERTS

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Nigel is the Managing Partner and Head of Litigation and Dispute Resolution in the London office of Mackrell Turner Garrett.

He is experienced in complex litigation matters, and various forms of dispute resolution.

Clients include in the banking and hedge fund sector [Indus Capital LLP, KBC Bank NV]; Information Technology and Management [AFD Software, Blue Cube Group]; Property [William Pears Group]; Motor [JLC Ltd (Jaguar Land Rover), Imperial Carriages Limited]; Publishing [Financial-I, Grapo AS]; Restaurant & Entertainment [Sketch, Wainscott Studios]; Architecture & Design [Space Projects Ltd].

Nigel has considerable experience in defending FCA prosecutions, and HMRC Appeals.

He is an International committee member for EMEA on Mackrell International, the independent network of 80+ law firms around the world and Chairman of the Membership Committee for Mackrell International.

As a result of the firms membership of Mackrell International, Nigel is very experienced in cross-border disputes, and multi jurisdictional litigation.

Nigel studied at Caterham School, City of London University before training at Mackrell & Co who he joined in 1988. He was made partner at Mackrell Turner Garrett in 1991.

Nigel has been a member of the Diversity Law Institute and a member of the Trial Law Institute since 2012. He was also made the only non-US f Fellow of the Litigation Counsel of America in the same year.

1. Can you outline the court and judicial structure in your jurisdiction?

Ganie: Indonesia has a modern judicial system based on civil law tradition. The Indonesian judicial system can roughly be divided into two subsystems: the general system and the administrative law system. The Supreme Court is the court of final instance in the general system and the administrative law system. The lower courts within the general system are the District Courts (general courts of first instance) and the High Courts (general courts of appeal). Specialised divisions/chambers within the District Court include the commercial court (among others for bankruptcy petitions) and the industrial relations court (among others for intellectual property and labour disputes). In 1991, Indonesia introduced a separate system of administrative courts that was to contribute to establishing the rule of law in Indonesia and to provide recourse for citizens against unlawful administrative behaviour. Separate courts include the Constitutional Court, Religious Courts and Military Courts. Decisions in the anti-trust sector rendered by the Commission for the Supervision of Business Competition (itself not part of the judiciary), can be challenged through the general court system.

Craig: Civil justice in England and Wales is dealt with in the County Courts and, in the case of more substantial or complex cases, the High Court, where trials are conducted by High Court judges, who must be practitioners of at least 10 years' standing.

The County Courts hear lower level and lower value debt, personal injury and contract claims, and some technology, construction and patent work up to a value of £350,000.

High Court matters are divided into three divisions: the Chancery Division, the Queen's Bench Division and the Family Division. Save for the Family Division, which deals with matrimonial and family matters, the manner in which cases are allocated between the Chancery and Queen's Bench divisions is relatively complicated as it has been developed in a piecemeal fashion over centuries, as opposed to being determined in light of current day litigation sub categories.

Broadly, the Chancery Division deals with non-specialist matters relating to land, trusts, bankruptcy, probate matters and specialist matters relating to intellectual property and companies.

The Queens's Bench Division hears non-specialist matters relating to, for example, general contract and tortious matters. The Queen's Bench Division further houses the following specialist courts: Technology and Construction, Commercial, Admiralty and Mercantile and Administrative courts. Each specialist court also has a number of "lists" on the basis of the expertise of the judicial officers in each list. For example, as recently as October 2015 the English judiciary introduced a new Financial List designed to handle claims related to financial markets.

Further, there are a number of additional first-tier specialist tribunals, such as the Employment Tribunal, the Social Security and Child Support Tribunal, the Upper Tribunal (Immigration and Asylum Chamber) and the First-tier Tribunal Tax Chamber. One further notable tribunal is the Competition Appeal Tribunal which came into force in April 2003 and has since become a prominent forum for UK competition litigation. The tribunals system has its own judicial structure, but appeals from the Upper Tribunal, Employment Appeals Tribunal and Competition Appeal Tribunal are heard by the Court of Appeal.

The Supreme Court (formerly the House of Lords) is the final court of appeal in the UK for civil cases. It hears appeals from the Court of Appeal and, in some limited cases such as the recent Article 50 ruling on Brexit, the High Court.

Isaac: Others may be better placed to summarise this, but at a high level in the UK the structure of our courts and tribunal system has evolved over hundreds of years. Depending on the case type and seriousness of the matter, cases will either be heard at the Magistrate, County, Family, High or Crown Court. Civil cases sometimes start at the Magistrates / Country / Family Court and can then progress to the High Court – or start in the first instance at the High Court; whereas Criminal cases may start at the Magistrates Court and find their way to the High Court. Where matters of law are in dispute following a judgement, the Court of Appeal will hear Criminal or Civil cases on points of law alone. The Supreme Court sits at the top of our system.

Rowley: The Court system in England and Wales has developed over 1,000 years of jurisprudence.

Civil litigation claims will either start in a local County Court or the High Court depending on the value and complexity of a case. Claims in the County Court are usually claims relating to debt collection, landlord and tenant, personal injury and family matters. Claims in the High Court will typically be claims which are High Value (the minimum value of the claim must be more than £100,000) and complicated claims. The High Court itself has a number of specialist jurisdictions such as Technology and Construction, Commercial and Admiralty, Chancery (company, partnerships, probate) and Queen's Bench (contract, tort judicial reviews and libel), to name but a few.

In addition to the County Court and High Court there are also a number of specialist Tribunals with their own structure and methods of appeal in areas such as tax, immigration, employment and property and there are professional regulatory bodies which operate their own jurisdiction in dealing with their members accused of professional misconduct.

Appeals are usually limited to appeals on points of law only. The High Court acts as an appellate court to courts and Tribunals below it. Appeals from the High Court are to the Court of Appeal which will be the final stop of the vast majority of appeals. The final appellate court is the UK Supreme Court. The UK Supreme Court will however only usually deal with appeals which are of significant public importance or significant points of law. To put this in perspective, the UK Supreme Court will typically deal with around 80 to 90 cases a year.

McTighe: In the United States, there is a federal court system, and each state has its own court system as well. It would be impossible to outline the details of the federal judiciary and each state's system in the space provided, but I will give a very general overview.

In general terms, federal courts can hear disputes involving federal law and, in certain circumstances, disputes involving state law (such as disputes between citizens of different states in which the amount in controversy exceeds $75,000 and, after the passage of the Class Action Fairness Act, many larger-scale class actions). State courts, on the other hand, generally can resolve most types of disputes unless exclusive jurisdiction is placed in a particular court (e.g., a federal law could require that disputes involving that law be resolved in federal court; many states also require certain types of cases to be heard in a particular court, such as small claims courts and other courts involving less than a certain amount in controversy).

In the federal system, the district court is the trial court—the court that initially resolves whatever claims are presented and conducts any trial (whether a jury-trial or a bench trial). Roughly speaking, district courts are organised by state (with some states having a single district, and larger states having multiple districts). The losing party has a right to appeal to the Circuit Court of Appeals in which the district court is located. A party losing at the Circuit Court of Appeals level may seek a writ of certiorari from the United States Supreme Court, but this type of review is discretionary and is seldom granted, being reserved for unusual circumstances such as a need to resolve conflicting interpretations of law by different Circuits or address matters of considerable, national importance. The Supreme Court also resolves certain disputes in the first instance (such as disputes between multiple states).

On the state court level, it is critical to understand the intricacies of each state's judiciary in order to litigate in that jurisdiction. Again speaking in general terms, states generally have one or more "trial court level" courts and at least one appellate level court (with many states having both an intermediate appellate court and a state supreme court). If there is a federal constitutional question presented, it may be possible to seek federal review after the state process is exhausted.

Venegas: Mexico is a federal state and therefore its court system is divided into federal and local courts. In addition to being a dual federal/state system, the court system in Mexico is also divided by material into civil/commercial, administrative, labour, agricultural and criminal matters. Each of these areas has its own set of substantive and procedural rules, and administrative, labour, agricultural and criminal matters have their own courts and judges.

The courts at the federal level include the Supreme Court of Justice of the Nation with 11 Justices, the collegiate circuit courts, having three magistrates, the unitary circuit courts, having one magistrate, and the district courts, having one judge. Each state has a state high court and specific courts divided by material such as civil/commercial, family, leasing, labour and criminal.

The Supreme Court functions as a full court or in two chambers of five ministers each. Among other matters, it resolves conflicts between states and between the federal government and a state, as well as conflicting decisions by the circuit courts. It also addresses challenges to the constitutionality of laws and is the last resort for appeal of certain cases involving constitutional matters.

The collegiate circuit courts resolve amparo proceedings involving questions of legality of decisions issued by the unitary circuit courts. The latter courts in turn resolve appeals from the district courts, which are the federal courts of first instance.

Both the district courts and the unitary and collegiate courts are divided territorially in the number of circuits that the Federal Judicial Board, an administrative body of the judicial power, establishes for the entire country.

With respect to the local courts, under the superior court of justice are the civil courts that act as courts of first instance, and the civil chambers, having three magistrates, which resolve civil and commercial cases at second instance. As at the federal level, separate courts handle bankruptcy and labour matters. Within the civil sphere in the local courts there are also judges called justices of the peace who hear claims involving very low amounts.

Ajumogobia: The Nigerian Constitution recognises a certain number of courts and empowers these courts with jurisdiction to entertain certain matters at first instance and on appeal. These courts (in descending order) are as follows:

The Supreme Court: This is the final appeal court in Nigeria; its decisions are binding on lower courts in the hierarchy of the Nigerian judicial system. Appeals to the Supreme Court in respect of interlocutory decisions of a lower court may only be instituted with leave of the court while final decisions may be appealed to the Supreme Court as of right. It is also useful to mention that appeals against a final decision on grounds of fact alone or mixed fact and law may only be initiated by leave. Appeals on points of law alone do not require leave of court. A panel of five justices of the Supreme Court sit over appeals generally, while constitutional issues are determined by a panel of seven justices. Seven Justices will also sit to review a prior decision of the Court. The Supreme Court also has original jurisdiction over disputes between the Federal and States governments, and disputes between the National Assembly and the Federal Government.

The Court of Appeal: is an intermediary appellate court which entertains appeals against decisions from the Federal and States High Courts of the 36 states of the Nigerian Federation and the Federal Capital Territory. Similar to the process in the Supreme Court, appeals may be commenced by filing of a Notice of Appeal against the decision of a lower court. Thereafter briefs are exchanged. The Constitution also mandates that, as with the Supreme Court, appeals on grounds of fact alone or mixed fact and law are commenced by leave while, appeals on points of law do not require leave of court. Appeals are determined by a panel of three justices, although five justices decide issues of constitutional relevance.

Federal and State High Courts: These courts are of concurrent jurisdiction. However the Federal High Court has exclusive jurisdiction over certain matters as specified in the Nigerian Constitution. The jurisdiction of the Federal High Court is largely commercial while the High Courts of the States are constitutionally empowered to entertain all matters outside the exclusive jurisdiction of the Federal High Court.

Other courts are the National Industrial Court which is the arbiter over labour disputes and the Customary and Sharia Courts of Appeal which determine issues of customary and Islamic law respectively. Appeals from these courts are to the Court of Appeal in the first instance and the Supreme Court finally.

2. Have there been any recent regulatory changes or interesting developments?

Ganie: One significant development is Indonesia's clean court program to fight corruption and bribery. Regulatory changes have been promulgated to turn this program into legal reality. The other developments include implementing regulations of a mandatory court-assisted mediation stage prior to the start of actual civil proceedings, more legal certainty in the enforcement of foreign arbitration awards and also quicker and more effective and efficient court proceedings generally.

Craig: Perhaps the most interesting development in the English legal sector in recent years has been the dramatic rise in private enforcement of legal obligations that were previously enforced only by public regulators. Public regulators investigate potential wrongdoing and, where infringements are found, those regulators will typically impose fines on those organisations. However, the sums obtained from those fines are retained by the regulator and are not used to compensate those businesses or consumers that suffered losses as a result of the infringement. Organisations and consumers are increasingly aware that they may be able to recover significant sums through private enforcement. Indeed, whilst around a decade ago such private enforcement was very rare, today in certain legal sectors almost every regulatory decision leads to private damages actions being pursued in the English courts.

For example, organisations are increasingly willing to pursue private damages actions to recover losses suffered as a result of anticompetitive behaviour. Such private damages actions typically concern losses sustained as a result of price fixing cartels or from organisations abusing their dominant positions in the market. Claimants will often seek to rely on the regulatory findings from the Competition and Markets Authority (the U.K. national competition authority) or the European Competition Commission to establish liability against the defendants in these claims, with the court being required to adjudicate only on the quantum of the claimant's losses. Whilst a regulatory decision is not required in order to pursue a private damages action, the secretive nature of cartel conduct and the difficulty of proving anti-competitive conduct renders "stand alone" actions much more difficult for claimants than "follow on" claims from a regulatory decision.

Similarly, institutional investors are now significantly more active in shareholder litigation in the English courts than they were a decade or so ago. A recent high profile example is the shareholder actions concerning losses sustained by shareholders of Tesco, one of the world's largest retailers, after its share price plummeted following two significant profit downgrades in 2014 arising out of its accounting practices. The Serious Fraud Office is currently investigating the matter, however in the meantime private damages actions are being pursued by aggrieved shareholders. This rise in private enforcement has also extended to matters concerning financial misconduct more generally. For example, a number of claims have been pursued in the English courts against major financial institutions in relation to their manipulation of LIBOR and other benchmark rates. The LIBOR test case *Graiseley Properties Ltd & Ors v Barclays Bank plc* [2013] EWHC 67 (Comm) settled shortly prior to a full trial taking place and most recently the court found in favour of the defendant in the case of *Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch), dismissing the claimant's £30 million claim.

Isaac: While I handle some criminal proceeds, most of the disputes I am instructed on are Civil in nature.

LJ Briggs published the Reform Programme last year which commented on how civil litigation was developing in England and Wales. In his paper, he discussed digitisation and the move towards paperless courts as a key to improving the efficiency of the courts. The establishment of online courts for certain civil claims under a certain threshold (£10-25,000) is a massive change. How that will impact an expert such as myself remains to be seen, however such initiatives are inevitable and reflect the general move away from paper across all aspects of litigation.

Another development will be LJ Jackson's proposal that certain civil cases are subject to a single fixed cost matrix or staged fees for claims up to £250,000. How this is developed will be highly relevant to experts such as myself, who are already required (under Jackson's earlier reforms) to prepare fixed cost budgets, often based on next to no information at all. While capping is a sensible way to limit litigation cost, inevitably I see the potential for inequitable allocations of pre-determined budgets across the representatives of the parties which may not reflect the best allocation of funds.

Rowley: The High Court in England and Wales is currently running a pilot under the Shorter Trial Scheme (STS) which has come to be known as a "speedy trial." The aim of the pilot is to achieve shorter and earlier trials for business related litigation (which can include claims where commercial property is concerned), at a reasonable and proportionate cost. It attempts to foster a culture of comprehensive disclosure so that full oral trials are not always necessary in order to save the time and cost of litigation.

If your case is allocated as a speedy trial it will be case managed by a docketed judge with the aim of reaching a trial date within 10 months of the issue of proceedings and judgment within six weeks thereafter. This differs markedly from the position under a normal trial where a large commercial case can take up to two years to get to a hearing and can take place over weeks rather than days.

The criteria are that these cases should not involve any element of fraud or dishonesty and is not appropriate for multi-party claims where extensive disclosure is required. This streamlined approach is, insofar as the approach to evidence is concerned, similar to adjudication, where parties present their case with just the evidence that they wish to rely on. The value of the claim is a factor but not determinative of the applicability of a speedy trial.

The advantages of a speedy trial are self-evident in that resolution is fast and provides certainty; there are lower costs, limited disclosure and truncated pre-action procedures. The parties or their advisors are expected to cooperate and assist in ensuring the proceedings are conducted in accordance with the scheme although interestingly there is no requirement for a party to voluntarily disclose documents adverse to the case that they advance. Finally, as the parties have elected to expedite the proceedings any points on whether to grant permission to appeal will be taken from this standpoint.

The feedback from the speedy trial process has been generally positive and it is anticipated that when the pilot comes to an end the intention is to see how the STS pilot works, refine it and then introduce it in permanently.

McTighe: As anyone who has viewed any recent United States-related media likely has seen, the new presidential administration has brought about a great deal of uncertainty, especially in light of the stark contrasts in political philosophy with the prior administration. The new administration wasted no time in attempting to introduce immigration restrictions by executive order – which was halted by an initial judicial determination – but the final fate of that executive order (and what potential replacement orders may be issued by the president) remains uncertain as of the submission of these materials. The president's clear willingness to use the executive order process to attempt to implement policy of his choice without having to wait for congressional action (or input) is something to note. It may be impossible truly to plan for whatever executive orders may issue, but the president's extensive use of social media and other outlets to make his intentions known makes it possible to predict what types of executive action may be on the horizon.

The new administration, combined with a Republican majority in both the House of Representatives and the Senate, also presents a reasonable likelihood that more conservative legislation will be introduced, and passed, in the next several years. Potential legislation to repeal, replace, or otherwise modify the Affordable Care Act (commonly known as Obamacare) could have a dramatic impact on virtually every industry depending on what occurs with insurance requirements, tax credits, and the host of other issues implicated by healthcare reform. While the potential elimination of the Affordable Care Act has consumed the most media attention (and understandably so), there is plenty of other potential legislation to consider. For example, on the litigation front, a bill has also been introduced in the House (the Fairness in Class Action Litigation Act of 2017) that has the potential to raise the bar significantly for plaintiffs seeking to certify class actions in federal court. A similar bill previously failed, but the new Republican majority in the Senate gives it a greater chance of success this time.

Venegas: Mexico is in the middle of the implementation of its new energy reform which basically opened the market to national and foreign private investment. This has led to more business-minded approach in the management of the giant oil and electricity state owned companies, which in turn had led to the possibility of negotiating and mediating a lot of outgoing disputes. In fact, Petroleos Mexicanos and the Comision Federal de Electricidad had recently enacted internal regulations aimed to implement a specific procedure for settling disputes in a more straight forward and transparent manner.

Ajumogobia: In recent times, Nigeria's Judicial System has witnessed several regulatory changes aimed at ensuring the efficient, fair and speedy resolution of cases as well as the discouragement of lame duck cases. These changes include:

<u>Frontloading:</u> is a relatively recent innovation to the Nigerian judicial system. The concept requires parties at the commencement of litigation, to set out their claims

> *Mexico is in the middle of the implementation of its new energy reform which basically opened the market to national and foreign private investment.*
>
> *- Marco Tulio Venegas*

before the court and opposing counsel. Frontloading was conceived as a means of sifting cases coming before the Courts and to ensure that only cases with prima facie prospects of success as opposed to frivolous suits are allowed through the judicial process.

Pre-Action Protocol: is another recent development in judicial process. Primarily, the claimant is required to provide evidence that steps have been taken to resolve the issues prior to resort to litigation. It was introduced by the courts to filter out cases where resolution could have been achieved without resort to the courts. In the High Court of the Federal Capital territory, counsel on behalf of claimants are also required to certify that they have advised the claimant on the strength of the case; the outcome of which is that where the court determines such cases to be unmeritorious, both counsel and client may be liable to costs.

Fast Track Procedure: this is a most welcome innovation as it has lent some aid to the speed of justice delivery. In essence, cases of high monetary or commercial value are screened and assigned to the fast track, in which cases are expected to be concluded within a period of eight months from commencement till judgment.

The fast track procedure was originally an inception of the High Court of Lagos State by its incorporation in the 2012 Rules of Court. However it has been adopted by many states with high commercial activity, including the National Industrial Court which accommodates only cases concerning or relating to a strike or industrial action or lock outs, and any other industrial actions that threaten the peace, stability or economy of Nigeria (there is an exhaustive list of cases which may qualify for fast track procedure in this court) and the Court of Appeal which qualifies fast track matters as including those relating to terrorism, rape, kidnapping, corruption, money laundering and human trafficking as well as all interlocutory appeals against rulings of the any tribunal from which an appeal is brought to the Court of Appeal.

3. Are you noticing any trends in industry-specific litigation or dispute resolution?

Ganie: In the commercial sector we have noticed a trend to resolve disputes through arbitration and recently also mediation among others to ensure less public/media exposure.

Craig: Historically, private enforcement would rarely follow regulatory decisions. However, over the last decade the number of private actions pursued following regulatory decisions has increased exponentially. Furthermore, findings in criminal investigations against both organisations and their employees are increasingly becoming relevant in civil litigation.

This trend is perhaps most apparent in litigation concerning the financial services industry. For example, following significant fines being imposed upon major financial institutions by regulators, including the U.K.'s then Financial Services Authority (now the Financial Conduct Authority), in relation to the manipulation of LIBOR, a number of criminal prosecutions were pursued against employees of those financial institutions in relation to their conduct. The Serious Fraud Office secured a conviction against Tom Hayes, a former trader at UBS and Citigroup, (*R v Tom Alexander William Hayes* [2015] EWCA Crim 1944) whilst a number of other employees of financial institutions were acquitted at trial. The evidence presented at these trials places into the public domain information helpful to potential claimants seeking to pursue civil litigation against the financial institutions that engaged in the manipulation of LIBOR. This trend is likely to continue, as criminal prosecutions have commenced against a number of bank employees who allegedly engaged in manipulation of the foreign exchange market. With civil claims likely to be pursued in the English courts in relation to the manipulation of the foreign exchange market over the coming years, the factual evidence presented in those criminal trials will likely assist claimants pursuing such claims.

A further trend in litigation in the English courts has been a marked increase in shareholder activism, which has resulted in claims being brought by institutional investors against organisations in which they have a shareholding. A recent high profile example is the various claims that have been brought against Royal Bank of Scotland plc ("RBS") for allegedly misleading investors in advance of a fundraising round in 2008, following which RBS required significant financial support from the UK government which drastically lowered the bank's share value. A further example is the shareholder actions concerning losses sustained by shareholders of Tesco as a result of profit downgrades following the exposure of dubious accounting practices (see above). This trend is set to continue, with litigation in the English courts expected to follow British Telecom's announcement in January 2017 that its Italian business had significantly overstated its income over a number of years and the significant impact that this has had on the company's share value.

Isaac: The increasing trend of alternative dispute resolution continues with many cases being settled in mediation. Whilst there are likely many reasons for this, the cost of a full trial with experts, solicitors and barristers on both sides appears to be changing behaviour. Within the insurance sector, the market is – and has been – particularly soft in recent years, with competition among Insurers fierce and low premiums resulting. The knock-on impact of that is an inevitable drive to

control cost – at times to the disproportionate cost of quantum – and so disputes seem less frequent in finding their way to trial.

Rowley: There is a definite move towards an increase in the amount of commercial dispute resolution by way of mediation or arbitration; clearly, as has become clear in recent years, there is a significant continuation in the move for international disputes to be resolved in London wherever possible – for example if a contract provides for English jurisdiction, or there is any other way in which the jurisdiction can be taken as being England. This is a general move away from standard High Court litigation, generally given as being on costs grounds.

McTighe: As has been the case for a number of years, the demand for alternative dispute resolution remains high. Even with new proportionality standards in the discovery rules in federal court and a general push to control litigation costs, litigation can be an expensive, time-consuming, and uncertain process. A mediated resolution may result in both sides going home with a result that is less than they wanted—but one that was tolerable enough to yield a bargain. Arbitration can be less expensive and quicker than litigation (and has the potential added virtue of generally not being a public process, unlike litigation in which there is a presumption of public access to the court records) and remains a popular choice as an alternative to litigation.

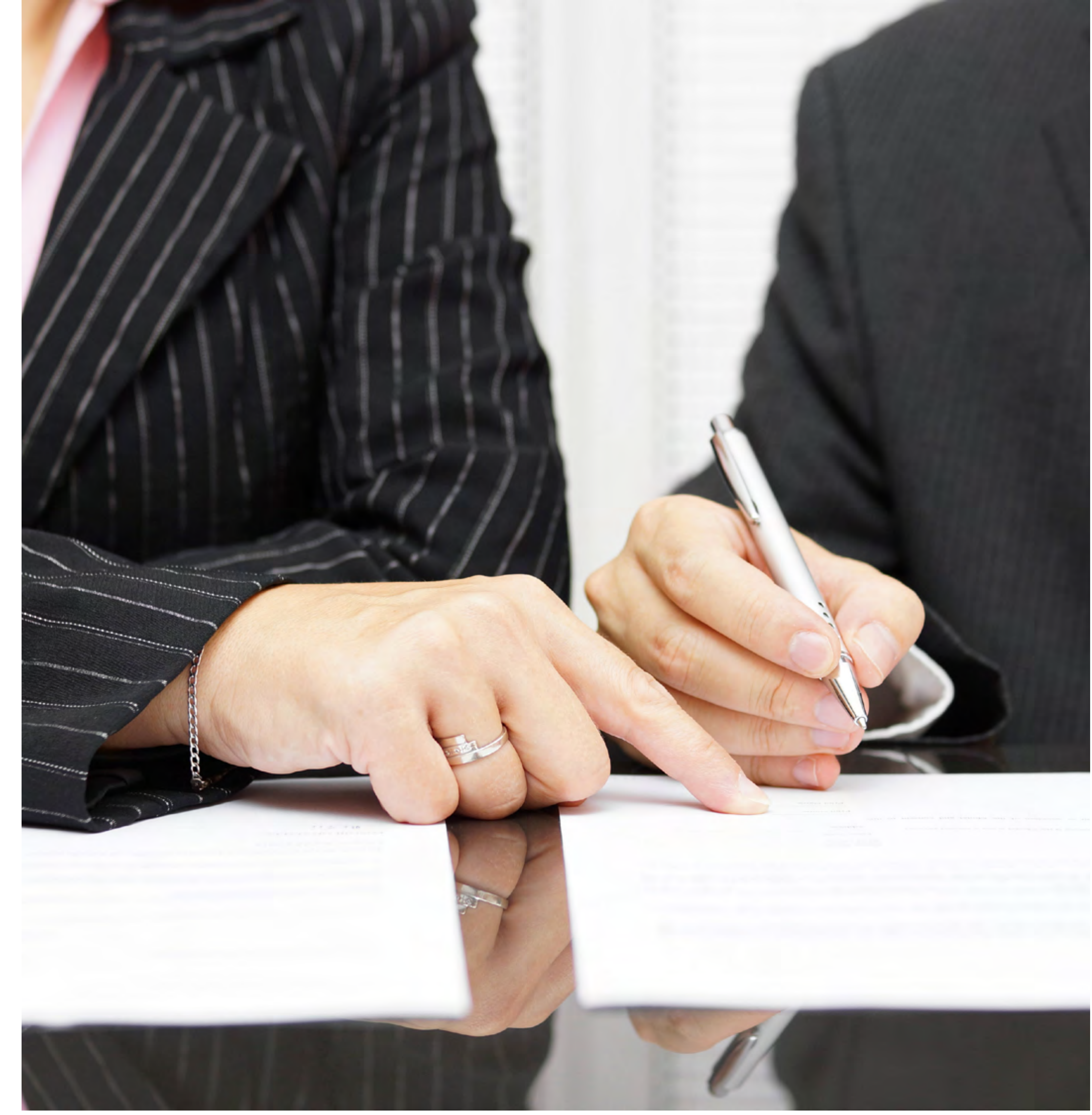
In both litigation and transactional matters, hourly billing for legal work continues to be prevalent, but the use of alternative fee arrangements continues to rise. Examples of alternative fees include flat fees for an entire case or matter, task-based flat fees (e.g., a flat fee for accomplishing a certain milestone in the representation), fee modifiers (such as hourly billing at a discounted rate, with a bonus based on a pre-defined standard of a "successful" outcome), bulk discounts, and many variations on these types of arrangements as well as other alternative fee arrangements.

Venegas: Due to the uncertain economic landscape of Mexico, there is a trend of minimising litigation costs and trying to settle disputes out of court. Clients are afraid of investing money in litigation and instead are taking care of their funds for the uncertain future.

Ajumogobia: The most noticeable trend in commercial litigation and litigation generally are the infusion of the Alternative Dispute Resolution mechanism into the court systems. Following the example laid down by the High Court of Lagos state whereby a Multi Door Court House was created which infused ADR as an alternative to litigation in the High Court, several other courts have adopted this model and incorporated the requirement for exploration of ADR alternatives in dispute resolution by way of codifying same in the Rules of Court.

Another noteworthy trend is the incorporation of electronic filing, commenced in 2012, at the registries of courts to ensure an electronic register of cases exists thus bringing the judiciary into the IT – driven world.

In relation to the matters concerning the Asset Management Corporation of Nigeria (AMCON) which have their own special rules of procedure, ex parte applications may be made to Courts without the requirement for filing an originating process under Sections 49 and 50 of the Asset Management Corporation of Nigeria Act and Order 13 of the AMCON Practice Directions 2013. By such procedure the AMCON has access to wide range of interim orders of possessory, preservative, injunctive, restraining nature prior to commencement of an action. Thereafter, the commencement of the litigation action within a period of time would convert the interim order to an interlocutory one, pending the determination of the suit. This was devised by legislation to meet the mission of the AMCON, and Courts were enjoined to grant such unusual orders in deserving circumstances.



4. Which dispute resolution method do you find you most commonly recommend and why?

Ganie: The dispute resolution method we most commonly recommend in our practice is arbitration, especially in contracts involving local amend foreign parties. A recent trend is mediation or a combination of mediation and arbitration. Concurrently with the eradication of corruption and bribes within the general court system (which gave rise to alternative dispute resolution mechanisms in the first place) and also increasingly more effective and efficient court proceedings, dispute resolution through general courts is competing again with alternative dispute resolution mechanisms.

Craig: Where we can persuade defendants to engage in early settlement dialogue, and there are ongoing commercial relationships between the parties to be preserved, we most commonly recommend an out-of-court settlement strategy as a first step in resolving the dispute. This is particularly true of competition claims against suppliers of goods or services, where an early resolution is usually far less costly and disruptive to the claimant's day-to-day operations than one reached after protracted litigation.

Where defendants are not prepared to commit to an early settlement dialogue, there are legal complexities which render the outcome of the case uncertain or where there is an information asymmetry in favour of the defendants (such as in claims arising out of price fixing cartels), the English courts are an attractive forum for claimants to resolve disputes. The English courts benefit from the significant experience and specialist expertise of the English judiciary, particularly in relation to competition and commercial litigation. In English court litigation, the parties are also subject to disclosure obligations. Access to documents is important for victims of anticompetitive behaviour or financial misconduct that raise difficult evidential issues concerning liability and/or quantum. The English courts enable claimants to access key documents at a relatively early stage in proceedings.

The disclosure process has the effect of not only bridging the asymmetry of information between the parties, but frequently acts as a conduit to the settlement of disputes. As the English court process is a public forum, as opposed to private alternative dispute resolution procedures such as arbitration, defendants are often reticent to disclose reputationally damaging documents into the public domain. By way of recent example, the chat room transcripts involving bank traders manipulating LIBOR, FX and other financial markets and benchmarks are likely to contain material that would cause significant reputational damage to those financial institutions. Further, the publicity resulting from high profile court litigation can encourage other claimants to pursue claims against the defendants to the litigation.

The English courts also operate the "loser-pays" rule, which is frequently not adopted by alternative dispute resolution processes. This potential liability for payment of the claimants' costs can exert further pressure on defendants to discuss settlement of claims, particularly in cases such as follow on cartel damages actions in which regulatory findings have previously determined the defendant's liability for the conduct alleged in the proceedings.

Isaac: As an expert accountant, I never recommend which method is most appropriate. My role is to assist the court, and this overrides any obligation to my client.

My personal opinion is that cases in which I have had a direct role, mediation has resolved far more disputes than it has failed to resolve. This is often written as a condition of an agreement or contract, and from a cost and confidentiality perspective alone I expect this is the most frequently recommended approach.

Parties often prefer to deal with more complex and larger contractual disputes at arbitration on the basis that the risk/reward renders the cost aspect less relevant and it presents both sides with a solution/award that – for better or worse – they agree to stand by – and that will remain are confidential.

Rowley: Where possible we encourage parties to mediate. Mediation can take place at any time during the litigation process and in practice involves a trained mediator who does not act a judge but rather as a go between the parties to facilitate the parties reaching an agreement to settle part or typically, the whole dispute.

In our experience mediation will usually result in an outcome, if not on the day of the mediation then shortly afterwards, and is an efficient and cost effective manner of the parties settling their differences. Our experience is also borne out by the Centre for Effective Dispute Resolution (CEDR) which in 2014 released figures confirming that just over 75% of cases settled on the day of mediation and another 11% shortly after.

Mediation may not be appropriate for all matters but where it is, it is usually an effective tool to resolve a claim.

McTighe: Although I am a litigator (or perhaps because of that fact), I routinely look for ways to help my clients avoid litigation (or, when involved in litigation already, to find an alternative means of resolving the

matter). It is impossible to predict what a jury might decide at the end of a trial or what rulings a judge might make along the way… and that is before accounting for what the appellate courts might do. Litigation can take years to resolve and tens (or hundreds) of thousands of dollars along the way, and that is before accounting for the less-quantifiable costs (diversion of employee resources, preservation of potentially relevant information, and negative publicity, to name a few). Even a "victory" at the end of the day can be a Pyrrhic one. And, it is important to consider that while there certainly are frivolous lawsuits, they are not as prevalent as some seem to think. It is perfectly fine to believe completely in one's position, and that position may indeed be the correct one. But, there would not be a dispute if there were not another side to the story. The court and the jury will hear both sides. There is a chance that the facts will come out in a way that lets them believe the other side even if, in reality, that side is "wrong." Recognising the risks and realities of litigation makes it worth considering ways to resolve the matter. And, being creative can go a long way. An apology for a mistake and a genuine effort to make things right can be all that it takes in some cases. Sometimes competitors might find a business solution by which both sides can actually profit. There often are solutions to be found beyond a pure win or loss.

That said, this advice does not mean that one should plan to settle every dispute. Sometimes litigation is warranted. And, there are alternatives to litigation that still involve a resolution of the merits of the case (like arbitration). Every situation is different.

Venegas: In large commercial disputes, I recommend arbitration because it gives the client the opportunity to have a sophisticated tribunal that with all certainty will hear not only the relevant facts and arguments of the case, but that can understand the business context of the operation and issue an award that will take all those factors into account.

In large infrastructure projects, I recommend the use of dispute boards. Dispute boards are the best preventive method of dispute resolution for this type of cases because it gives the parties the opportunity to have a panel of experts in the industry that will detect and recommend the solution of problems as soon as they arise. The fluidity of this ADR has proven to be very successful to avoid the interruption of works or the accumulation of multimillion claims.

Ajumogobia: I would recommend mediation. This is because, by its very nature and essence, it is party-driven. The speed of this dispute resolution mechanism is unprecedented in Nigeria, in comparison to other ADR methods. It is particularly useful at the Lagos State High Court as it has been fused with the court system. In the High Court of Lagos, parties may either approach the Multi Door Court for mediation, at the conclusion of which, an agreement is executed by parties and adopted as a binding decision of the court; or screened by the Registry of the Court and assigned to the ADR track, where they are sent to the Multi Door Court for mediation sessions. Parties' agreements following mediation sessions at the Multi Door Court House are thereafter entered as judgments of the High Court of Lagos State by an ADR Judge of that Court, thus giving such agreement the force of the judgment of court.

5. Have there been any noteworthy case studies or examples of new case law precedent?

Ganie: There is an increasing body of case law in the field of antitrust, money laundering and disputes relating to electronic transactions.

Craig: The recent case *Sainsbury's Supermarkets Ltd v Mastercard Incorporated and Others* [2016] CAT 11 is the first private enforcement competition damages claim to have proceeded through trial to a full court judgment. The decision in this case has set important precedent for the future of competition damages claims in the English courts. The court established that, should the defendant wish to argue that the claimant passed on any overcharge to its own customers, the burden of proof lies with the defendant to show that there exists another class of claimant, downstream of the claimants in the action, to whom the overcharge has been passed on. The court also awarded compound interest to Sainsbury's, which reinforces the provision of this head of loss in a private enforcement competition damages context and significantly increased the damages awarded in that case.

Another important judgment in *Premier Motor Auctions Limited (in liquidation) & another v Pricewaterhousecoopers LLP & another* [2016] EWHC 2610 concerned whether the arrangement of After the Event insurance ("ATE Insurance"), was sufficient to defeat an application made by the defendants seeking security from the claimants in respect of the defendants' costs. The court found in favour of the claimants, holding that the provision of ATE Insurance may indeed defeat an application for security of costs. This case is helpful precedent for smaller or impecunious claimants pursuing cases against well-resourced defendants, as well-resourced defendants have often previously employed tactics such as applying for security for costs in order to prevent under resourced defendants (who are not financially able to provide such security) from pursuing legitimate claims.

There have also been some case law developments in the English courts that have been less favourable to claimants. There has been a general trend in English court judgments restricting the jurisdictional scope of the English courts and the application of domestic law. In *Iiyama Benelux BV v Schott AG* [2016] EWHC 1207 (Ch) the court held that the claimants could not argue that cartelised sales by the defendants outside of the E.U. resulted in an infringement of E.U. law, or constituted an implementation of the cartel within the territorial scope of Article 101 of the Treaty on the Functioning of the European Union. The case was dismissed as there was an insufficient connection between the cartel and the E.U. to establish a breach of E.U. competition law.

Rowley: Mackrell Turner Garrett have recently been involved with an appeal to the Court of Appeal in relation to an important issue as to whether food served in public eateries ever became the property of the customer or whether the eatery only ever granted a licence to their customer to consume food. The standard of care required in the preparation and service of the food (and thus liability in a food poisoning case) depended on the answer.

This case was particularly important in the field of personal injury claims brought under the Package Travel, Package Holidays & Package Tours Regulations 1992 (which implements EU Regulation Directive (90/314/EEC) which allows holiday makers to sue the tour op-

erator in England and Wales rather than pursue the hotel in the country where it is located.

The Court clarified that food became the property of the customer once served to them. This meant in turn that a statutory implied term that the food had to be of satisfactory quality was implied into the holiday contract, rather than the considerably more limited term that reasonable care would be used to ensure the quality of the food. Since food that was liable to make the customer ill was clearly not of satisfactory quality, the impact of the decision is to confirm effectively a strict liability where the claimant can prove that it was the hotel's food that caused the illness.

In recent years the travel industry has experienced a huge increase in claims brought by holidaymakers who claim to have suffered gastrointestinal illness on holiday. Mainly these claims relate to all-inclusive food and drink deals, where it is relatively easy for claimants to prove that it was the hotel's fare that caused the illness.

This decision is therefore of great importance in clarifying that the tour operator's liability in such circumstances will be a strict one.

McTighe: 2016 saw several high-profile cases issued by the United States Supreme Court. In *Fisher v. University of Texas* [2016] 579 U.S. , the court narrowly upheld the use of a race-conscious admissions policy by the university (though it should be emphasised that consideration of an applicant's race was just one factor in a holistic evaluation, and the court emphasised that the university should constantly work to evaluate and refine its admissions policies). In *Whole Woman's Health v. Cole* [2016] 579 U.S., the court struck down a Texas law that would have the practical effect of restricting the ability to obtain abortions. Interestingly, given the disputes regarding the current administration's use of executive orders relating to immigration, the court had the opportunity to address the president's ability to issue sweeping immigration orders in *U.S. v. Texas* [2016] 579 U.S., but a divided court simply left in place the Fifth Circuit's decision upholding an injunction against President Obama's immigration orders. Thus, the court did not provide any real guidance on the subject.

There are a number of potentially significant cases on the court's docket in 2017 as well. For example, the court is expected to address issues relating to the education of students with disabilities, the potentially murky area between free speech and trademarks, property rights and takings under the Fifth Amendment, and the ability of litigants seeking to pursue a class action to voluntarily dismiss their claims with prejudice, but then to seek appellate review of an earlier decision to deny class certification (which is the decision leading the plaintiffs to dismiss their claims, as they would not be economically worth pursuing individually).

Venegas: Yes, recently our Supreme Court of Justice has issued several precedents endorsing arbitration between private and state-owned companies. These precedents have limited the scope of judicial revision under the excuse of violations of public policy and had taken a more commercial-friendly approach to the awards rendered in said type of arbitrations even putting principles of contractual law over principles of administrative law.

Ajumogobia: Yes. A noteworthy precedent was set by the Nigerian Court of Appeal, Abuja Division in Appeal No: CA/A/208/2012 *-Shell Nigeria Exploration and Production Co. & 3 Ors. v. Federal Inland Revenue Service & another*. The main issue for determination in this case was the arbitrability of tax disputes. In brief, the facts are as follows: the 1st Appellant (Shell) entered into a production sharing contract (PSC) with the 2nd respondent (NNPC). Under the PSC, any crude oil found is allocated to the parties in accordance with the 'lifting allocation' agreed by the parties. The PSC also provided that the CONTRACTOR shall have the sole right and responsibility to compute the lifting allocation. The appellants filed a notice of arbitration against the 2nd respondent on the allegation that since May 2007, it had been lifting oil in excess of its entitlement. The appellant's tax obligations were computed based on the filings made by 2nd respondent to the 1st respondent. The appellants alleged that their tax obligations to the 1st respondent had been grossly overstated as a result of the filings of the 2nd respondent. As a result of this dispute Shell filed a Notice of Arbitration against the NNPC. The 1st Respondent (FIRS) however successfully challenged the jurisdiction of the arbitral tribunal to adjudicate over tax disputes at the Federal High Court. Dissatisfied, Shell appealed to the Court of Appeal which upheld the decision of the Federal High Court in a judgment delivered in August 2016. By the principle of hierarchy of decisions of courts, this judgment has rendered tax disputes non-arbitrable; a hitherto untested area of law.

6. What are the advantages of utilising financial centres such as Dubai, London, Singapore and Qatar for international litigation and arbitration?

Ganie: Regional arbitration centres such as SIAC become increasingly popular if involving disputes between Indonesian and foreign parties. Whilst Singapore has generally become a popular dispute resolution hub in Asia, the advantages for Indonesian parties also include easier logistics and cost efficiency especially compared to more distant financial centres such as London for example.

Isaac: At the contract negotiation stage, it may be easier to agree on a neutral well-respected arbitration institute and seat. The advantages of these locations are that they are all established financial centres, which have been accepted by Claimants and Defendants as appropriate venues as places where cases can be heard in a less formal and costly process.

The location can depend on what is most convenient logistically for the parties. Certainly, each has experienced local counsel and arbitrators who are familiar with well-tested rules with supportive local laws and judiciary. Each also has purpose-built facilities and related support (arbitration centres with appropriate rooms, AV equipment, stenographers).

Rowley: The advantages of using London as a setting for international litigation and arbitration are numerous. London is renowned as a jurisdiction of choice in a number of high value and complex agreements for the simple reason that it is a global legal centre, with the infrastructure and expertise to deal with significant litigation.

Particularly with regard to Arbitration (a private dispute resolution procedure that is often quicker than litigating through the courts), the diverse spectrum of arbitrators, level of expertise and availability of arbitrators in London sets the City apart from other financial centres. Regardless of how the landscape will look following Brexit (discussed later), the UK as a signatory to the New York Convention (Convention on Recognition and Enforcement of Foreign Arbitral Awards) will be unaffected and the expertise of the law firms and specialist barristers in the prosecution and settlement of disputes will remain undiminished.

The certainty of enforcement in the UK of arbitral awards in other jurisdictions and the user friendly nature of steps available here is also a factor in ensuring the UK's continued success.

In terms of litigation generally it is our experience that parties whatever their nationalities prefer litigating in London with its rich tradition of providing high quality legal services.

Venegas: Generally speaking, those Centres provide a professional and independent institution to manage arbitration disputes, which are also paired with experienced and arbitration-friendly Courts. In Mexico, however, they have not gained as much traction as Paris, due to the tradition and success that the ICC has had in the Latin American region.

Ajumogobia: International arbitration offers the advantage of a greater choice of forum for parties. The parties are not limited to their place of residence or the place where that party has assets, as they normally are in litigation.

Financial centres are attractive arbitration venues because the attitude of national courts to arbitration can vary substantially from country to county. The choice of seat dictates which country's court will exercise supervisory jurisdiction over the arbitration. English arbitration, for example, recognises party autonomy and grants English courts a wide range of powers to step in and support an arbitration if requested, including the power to grant injunctions to support the jurisdiction of the tribunal, or a grant to stay proceedings to concurrent court proceedings in other jurisdictions, compel witnesses to attend the hearings or require evidence or granting injunctive relief to protect assets subject to the arbitration. Parties may wish to avoid seats in which the national courts are known to take an inappropriate hands-on approach, which can slow the process down, increase costs and erode party autonomy.

Financial centres also tend to help and assist with the enforcement of the arbitral award. An arbitral award is often only as good as the ability to effectively enforce it. Companies operating internationally typically hold assets in many jurisdictions. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) maximises the chances of being able to access the relevant jurisdictions for the purposes of enforcement by creating a favourable international regime for the recognition and enforcement of arbitral awards.

Parties prefer these financial centres mainly because they are more arbitration friendly and have few mandatory provisions and allow the parties considerable freedom to agree upon any number of matters. The parties have confidence in the system and these financial centres have the resources to make sure that disputes being handled in their jurisdiction are respected and awards are enforceable in other jurisdictions.

7. What impact will Brexit have on litigation and dispute resolution both in Great Britain and Northern Ireland and in Europe?

Ganie: There is no significant impact as far as dispute resolution between Indonesian and foreign parties is concerned.

Isaac: The jury is still out on this. From what I understand, the EU referendum is likely to only really impact litigation and other forms of dispute resolution when there is a cross-border entity or location and there is a conflict between UK and EU legislation. English Law seems to be the preferred choice in international contract disputes and so to the extent that this continues to be the case, it is logical to assume that there will be minimal change as under which law and where a case is heard.

Unfortunately, the extent to which recognition of English court jurisdiction or enforcement of an English court judgment is managed across the EU is outside my ability to comment, but it is certainly not a straightforward issue.

Rowley: We do not consider that Brexit will have a substantial impact on litigation and dispute resolution in the England and Wales. The attraction of having English law to govern a contract will remain substantially the same post Brexit, although the three key questions that will arise as a result of the vote to leave the European Union will be:

(1) Will European Courts continue to recognise choice of law clauses in contracts;

(2) Will European Courts continue to enforce English judgements; and

(3) What impact will this have on whether the parties decide to litigate in England?

With respect to recognition of choice of law clauses in contracts, at present the European statute, Rome I, require all domestic courts within the EU to uphold parties' choice of law contractual clauses. Post Brexit this may cease to apply. If that is the case the simplest situation would be for the UK to revert to the position before Rome I, this means applying the Rome Convention which has similar terms as Rome I particularly with respect to parties' choice of law. It is also highly likely that after Brexit domestic courts within EU countries will continue to uphold an English jurisdiction clause because Rome I still applies to them.

The next and more concerning area of interest is the mutual enforcement of judgements in Member States of the European Union and this is where things get a little more uncertain. Depending on the outcome of the Brexit negotiations, the Recast Brussels Regulation (Brussels I Regulation (recast) EU/1215/2012) which regulates the recognition of judgments in civil and commercial matters may cease to apply with the effect that the procedures adopted for UK judgments to be recognised and enforced in Europe and vice versa will no longer be available. Unlike recognition of choice of law there is no default position which means that should the Recast Brussels Regulation no longer apply it will be up to each European country to decide if and how it will enforce a judgment of the English Courts' and not the harmonised approach that there currently is. There are potentially a number of ways to deal with this including providing for non-exclusive jurisdiction to the English Courts and naming an EU member state court as an alternative thereby allowing for a choice to be made of which country's court to litigate in depending on where enforcement will take place. A bolder approach is to give sole jurisdiction to a court of an EU member state though the attractiveness of this will understandably vary depending on the country's judicial system. Either approach though entails relying on a different judicial system and not litigating in an internationally renowned forum which may not be attractive to any of the parties.

Whether a party decides to litigate in the UK should, we think, be unaffected. The quality of the legal market in England and Wales, the faith placed in the legal system in this country and the expertise of the Judiciary should ensure that international work continues to be undertaken here.

> *There are those who will sue when they feel wronged no matter what, and there is no shortage of attorneys willing to bring such cases.*
> *- Chad McTighe*

8. What dispute prevention mechanisms should an organisation implement?

Ganie: The higher the compliance level and level of good corporate governance of an organisation the less "self-inflicted" or "self-contributed" disputes will occur in our experience. The other dispute prevention mechanism is the ability of an organisation to conduct a legal risk analysis and, especially for foreign parties, to obtain legal advice from local external counsel in advance of any transaction as an early warning system to prevent any potential dispute. We also recommend regular legal audits of an organisation to identify existing or potential legal problems of which the organisation was not even aware.

McTighe: It is difficult to avoid litigation. There are those who will sue when they feel wronged no matter what, and there is no shortage of attorneys willing to bring such cases. Still, there are some steps companies can take to reduce the possibility of litigation. Depending on the business, it may be possible to include an arbitration provision in a customer contract that sets out not only the requirement to arbitrate disputes, but other aspects of an alternative dispute resolution process (such as an initial claims process, mediation, or other required steps that must occur prior to full-scale litigation or arbitration). Even in industries where this is not viable (and that can be the case for many reasons, not the least of which is running afoul of any legal impediments in a particular jurisdiction), an effective informal claims process can be extremely helpful. Obviously, you cannot force a customer to call the toll free number to get a refund if he's unsatisfied with the product, but the availability of such an option—and fostering public knowledge that the company takes complaints seriously and looks out for its customers—can stave off at least some litigation efforts. Sometimes, customers really are happy just to have the problem fixed and don't care to hire an attorney, go to court, and so on.

Venegas: The best mechanism is to have a clear-cut policy regarding the principles of contract management, including a strict follow up on the credits granted and on the timely performance of the obligations agreed on each contract. In addition, a list of contracts by priority based on the importance and amount in place in each contract is essential. A strong compliance department is also key to avoid running into problems with governmental agencies in regards to the compliance of statutes and regulations that may affect the daily operations of the company.

If a client has in place good policies that are strictly enforced by its managers, disputes are always minimised or their scope is limited to a size in which they can be successfully settled.

9. How has the increased importance of public perception and non-legal obligations altered the way in which organisations approach litigation?

Ganie: The increased importance of public perception and non-legal obligations influences the decision of an organisation among others whether or not to initiate litigation and the willingness to enter into out of court settlements or to choose dispute resolution mechanisms that are deemed more confidential such as arbitration and mediation to avoid negative exposure for its ongoing business.

Isaac: I think corporations are more mindful of non-legal obligations and the perception that a certain outcome of a potential litigation may have on public perception. We also see an increase in defendants accepting non-legal obligations in order to protect commercial relationships so these relationships can continue after the resolution of the dispute. News – and especially bad news – travels faster than ever, and organisations are much more aware and interested in seeking a resolution of matters to keep matters out of the public eye and reduce negative perception by the public.

McTighe: Litigation can bring extreme adverse publicity—even if it has no merit. Especially in light of social media and the corresponding ability for litigation to receive much more widespread coverage and attention than it otherwise might, it would be foolish not to account for public opinion in evaluating litigation. Consider a data breach, for example. Getting ahead of the inevitable adverse publicity (and the possibly equally inevitable lawsuit from someone whose records were included in the breach) can be critical. Quickly determining the nature and scope of the breach and implementing an appropriate action plan to address and attempt to remedy the breach can go a long way. This is important whether there is any legal requirement to do so or not. It may not be possible to avoid litigation entirely, but taking reasonable steps to address a known problem such as this can help set the table for an effective defence—and score points in the court of public opinion and minimise the adverse public perception that almost certainly would exist if a breach occurred and the company turned a blind eye to the situation.

Venegas: Companies and organisations have become much more self-conscious of their social role and the importance that it has for consumers that a brand or company has a good name and reputation. Based on this "good-boy PR culture" companies are afraid of entering disputes with either governmental agencies or clients that may bring negative advertisement to their way of doing business. Thus, there is a conscious effort to avoid said type of litigation and at the same time, implement sustainability and equality initiatives in their daily activities. Litigation is more and more seen just as a last resort that should ideally be avoided.

Ajumogobia: Most organisations perceive litigation in Nigeria as unduly time consuming, cost-intensive and uncertain. Furthermore, the recent anti-corruption fight of the present government of Nigeria which has thrown limelight on the Nation's judiciary has added to the apathy and distrust for the judiciary and litigation. There is therefore a trend for litigation to be undertaken or continued as a last resort. Another perception issue borders on the non-uniformity of judicial pronouncement and precedent which leaves a feeling of uncertainty of the law on litigants and even practitioners alike; leading to conflicting decisions by appellate courts; which has led to frustration and disaffection of the uncertainty and the lack of precision in the judicial process.

10. How can an organisation effectively utilise risk analysis prior to engaging in a dispute?

Ganie: Risk analysis is important to determine potential alternative outcomes of lengthy and costly court battles prior to engaging in a dispute. That is the reason why risk analysis should include legal risk analysis and not only purely commercial criteria.

Isaac: From what we see, a lot of effort and time spent on establishing liability prior to engaging in a dispute but very little time spent understanding the true value of the dispute. It seems sensible that litigation risk analysis should weigh up the overall risk and that should include not only the obvious liability analyses, but also the financial risk. The assessment of liability is clearly essential, but the assessment of quantum on a parallel basis may show that the financial risks are not as great as feared. This may reduce expectations and facilitate a favourable resolution.

Parties can spend so much time and money on liability that, when quantum needs to be looked at there is insufficient time – and sometimes funds – to do it properly. I have certainly been involved in cases where a more timely review of the damages would likely have impacted the direction in which the parties approach a case.

A final point – I have been instructed on cases where attorneys have had to deal with the quantum. Cost is such a focus these days, but to think that such an approach will reduce overall cost is short-sighted at best. I would not seek to offer legal advice for the simple reason that I am not a lawyer. So will parties really get a clear understanding of risk if someone not equipped to understand the accounting complexities of a case has been left to look at the numbers?

My advice: get an early, qualified opinion on quantum as it can be hugely helpful; bring the key issues into focus and save a considerable cost down the line.

Rowley: In our experience before commencing a claim in court and unless there is extreme urgency (for example when an injunction is necessary to preserve assets), pre-action investigations should be carried out. Indeed the Court rules in England & Wales impose a Pre-action protocol where the parties are encouraged (on pain of adverse cost consequences) to narrow the issues between them in correspondence before proceedings are issued. In this way, so the theory goes, risky or unmeritorious claims are filtered out.

What we mean by this is that the client should engage in correspondence with the potential defendant(s) to see if the issues in dispute can be narro wed or if a settlement can be reached without the need of court proceedings.

If this cannot be done, then an analysis of whether the potential defendant(s) is or are "good for the money" either in terms of paying the damages awarded and/or the costs of the successful party should be undertaken. An indisputable debt of £1,000,000 is excellent grounds for an order from the Court but if the other party is unable to pay then the client may be throwing good money after bad.

Venegas: The best intelligence should always focus in understanding two essential factors: (i) the persons with whom the company is doing business and (ii) the regulatory restrictions to perform certain activities in a specific country or territory. To this purpose, it is essential to pair a good legal department with private investigators when necessary. Honesty and liquidity are key factors to avoid entering contracts or businesses that may suddenly become a liability. Any money expended to make sure that those factors are well preserved, is money worthily invested.

11. To what extent has digitisation altered the litigation and dispute resolution landscape?

Ganie: Digitisation has increased the level of accuracy (and transparency) in discovery efforts in the dispute resolution landscape especially if big data is involved and indirectly ensures complete discovery of all legally relevant facts, and at the end of the day ensures a fairer award or judgment.

Isaac: Digitisation has increased the volume of information available and made information much easier to access and share. This can increase the volume of information to the limit of information overload, and this can delay progress and increase costs. That said, digitisation allows this information to be efficiently and readily searched with the use of computer software. This has also significantly increased the ability of parties to identify and request extensive disclosure to prudently consider all information available which can enhance the ability to find that key piece of information that can make or break a case.

From an accounting perspective, the volume of quantum documents available has increased, providing the opportunity to do a much more thorough review and analysis. Whilst this allows for the facts to speak for themselves it has also increased the scope of potential work, leading to increased costs. We can certainly deal with huge amounts of data and have the tools to efficiently extract what we need, but it does raise the question for the expert as to what a reasonable assurance about the value of damages may be – and to make the call as to whether sampling approaches or a more thorough analysis is required.

Rowley: A good example as to how digitisation has altered the landscape is that given the vast amount of information and documentation which is held electronically, the Civil Procedure Rules which govern the litigation process in England and Wales has quickly and efficiently adapted to "e-disclosure."

Disclosure of documents has for some time included "Electronic documents" which is defined widely and means any document held in electronic form, including, for example, emails, text messages and voicemail, word-processed documents and databases, and documents stored on portable devices such as memory sticks and mobile phones.

Parties are encouraged at an early stage of the claim to identify and liaise with each other as to the ambit and scope of disclosure of electronic documents and it is more common than not that the parties will only provide disclosure electronically rather than in paper which was the usual method of disclosure.

McTighe: Electronic discovery has fundamentally altered the scope of the discovery process in litigation. Years ago, discovery might involve countless hours of combing through documents contained in dust-covered boxes in warehouses scattered around the country. Now, it more often involves trying to sift through data stored on servers. While this leads some attorneys insisting upon sweeping discovery to claim that everything can be produced "with the push of a few buttons," the reality is that reviewing and producing relevant electronically stored information can be more difficult, in some ways, than the "old-fashioned" process of reviewing paper documents. For one, it is much easier to accumulate electronic information because it does not take up physical space like paper documents (making the implementation and enforcement of a good document retention policy that includes electronic records critical). And, while it may not be practical to send inter-office memos in hard copy format to address routine issues, it is exceedingly easy to send emails on virtually any topic—all of which conceivably could be stored for years on a server (if there is no retention policy in place) and then be subject to discovery in litigation. Those documents need to be reviewed prior to production just like any other materials being produced in discovery.

To be clear, however, the rise of digitisation has not somehow rendered the discovery process impossibly-overwhelming. To the contrary, technology has developed to facilitate the review and production of such materials. For example, simply establishing search terms to be applied to a given data set can cull many non-responsive, irrelevant documents from the list of materials actually requiring attorney review or analysis. And, as technology continues to improve, predictive coding and similar technologies (essentially, computer-based review of documents based on an appropriate algorithm to assist in identifying relevant documents) are becoming increasingly-viable means of conducting more advanced review of electronic records.

Venegas: In some aspects, it has made it easier, but at the same time it has also become expensive to have all the software in place to run the analysis of all the electronically generated information and make sense of it. There is also this sense of urgency and quickness that has made the design of well-thought litigation strategies a challenge.

Ajumogobia: The landscape of disputing is slowly being transformed by technology as the real physical world and the virtual world merges. A wide range of issues have arisen and there is a new need for contemporary means of dispute resolution and prevention process.

In Nigeria, the most recent technological advancement is the application of the Evidence Act 2011 which provides the criteria for admission and reliance on electronic evidence. As a result, the Nigerian judicial process has moved from the era where electronic evidence was inadmissible and difficult to tender in litigation.

There is evidence that digital tools are increasingly used to assist parties in conflict; the use of pre-digital dispute resolution models will appear archaic. Although this is yet to form part of the Nigerian dispute resolution, Artificial Intelligence is increasingly being relied upon by litigants and their counsel to predict outcomes of litigation and determine the viability of commencing disputes as a whole. Taking of evidence via video conferencing is also a development which is increasingly popular in the legal community, although used primarily in arbitration and other ADR proceedings in Nigeria; it is anticipated that the judiciary would eventually welcome such advances.

"In Nigeria, the most recent technological advancement is the application of the Evidence Act 2011 which provides the criteria for admission and reliance on electronic evidence."

- Odein Ajumogobia

12. In an ideal world what would you like to see implemented or changed?

Ganie: Success in the efforts to completely eliminate corruption and bribery from the Indonesian judiciary system. This is expected to lead to a better investment climate in Indonesia for the commercial sector (including for foreign investors) and indirectly also to a higher level of prosperity for the Indonesian nation and the Indonesian people generally.

Craig: The introduction of deferred and contingent fees as alternatives to the hourly rate billing model has played a key role in London maintaining its position as the litigation forum of choice within Europe. Such fee agreements increase access to justice for small or impecunious claimants who would otherwise be unable to pursue their claims for compensation due to the costs involved in doing so. Under these fee agreements, and in conjunction with After the Event insurance ("ATE Insurance") and third party funding, claimants can pursue claims with minimal cost risk and potentially without needing to pay any legal costs unless and until the claim succeeds.

However, the impact of these developments has been muted due to a number of further reforms that were brought into force on 1 April 2013, commonly referred to as the "Jackson Reforms". In an ideal world we would like to see the repeal or amendment of certain aspects of those reforms, particularly in relation to the introduction of damages-based agreements ("DBAs"), the changes to conditional fee agreements ("CFAs") and the recoverability of ATE Insurance premia. The Jackson Reforms were intended to play a key role in controlling costs and increasing access to justice but they have, in our view, fallen short on both objectives.

The Jackson Reforms brought in new rules such that, in relation to any CFA and ATE policies entered into after 1 April 2013, both the representative's success fee (or uplift) and insurer's premium, which could previously be recovered from the losing party by virtue of the "loser-pays" rule, must now be borne by the claimant. This reform has had a significant, negative impact on access to justice for small or impecunious claimants, who are simply unable to afford the ATE insurance premium necessary to protect them against potentially existential adverse costs awards.

Separately, both the Law Society and Bar Council have expressed serious concerns about the drafting of the Damages-Based Agreements Regulations 2013 and the enforceability of such agreements in certain situations. One acute difficulty is that the Damages-Based Agreements Regulations 2013 provide that the contingency fee must include both the claimant's solicitors' and barristers' fees. Under the indemnity principle, the claimant is prohibited from recovering more in costs from the losing party than the fee it is entitled to under the DBA (applying the contingency fee percentage to the claimant's damages in the case). Therefore, unless the barristers are also prepared to act on a DBA, in circumstances where a case is litigated for significantly longer than originally anticipated, or the claimant ends up recovering substantially less in damages than was anticipated, the litigation funder will potentially not recover sufficient costs from the losing party to meet the barristers' fees, leaving no sums to be paid to the solicitor. The financial risks that solicitors undertake when entering into DBAs under the current rules are therefore so significant that few legal firms are willing to offer DBAs to clients, which is a further impediment to access to justice for claimants.

Isaac: The short answer would be earlier analysis of quantum. Many cases when particularised have next to no detail on this element. Depending on whether you are looking at litigation or arbitration, there is always going to be a more realistic chance of settling a dispute if there is a realistic and properly considered range on quantum.

McTighe: Discovery continues to be among the most painful aspects of litigation for many clients, especially larger businesses that maintain more records (in whatever format). There have been both formal efforts to address this issue (such as recent revisions to the Federal Rules of Civil Procedure addressing proportionality) as well as informal efforts (there are countless conferences, articles, studies, and the like evaluating discovery costs, problems, and potential solutions). Still, many litigants complain (and reasonably so) that discovery costs continue to be excessive and can effectively help to coerce a party into settling even non-meritorious claims simply to avoid overwhelming discovery costs. I won't pretend to have a one-size-fits all solution, and there likely isn't one. But, I think that both the legal profession and the clients that we serve would benefit greatly from a continued and focused effort to address the proper scope of discovery and the best means of reducing discovery burdens without impairing the ability of either plaintiffs or defendants to have their proverbial day in court.

Venegas: There is a constant need of quality in the judiciary. Due to the low wages of state Court judges in many cases students prefer to focus their careers on the private practice and this trend has led to an alarming decrease in the quality of the officers and Judges ruling the disputes. Moreover, the lack of budget has also led to a saturation of the Courts that impede the Judges to take their time to really understand and resolve the cases. Thus, in an ideal world I would like the governments to have a much more comprehensive and consistent policy to prioritise the effective implementation of the rule of law and a methodical and relentless effort to better the conditions of the members of the judiciary.

Ajumogobia: More transparent, speedy and efficacious dispute resolution procedures. Uniformity of judicial precedents and more centralised legal materials research platform or resources.