Corporate LiveWire

LITIGATION & DISPUTE RESOLUTION 2021

VIRTUAL ROUND TABLE

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Introduction & Contents

In this roundtable, we examine the global impact of the COVID-19 pandemic on the litigation & dispute resolution landscape, as well as discussing industry specific trends, noteworthy case studies, best practice for cross-border disputes, and much more. Featured countries are: Greece, Nigeria, Turks and Caicos Islands, United Kingdom and the United States.

James Drakeford
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Meet The Experts

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Ben is the Co-Chair of Clyde & Co's Global Arbitration Group and Chair of the Dispute Resolutions Practice Group. He focuses primarily on International Arbitration with particular experience in upstream and downstream oil & gas, trade & commodities, aviation and telecommunications.

Ben has extensive dispute resolution experience, particularly in international arbitration including at the ICC, ICSID, PCA and LCIA. His work comprises commercial arbitrations as well as investor state cases.

Clients describe Ben as an "outstanding professional who combines his extensive knowledge of arbitration with a flexible approach", "very smart" and he "knows how to deal with our cases".

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As one of only a handful of attorneys licensed in both the U.S. and Greece, Mr. Kounoupis has practiced international and comparative law for over 25 years. After practicing corporate and securities law for one of the largest Philadelphia law firms (Fox, Rothschild), Mr. Kounoupis formed his own law firm, with offices in the U.S., Athens and Thessaloniki Greece, focusing on U.S.-Greek legal matters. He is the former legal advisor to the Greek Embassy and the Greek-American Chamber of Commerce, as well as multiple other organizations, including, at one time or another, almost all major Greek-American organizations. He has represented numerous municipalities, police organizations and public unions in legal matters, as well as having acted as general counsel to a major NASDAQ corporation. He is a frequent lecturer on international business and employment matters including regularly presenting for the Pennsylvania Bar Institute and appearing on television's "American Law Journal". He has been quoted in numerous publications including the Wall Street Journal, USA Today, C-Span, the Philadelphia Inquirer and Court TV. Notable recent cases involving Greek law have included representation of the heirs and estate of the Patriarch of Alexandria (second highest member of the Orthodox Church worldwide) in litigation against Boeing for a crash in Greece; a successful trial victory in Greece, in a Hague child kidnapping case, over Greece's premiere trial attorney; and representation of a major U.S. software manufacturer in closing a multi-million dollar Greek computer contract.

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Stephen Wilson QC is a partner in the law firm of GrahamThompson and head of the firm's Litigation and Dispute Resolution practice in GrahamThompson's Turks and Caicos Island's office in Providenciales. He has headlined cases involving multi-national entities, across a range of sectors, notably tourism and hospitality, banking, real estate, insurance and construction. His work has included multi-jurisdictional claims and multi-party actions and he is especially noted for his expertise in complex corporate and commercial disputes. He is highly regarded for his knowledge of constitutional and administrative law and is a leading attorney in the field of asset recovery.

Meet The Experts

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Emmanuel Ekpenyong has many years of international business advisory experience. He is the Managing Partner of Fred-Young & Evans LP, a full service commercial law firm and Fred-Young Recoveries, an international debt collection firm.

Emmanuel has been engaged in prominent commercial litigations and international commercial arbitrations. He is involved in many public interest litigations on good governance and protection of fundamental human rights in Nigeria. He is experienced in corporate and intellectual property practice, bankruptcy and insolvency, enforcement of foreign judgments and arbitral awards, foreign investments, real estate and construction.

Emmanuel is a Member of International Credit Exchange, ADVOC, IR Global, Leaders in Law, The Lawyers Network, Advisory Excellence and World Law Alliance. He is a Fellow of the Chartered Institute of Arbitration, United Kingdom (Nigerian Branch) and Nigerian Institute of Management Consultants. He is a postgraduate student of International Business Law at the University of Liverpool.

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I am a Senior Advocate of Nigeria, a Partner in the Dispute Resolution practice group at Templars with over twenty years of active arbitration and courtroom experience relating to variety of disputes in the oil and gas and construction industries, taxation, anti-bribery, corruption etc.

I am a Fellow of the Chartered Institute of Arbitrators, a board member of the Lagos Court of Arbitration, a member of LCIA, African Arbitration Association and Lagos Chamber of Commerce International Arbitration Centre. I am also a CEDR Accredited Mediator and a Fellow and Governing Council member of the Institute of Chartered Mediators and Conciliators.

Q1. What areas of law have you been predominantly working on over the past 12 months?

Stephen Wilson

Wilson: 2020 was dominated by requests for advice and assistance coming from clients as a result of the COVID-19 pandemic and the local and international responses thereto. In particular, we were asked to advise businesses in the tourism industry how to deal with employees when the income for the business is reduced to zero – navigating lay-offs, short-time, redundancies; dealing with the reality that work permits for expatriate employees will not be renewed, etc. We assisted in trying to mitigate the financial exposure for businesses while retaining staff and drafted agreements whereby employees agreed to salary reductions rather than terminating the employment relationship entirely – working together to keep the businesses alive when all the while appreciating that the money simply isn't there to make the big severance payments that would fall due if claimed.

Away from COVID-19 related work, we continued to spend time on the enforcement of judgments (both domestic and international) or steps ancillary thereto. The principal case involves us acting for equitable receivers appointed by the High Court of England and Wales in respect of a judgment debt of around $300 million. Proceedings are being brought in the Turks and Caicos Islands ('*TCI*') to recover assets allegedly transferred in order to put them out of the reach of the judgment creditor.

We have continued to advise and act for clients involved in strata title disputes as well as strata lot owners in dispute with their property rental managers. One major case involved a dispute between a strata corporation and a property developer as to the ownership of an amenity building in respect of which the developer retained title but the strata corporation claimed the building should be common property.

2020 also saw us act for the TCI Government is resolving a long-standing dispute with the country's largest luxury all-inclusive resort regarding the alleged non-payment of tourist taxes and related disputes.

Godwin Omoaka

Omoaka: Our law firm is one of the top full-service commercial law firms in Africa. As such, our practice covers diverse areas of law and we provide legal services to the major sectors of the Nigerian economy. Our firm is sub-divided into practice groups which are broadly categorised based on the broad practice areas of law such as Corporate & Commercial, Dispute Resolution, Finance and Tax Advisory and Energy & Projects. These practice groups are interlinked and interdependent on each other in the rendering of legal services. Hence, while I am primarily in the Dispute Resolution practice group, I also work with other practice groups as the need arises and routinely get drafted into integrated teams within the firm in order to provide holistic legal services to clients.

Over the past 12 months I have been involved in a number of disputes which cut across various fields, but more prominently in the areas of oil and gas disputes (especially disputes arising under petroleum sharing contracts and other contracts relating to oil and gas interests, rights and obligations, oil prospecting leases, oil mining leases, crude oil spills), real estate transactions, contract, foreign judgment enforcements and arbitration proceedings.

Emmanuel Ekpenyong

Ekpenyong: During this period, we advised various clients on the effect of force majeure caused by the COVID-19 pandemic lockdown ("the lockdown") on existing commercial obligations. We also advised our foreign clients on the legal framework of business opportunities which the COVID-19 pandemic ("the pandemic") has sprang up in Nigeria.

Our clients benefit from our experience on ways to renegotiate terms of their contracts which have insulated them from litigation risks and prevent them from running at a loss as a result of the shutdown of their businesses during the lockdown period that inhibited them from carrying on business and fulfilling their obligations under such contracts.

Litigants are now more willing to settle out of court. We have negotiated with counsels of adverse parties who commenced various litigations against our clients and reached amicable settlement with them. The terms of the settlement were adopted by the parties and entered as consent judgment.
Ailing businesses are looking for ways to inject fresh capital. This has led to a growth of our debt collection portfolio. International clients retain our services to collect business, hospital and school debts against Nigerians and Nigerian businesses. We have also collaborated with our foreign partners to recover outstanding debts for Nigerians and Nigerian businesses against foreign debtors abroad.

Inevitably, the pandemic has led to many foreign businesses rebuilding by seeking new markets abroad, including the huge Nigerian market. We advised firms – especially in Europe and Asia – on the most suitable business entities to form and the permits and certifications they require in order to carry on business in Nigeria. We have registered more trademarks, patents, designs and franchise within this period.

George Kounoupis

Kounoupis: I have been working on federal business and labour litigation, and international litigation involving cases between the United States and Greece.

Q2. How do you determine which method of litigation or dispute resolution is most suitable on a case by case basis?

Stephen Wilson

Wilson: Much depends on the nature of the dispute and whether there is in place a contractual provision requiring or submitting to alternative dispute resolution. However, the resources available in the TCI for mediation are very limited and the antiquated legislation dealing with arbitration is such that neither is generally recommended. That being said, in family cases or low value financial disputes such as construction disputes, mediation is often put forward as a cost-effective way of avoiding litigation and assisting in bringing about a resolution.

Q2. How do you determine which method of litigation or dispute resolution is most suitable on a case by case basis?

Godwin Omoaka

Omoaka: The primary considerations towards the determination of the most efficient method for dispute resolution to be adopted for the resolution of disputes are as follows:

<u>The intention of the parties:</u> The parties to the dispute may agree to adopt a specified method of dispute resolution prior to the dispute or after the dispute had arisen, in which case the intention of the parties will be adopted by me. For example, the parties may have an arbitration clause in their contract, or an agreement to opt for mediation, conciliation, or negotiation, etc., when a dispute arises, and in that case the agreement of the parties will be binding upon them.

<u>Statutory requirements:</u> Where the law has provided that a type of dispute must be resolved through a specified method of dispute resolution, the parties cannot derogate from the dictates of those laws when such disputes arise. For instance, the position of the law in Nigeria is that tax disputes cannot be resolved through arbitration, but through an action in court or at the Tax Appeal Tribunal.

<u>The nature of the subject matter of the dispute:</u> There are certain subject matters that may not be appropriate or beneficial to one or both of the parties if it is determined through litigation before an open court. This may be due to the confidentiality of the subject matter. In such instances, more confidential means of dispute resolution such as arbitration, conciliation, mediation or negotiation may be adopted.

<u>The nature of the relationship between the parties:</u> Where the parties have a long-standing cordial relationship which my client desires to maintain after the resolution of the dispute, I will advise my client to opt for less adversarial methods of dispute resolution such as mediation, conciliation and negotiation. As a last resort, they may adopt arbitration because the chance of maintaining a cordial relationship after a full litigation is minuscule.

<u>The nature of the dispute:</u> Where the parties are engaged in a hostile dispute that has strained their relationship to the extent that they cannot or do not desire to revive the relationship, litigation may be adopted, unless the subject matter of the dispute is confidential or the laws or agreement between parties provide for a separate method for dispute resolution. Litigation, though adversarial, will ensure that the outcome of the resolution will be enforceable against the other party.

Emmanuel Ekpenyong

Ekpenyong: Business disputes are inevitable. Dispute may arise from the interpretation of the provisions of a contract, ascertaining the obligations of the parties, failure to fulfil obligations under the contract, or even breach of the contract itself. In order for the parties to settle their dispute and possibly continue their business relationship, it is important to ascertain when to litigate a matter at conventional courts or employ other disputes resolution mechanisms such as negotiation, mediation and arbitration or a blend of the mechanisms.

In recent times, both legal practitioners and judicial officers have come to appreciate the role which mediation play in the dispute resolution process. For instance, in franchise law, mediation is increasingly becoming popular. Parties agree to settle their franchise disputes by mediation by including mediation provisions in their contracts. Mediation offers both parties the opportunity to resolve their conflict in a non-adversarial way so as to maintain their relationship in the future.

As a result of the acrimony and the delay in resolving commercial disputes by litigation, it is better for disputes in sectors such as construction, maritime, telecommunications, manufacturing, oil and gas, finance, where time is of essence to be resolved by arbitration.

Apart from the autonomy of the parties to choose their arbitrator and determine the mode for hearing, it allows parties to resolve their dispute timeously which allows them to concentrate in growing their businesses. This is far better than waiting for many months or even years for the court to deliver judgment which in most cases is subject to an appeal.

Nonetheless, parties to arbitration still require the coercive powers of the court to enforce their arbitral award. The law provides that some disputes such as matrimonial causes like dissolution of marriage, paternity issues and custody of children; land matters and criminal matters cannot be resolve other than by litigation.

Ben Knowles

Knowles: Sadly, by the time a case reaches us, in the disputes teams, the decision has often been made for us. That being said, there are some obvious trends we are seeing and reasons behind that trend.

Arbitration continues to grow apace, and it is starting to be used in areas where it hasn't traditionally, such as the tech sector. For anything cross border, involving a significant investment, arbitration has to be the choice, because arbitration awards are much easier to enforce, and, in relation to the UK, especially so post Brexit. Indeed arbitration is only peripherally impacted by Brexit, unlike court proceedings, where the rules on enforcement of judgments have changed enormously, and great uncertainty has arisen.

There are, on the other hand, types of dispute that are uniquely suited to court proceedings, and, as we have seen in the last year or so, consumer litigation and associated class actions, are likely to take up more and more of the court's time. Court proceedings are also particularly useful where a determination is required that will impact on a whole industry or sector. But that can have advantages and disadvantages.

Mediation, whether in support of litigation or arbitration, continues to have its place, particularly where both parties recognise that money needs to pass hands, but they are struggling to agree on a figure. However I think it would be fair to say that for certain clients, mediation has not perhaps been the 'cure all' that was perhaps once promoted. It's all about picking the right cases.

George Kounoupis

Kounoupis: In Greece, mediation is just being implemented and I have been instrumental in advising Greek experts of how we use mediation in the United States. In federal cases, the District Courts refer the case to Magistrate Judges for settlement conferences or federal mediation. I always choose agency mediation—such as before the EEOC (Equal Employment Opportunity Commission).

"Mediation, whether in support of litigation or arbitration, continues to have its place, particularly where both parties recognise that money needs to pass hands, but they are struggling to agree on a figure."
- Ben Knowles -

Q3. What strategies, techniques or conflict management tools can be employed in order to achieve consistent results?

Godwin Omoaka

Omoaka: The facts, parties and the intended goals of the client will typically inform the strategy that will be adopted in resolving any particular dispute. However, a general guide for the strategies, techniques or conflict management tools that can be employed towards achieving consistent results in dispute resolution include the following:

Assessment of the underlying cause of the conflict: It is imperative to assess the origin and the underlying cause of a conflict. This would assist in highlighting the link between the factors that led to the conflict and also develop a clearer picture of the cause-effect chain.

Analysis of the various party's rights and obligations: Initiate discussions that will require the parties to express their views as to each party's rights and attendant obligations with respect to the issues in conflict. Then, harmonise the areas in which they expressed divergent views by pointing out the valid points made by each party and proposing a common ground.

Streamlining the conflict between the parties: The points of conflict between parties are often exaggerated to the extent that parties believe that they disagree over more issues than they actually do. The solution for this is to pose questions to the parties to the conflict to independently present points upon which they disagree with each other, compare the notes of each party to determine their points of agreement, then focus on the points of disagreement to determine what concessions each party may need to make in order to achieve a resolution of the dispute.

Ensure that the end-goal of each party is accurately defined: There is a tendency that once a party obtains what he/she/it desires, such party may raise the bar on his/her/its end goal beyond what it had been initially, and this may lead to a protracted dispute between the parties. However, this can be kept in check by asking parties what their end-goal is and then reminding them to desist from going any higher and/or encouraging them to accept a resolution that is the closest possible to their end goal.

Emmanuel Ekpenyong

Ekpenyong: Conflicts can either arise as a result of scarce resources, personal and cultural differences, underperformance, unrealistic expectations, stress, ambiguous work roles, poor communication amongst other human factors.

Conflicts must be timeously managed so as not to impact negatively on an organisation and result in poor results. The management of any organisation should employ the following good conflict resolution techniques:

Proper communication: Every organisation should encourage proper communication across different cadres of its set-up. There should be increased dialogue among groups and sharing of information. This will help the group know more about each other, eliminate suspicion and encourage teamwork.

Prompt resolution of conflicts: Management must endeavour to immediately address conflicts because postponing conflict resolution would escalate the issue and affect performance. However, the issues resulting in the conflict should not be addressed too quickly without careful consideration as management's decisions will directly affect the demeanour and performance of staff.

Emphasis organisational goals: Management should emphasise organisation goals and objectives which should prevent conflicts. If larger goals are emphasised, employees are more likely to see the big picture and work together to achieve corporate goals.

Impartiality: Management must be impartial and be seen to be impartial. Situations should be accessed from all sides for the purpose of arriving at a fair and reasonable solution.

Provide well-structured tasks and roles: Where tasks and roles are clearly defined, understood, and accepted, conflicts are less likely to occur. Tasks and roles uncertainty and ambiguity increases conflicts in an organisation.

Listening to both parties: Management should listen to all parties involved to completely understand the nature of the conflict and troubleshoot solutions which will solve the conflict and prevent future occurrence.

George Kounoupis

Kounoupis: Identify the strengths of the case and work hard in discovery to establish key components, and communicate early and honestly with opposing counsel to achieve settlement.

Q4. What measures can a company enact to help minimise the cost, damage and disruption of litigation to their business?

Godwin Omoaka

Omoaka: In order to fully protect a company against exposure to potential litigation risk and liability, it is imperative that it recognises the need for sound legal counsel. As such, management should endeavour to have both an internal and external team that can provide round-the-clock legal advice on its various transactions and activities. Four tips that should be adopted are:

- Engaging experienced and competent legal advisors prior to or as soon as a potential litigation arises. This will help in providing an assessment of the potential disputes in terms of the chances of success and the best avenue for reaching a resolution. At times, companies that attempt to resolve disputes themselves often engage in interactions with the other party that may later be used against them in court, but this could have, otherwise, been averted if they had sound counsel in time.
- Establish protocols for handling and storage of documents, and correspondence. This will help preserve useful evidence that may be required in resolving the dispute.
- Consider alternative means of settling disputes outside litigation, which may be more cost effective and better suited for dealing with the issues in contemplation.
- Require that both internal and external counsel advise the management periodically on the progress of the dispute and to reassess their strategies towards handling the dispute.

"Conflicts can either arise as a result of scarce resources, personal and cultural differences, underperformance, unrealistic expectations, stress, ambiguous work roles, poor communication amongst other human factors."
- Emmanuel Ekpenyong -

Q4. What measures can a company enact to help minimise the cost, damage and disruption of litigation to their business?

Emmanuel Ekpenyong

Ekpenyong: The main aim of any business is for profits and not to engage in endless litigations. This is because litigation is time consuming, distracting, expensive and sometimes may be costlier than the amount in dispute. Time spent preparing staff as witnesses takes away business time. The company pays its counsel from its scarce resources to represent the company in court. Disputes can also dampen staff morale and ruin the company's business reputation. This is why a company should observe the following measures to avoid and minimise the risk and cost of litigation:

<u>Retain the services of a company secretary:</u> In the 21st century, a company secretary is no longer a mere clerical officer but an important member of the board who advises the company on modern due diligence matters, corporate and governance issues and ensures that the company's practices are in line with extant legislations and international best practices. This will reduce the company's exposure to litigation.

<u>Proper documentation:</u> A company should engage the services of a solicitor to ensure that all its agreements with other companies, its staff, suppliers, business partners, etc., are properly documented and franked. Variations to the original agreement should be properly documented, approved and executed. Having an agreement which clearly sets out rights, obligations and dispute resolution clause of partnership or business relationship when it breaks down can minimise the cost of resolving disputes.

<u>Proper communication:</u> In order to avoid conflicts which may result in litigation, a company should ensure its clients, customers or associates are well informed about their activities and send timely updates. This could be by informing them about increase in cost, budgets and scheduling. Respecting its customers and keeping them well informed can go a long way to make a company avoid litigation.

<u>Effective customer care service:</u> A company should maintain an effective customer care service which will pacify and attempt to resolve disputes between the company and its customers or business partners. If actions are taken promptly to deal with conflicts as they arise, a company would be able to prevent such conflicts from developing into a major problem. It is not advisable to ignore a problem or complaint hoping that it will go away by itself.

<u>Study profile of potential partners:</u> A company should do proper study and search on their potential clients, customers, employees and suppliers. The company should ensure that they know the individuals or companies which they do business with. Some individuals and organisations have a tendency to attract trouble. Businesses should avoid companies or individuals with such profiles.

<u>Being objective:</u> Persons in management positions should think and act objectively for both the short and long time gain of the company. They should, put themselves in the shoes of others and identify the motivation for litigation against the company and negotiate towards an amicable settlement. They should be able to determine if it is simply animosity or the other party has a genuine reason for commencing litigation against the company.

Ben Knowles

Knowles: The issue of cash flow is going to be a major concern for all businesses as we start to emerge from COVID-19 and as some of the governmental support that has been put in place, is gradually rolled back. In that regard, we have seen a growing interest from clients in contingent cash flow projects and funded portfolios. In essence, this is where we work with a client to effectively manage the entirety of their external cash flow issues, right from the time an invoice is unpaid up until collection, whether pre or post litigation. And we have been putting in place these arrangements for clients on a global basis taking advantage of lower cost base opportunities and the use of systems to simplify the process. Likewise we have also seen an uptick in the interest of clients in obtaining third party funding to fund single or multiple cases, the advantage with the latter being that risk is reduced and hence costs are lower.

George Kounoupis

Kounoupis: Aggressive litigation will always disrupt. Nothing can beat trained executives, enforced policies and the retention of experienced counsel to provide advice on minimising or preventing issues.

Q5. How has COVID-19 impacted the litigation & dispute resolution landscape?

Stephen Wilson

Wilson: Initially, (in mid-March 2020) the majority of the courts ceased conducting cases. Thereafter, there was a rapid response including permitting filing and service of process by email (which had not hitherto been permitted) and payment of filing fees online, all of which has provided a positive advance towards proper electronic filing.

The Emergency Powers (COVID-19)(Court Proceedings) Regulations 2020 came into operation from 20 April 2020. These regulations were introduced to put measures in place during the pandemic to ensure that the administration of justice, including enforcement of orders and access to justice is carried out so as not to endanger public health. These regulations allow the Chief Justice to make such rules of court and issue such orders or directions as deemed necessary to allow for, *inter alia*, remote sittings of civil and criminal proceedings; the adjournment of jury trials; and the swearing of affidavits by remote means before Justices of the Peace. The Chief Justice has issued a number of Practice Directions in response to the pandemic dealing with these and other procedural matters.

Since the courts resumed business, all hearings before the Court of Appeal and Supreme Court and the vast majority of hearings before the Magistrate's Court have been over Microsoft Teams (in the case of the Magistrate's Court and Supreme Court) or Zoom (in the case of the Court of Appeal), though with the country's enviable vaccination programme and (until prior to the end of 2020) low number of positive COVID-19 cases, we are slowly moving back towards 'in-person' hearings.

Godwin Omoaka

Omoaka: Generally, legal practitioners, like many other professionals, felt the impact of the COVID-19 pandemic, but those in the litigation and dispute resolution space appear to be the most affected by the pandemic. In Nigeria, due to the initial total closure of courts during the early days of the pandemic, and the limited access to courts that is currently in place, litigation lawyers and dispute resolution practitioners have had their practices truncated, and their incomes significantly reduced.

Some of the main ways the pandemic and the resultant government actions to control its spread had on dispute resolution are:

<u>Limited access to courtrooms:</u> Access to the courtrooms were and are still very restricted, the number of cases listed on the cause list and the number of lawyers who can have access to the court per time were reduced, depending on the size of the courtroom.

Q5. How has COVID-19 impacted the litigation & dispute resolution landscape?

Godwin Omoaka

Limitation of cases heard: As the times passed, the various heads of the courts released several practice directions which set out the modalities on how cases would be heard. Particularly, it initially restricted the physical hearing of cases to only time sensitive and criminal matters.

Adjournments: Due to the limited cases that were listed daily for hearing, this led to the rescheduling of a lot of cases which were given long adjournment dates.

Emmanuel Ekpenyong

Ekpenyong: Courts across the globe have rapidly adapted to COVID-19 protocols. The have found new ways to hear cases before them. As restrictions are relaxed in Nigeria, litigants are now faced with a significantly altered dispute resolution landscape. In order to decongest the courts and maintain social distancing, access to courtrooms in most States of the Federation is restricted to one counsel per litigant. The counsels must maintain social distancing in their sitting arrangement.

Many courts now conduct fully virtual hearings, in which the Judge and some parties are present in the courtroom while others attend virtually. The courts provide parties, the public and the media with login details for virtual hearings. This is a drastic change from the requirement that parties and counsels must be physically present at court proceedings.

Electronic processes have been widely adopted and used as a means of filing and serving processes of court. Before now only the National Industrial Act and its rules make provision for this technology. However, the High Courts of some states started test running electronic filing system in their jurisdiction, but the COVID-19 restriction has sped up the process. Electronic filing and service is now an integral part of the justice delivery system in many jurisdictions in Nigeria.

There has been an increased awareness in settling commercial disputes amicably. Financial pressure caused by the pandemic has made many litigants to be more willing to settle disputes to avoid long and expensive court proceedings. Settlements are currently being achieved through virtual meetings, mediation and informal discussions between counsels and the litigants.

Nevertheless, in spite of the increased use of technology in court proceedings, in many jurisdictions, courts are yet to embrace this innovation. This has increased the backlog of cases in those jurisdictions and made litigants to believe more in ADR mechanisms, especially, mediation and arbitration to promptly resolve their disputes.

Ben Knowles

Knowles: 2020 was a most unusual year, as we all know. As COVID-19 hit, litigation and arbitration were, unsurprisingly, not the top priority. And indeed, in some sectors, for example property and insolvency, legislation effectively postponed action that may well have led to claims being issued. On the other hand, the insurance market was hit with an avalanche of COVID related disputes, which have been very swiftly dealt with, as is well known, leading to a major judgment in the Supreme Court – at record speed. As 2020 progressed, and clients became used to the 'new normal', we saw an uptick in disputes, leading to what has been, overall a very busy year.

In terms of the change in the way disputes have been handled, clearly there has been an enormous step change in relation to the use of technology to assist with the resolution of disputes, particularly as to document management and virtual/remote hearings. Before 2020, the use of technology to support remote hearings was a rarity. For much of 2020, it has become the only way for hearings to take place. Going forwards, in my view, 2020 has illustrated some of the advantages of virtual justice, and I think the big debate is going to be around how we incorporate the undoubted benefits of virtual or semi virtual hearings, as the world returns to normal.

George Kounoupis

Kounoupis: It has created a multitude of HR issues and employment and labour compliance issues; plus, there are now two to three years waiting periods for a jury trial in Federal Courts. Also, obtaining witnesses in cases who live abroad is difficult due to COVID travel restrictions. Now we are increasingly seeing Zoom depositions and mediations.

Q6. What new challenges have emerged as a result of COVID-19 and what steps should companies take to remediate these risks?

Stephen Wilson

Wilson: The TCI economy is heavily reliant on tourism and there is no doubt that the COVID-19 pandemic has had a severe impact on international tourism. Companies in the tourism sector are doing all they can to combat the spread of the COVID-19 virus, including following all health and safety recommendations. Many resorts are now offering their guests free Antigen testing as countries such as the USA (TCI's largest market for tourists) now require a negative test result to be obtained no more than 72 hours before entering the country. Because the reliability of such tests, in particular in respect of positive results, is not 100%, we have been assisting resorts with drafting exclusion/limitation of liability clauses for use when administering those tests. This followed the case of an asymptomatic tourist who tested positive with an Antigen test and who was thus not able to take his scheduled commercial flight back home. Rather than stay in TCI until he had recovered, he had to charter a private plane at great expense. On returning to his home jurisdiction, he tested negative and, perhaps not surprisingly looked to hold the testing facility in TCI liable to compensate him for what was, on his case, an unnecessary but costly private charter.

Godwin Omoaka

Omoaka: It is our observation that the pandemic has brought up a number of concerns for companies, particularly with respect to how they should go about mitigating potential legal and commercial risks arising from their commercial arrangements and contracts.

One major concern has been in relation to whether COVID-19 will qualify as a force majeure event. The general response is that it will depend on the drafting of the force majeure clause in the contract. For instance, some clauses may expressly reference 'pandemic' or 'epidemic' as trigger events. In that event, COVID-19 could constitute a force majeure event.

On the other hand, for those which do not expressly reference 'pandemics' or 'epidemics', or like terms, whether COVID-19 should qualify as a force majeure would depend on how broadly the force majeure clause is drafted. Most force majeure clauses will specify several events, and then conclude with a broad, omnibus phrase such as "or any other causes or events beyond the control of the parties". These omnibus phrases are usually construed as having a wider meaning which is not limited to the class of events earlier specified. For example, if a force majeure clause specifies events such as war, fire, tsunami, earthquakes, natural disasters "or any other causes or events beyond the control of the parties", the latter phrase may be interpreted to include a pandemic (such as COVID-19) even though it is not within the class of the events specified. Narrowly drafted clauses usually limit the events of force majeure to what has been expressly specified by the clause. In such cases, only the expressly mentioned events may trigger force majeure.

In terms of practical steps companies can take to mitigate its risk with respect to present or future contract, steps that can be taken include: (a) contract review and renegotiation, and (b) negotiating price reopener/review clauses.

Q6. What new challenges have emerged as a result of COVID-19 and what steps should companies take to remediate these risks?

Emmanuel Ekpenyong

Ekpenyong: The pandemic has tested the resilience of most businesses and challenged their financial, operational and commercial framework. In order to survive the rough tides, companies should be ready to adapt to the current strains and market conditions caused by the pandemic. As the situation evolves, companies should expect to see a shift in focus and a reprioritisation of operational and conduct risks as they come to terms with the harsh reality of managing their dispersed workforces. In order to grapple with these challenges, companies must be ready to engage in the following:

Conduct readiness assessments: A readiness assessment is a good place to start when companies don't know what their business continuity programme should be. Industry and role readiness templates as well as pandemic-specific templates allow a company to evaluate their business continuity programme against a best practice standard and identify where gaps may exist. These readiness libraries break down standards and best practices into actionable pieces so that companies can track progress and adherence.

Have a risk management plan: Companies should complete a risk assessment on their core business processes to identify and prioritise any new risks or gaps in their existing controls for new scenarios like pandemics, recession, and geopolitical conditions risks.

Conduct business impact analysis: Not all risks within processes or functions within a company should be treated the same way. A business impact analysis allows companies to identify which parts of the business are most critical to its operations.

Have a management policy: As the pandemic lingers and new information arises, policies will need to be revisited, updated and communicated. For example, reviewing and revising a work-from-home policy will be effective only if dissemination of that revised policy is made with governance tracking for adoption across the company.

Ascertain staff redundancy benefits: As the pandemic lingers and revenue dwindles, some companies may have to terminate the employment of redundant staff. It is therefore important for the company to ascertain the severance package for its redundant staff so that it does not expose itself to the risk of litigation and other labour related issues.

Ben Knowles

Knowles: It is no secret that, in any downturn, 'cash is king'. It is more critical than ever for clients to keep a close eye on the timing of payments from counterparts and to watch out for indicators of struggling financial performance. Cash flow management is not always the number one priority of General Counsel and their legal teams, and the client may have insufficient resources to manage this process. In those circumstances, General Counsel may want to consider outsourcing the entire process to external counsel.

At Clyde & Co, we offer a global recovery programme, which combines the use of our own cash management (non-lawyer) specialists to deal with the pre litigation phase, and then for those debts that are more intractable, we can seamlessly hand that over to lawyers who are specially trained to run this process efficiently, in their home jurisdiction. We will often manage this on a contingent or funded basis, so that the client has no exposure to legal fees.

George Kounoupis

Kounoupis: New challenges include a complex additional set of regulations for HR matters and on-site compliance.

Q7. Have there been any recent regulatory changes or interesting developments?

Stephen Wilson

Wilson: 2020 and the first quarter of 2021 has been dominated by emergency legislation dealing with COVID-19, the details of which are too voluminous to include in a publication of this nature and which change approximately every fortnight.

That being said, on the litigation/dispute resolution front, at the beginning of November 2020, the Chief Justice of the Turks and Caicos Islands appointed a four-member technical team to produce new Civil Procedure Rules for the Judiciary of the Turks and Caicos Islands. The aim is to modernise the existing Rules and to produce rules of procedure, which reflect a consciousness of natural and other disasters that may affect the efficient and effective operation of the courts. Amongst other things, focus is to be on the following:

- The Overriding Objective: The philosophy underpinning litigation and court proceedings
- Case management
- Case flow management: process
- Registry organisation and management
- Case flow management: judicial organisation, management and responsibility
- Backlog reduction
- Rules
- Strategies
- Alternative or appropriate dispute resolution
- Rules
- Strategies
- Mediation
- Judicial settlement conferencing
- Arbitration
- Initiation of proceedings, including electronic filing of process and other documents.

It is hoped that the new rules will come into force in Q2-2021.

Godwin Omoaka

Omoaka: The pandemic and resultant lockdown has stalled operations and activities of companies in various sectors, thereby leaving stakeholders at their wits end regarding modalities for undertaking corporate actions and fulfilment of compliance obligations. In response to this, various regulatory agencies in Nigeria have issued circulars and guidelines geared towards providing guidance to companies and modifying compliance requirements to enable companies fulfil attendant compliance obligations amid the pandemic.

Q7. Have there been any recent regulatory changes or interesting developments?

Godwin Omoaka

For instance, the Corporate Affairs Commission ("CAC") issued *Guidelines on Holding of Annual General Meetings of Public Companies Using Proxies* (the "Guidelines") on 26 March 2020. The Guidelines enjoined public companies to capitalise on the provision of the Companies and Allied Matters Act ("CAMA") which permits shareholders to appoint proxies to attend and vote at meetings on their behalf in order to hold their annual general meetings during the pandemic. For this, the prior approval of the CAC is required and the application for approval may be sent to the Registrar General of the CAC by email.

There was also a circular issued by the Nigerian Stock Exchange ("NSE") on 23 of March 2020 which granted listed companies a 60-day extension for submission of their Audited Financial Statements for the year ended 31 December 2019 which were due to the NSE on 30 March 2020. Additionally, on 19 March 2020, the NSE published a circular on the conduct of 2020 Annual General Meetings ("AGM") during the pandemic by issuers listed on the exchange. The NSE, advised all listed companies scheduled to hold their AGMs to adopt adequate precautionary measures in line with guidelines/directives issued by the Nigerian Centre for Disease Control and World Health Organisation, to ensure safety of all stakeholders at the AGMs. Issuers were also advised to capitalise on the flexibility available under the CAMA by applying to the CAC to grant an extension in the time within which the company is required to hold its AGM.

Emmanuel Ekpenyong

Ekpenyong: One of the key provisions is the recently passed Bank and Other Financial Institution Act, ("the BOFIA 2020 Act") which makes bank staff personally liable for contraventions of the terms of a banking license. This will improve compliance and reduce recklessness by forcing bank management to be more vigilant. The new regulation hopes to avoid events like the toxic asset crisis of 2009, which many people believed that Nigerian banks contributed towards.

These changes have far-reaching implications in the areas of monitoring, and enforcement of safer lending practices. For example, the BOFIA 2020 Act provides that loans in excess of three million naira without collateral will require the Central Bank of Nigeria ("the CBN") approval. Many small and medium businesses that rely heavily on revenue-based financing will now face an extra hurdle which will further slow allocation of credit in Nigeria's economy. The increased powers given to the CBN potentially mean that the regulatory bank could become more obstructive in coming weeks.

The BOFIA 2020 Act even gives the CBN authority over the opening or shutting down of bank branches. The law gives immunity to the CBN which limits the redress banks can seek if they feel they have a case concerning any action taken by the regulator. On one hand, the new legislation will certainly make the sector more robust, due to the higher penalties for recklessness. However, the range of things requiring CBN approval may stifle growth, and make banks slower to respond to changes in the banking industry and Nigerian economy.

The BOFIA 2020 Act provides opportunities for fintech investors to support meaningful innovation in financial services that improves the lives of people. Generally, certain aspects of the Act will be advantageous to local fintechs, partly because a slight barrier was incorporated to ensure foreign fintechs localise their operations, giving a degree of protection to home-grown players, and also because the CBN's powers have been broadened, to the extent of having to sanction even some of the most rudimentary moves by banks.

Furthermore, the Companies and Allied Matters Act, 2020 introduces some new provisions for the purpose of entrenching the ease of doing business in Nigeria and to ensure that the practice of business entities meets international standards and modern corporate governance principles. The new provisions will indeed improve the management and productivity of Nigerian businesses in the coming years.

George Kounoupis

Kounoupis: The CARES Act and new FMLA have affected companies.

Q8. Are you noticing any trends in industry-specific litigation?

Godwin Omoaka

Omoaka: The COVID-19 pandemic has effectively changed the way the world works and how far the changes go is anyone's guess.

For non-resident companies operating within the digital space, the new Finance Act will bring about issues on whether such companies have significant economic presence as to bring them within the taxation purview of the tax regulators in Nigeria.

Companies in the oil and gas industry, like many other companies, are constantly seeking better alternatives to remain profitable as the combined effect of declining oil prices and the impact of the pandemic has stagnated some of their business prospects. Naturally, companies will attempt to opt out of contracts that are no longer favourable to them and this will lead to an increase in the number of disputes around contract terminations due to the weakening capacity of some companies to fulfil their contractual obligations and/or their desire for better options. It is also likely that some companies may expose themselves to liabilities for inducing breach of contracts through attempts to lure companies out of their contracts with other parties with offers of more favourable deals. If the latter occurs with enough frequency, we anticipate that there will be increased litigation on the tort of inducing breach of contracts by companies in the oil and gas industry.

Also, due to the challenges that the pandemic brought, some companies have resorted to downsizing by laying off their employees in order to survive through the pandemic. The expected result of this downsizing is that some of the laid off employees, especially unionised employees, will open a floodgate of litigations in a push against the actions of employers. Consequently, it is anticipated that there will be a rise in employment disputes and the National Industrial Court of Nigeria will be called upon to continue to expound and expand the labour and employment jurisprudence as it weighs the actions of employers against the principles of unfair labour practices, international best practices and international best standards in labour and industrial relations.

Emmanuel Ekpenyong

Ekpenyong: As a result of the numerous problems in resolving international commercial disputes through litigation in domestic courts, in the last few years, international arbitration has grown to become the preferred dispute resolution mechanism for disputes arising from international contracts and investments agreements. In particular, international arbitration has been used to resolve an increasing number of technology and IP disputes. In order to keep up with the explosion of technology investments overseas, companies have spent considerable time drafting arbitration clauses to protect the confidentiality and proprietary nature of the technology and IP they share with foreign partners, manufacturers, and distributors.

Q8. Are you noticing any trends in industry-specific litigation?

Emmanuel Ekpenyong

Financial market pressures are forcing companies to rely more heavily on ADR mechanisms in an attempt to limit litigation exposure while expanding business interests globally. Companies have become more sophisticated in utilising international arbitration, particularly in emerging markets. This additional corporate sophistication has provided a suitable ground for accelerated competition among various arbitration institutions.

This has led to the development of a variety of driving trends in international arbitration, including new expectations of parties to arbitrations and new competition-driven features offered by international arbitration institutions. Companies choose international arbitration over pursuing judgment in domestic courts for a variety of reasons such as the elimination of perceived bias by domestic courts.

However, a primary and perhaps underappreciated advantage is the flexibility offered by international arbitration. Parties can choose the applicable law, the seat of arbitration, the arbitration institution, the arbitrators, the jurisdictional scope, and the general procedure and conduct of the arbitration, all of which can provide efficiency advantages over domestic courts as well as important legal and tactical advantages customised to the subject matter of the dispute.

A majority of parties who have been involved in international arbitration in the past, however, believe that any negative impact of choosing a particular governing law can be limited by carefully drafting either the original contract or a subsequent agreement to enter into arbitrations with this in mind, businesses can draft an arbitration clause that allows for negotiation of the choice of law provision in order to gain contractual advantages elsewhere in a particular agreement. This flexibility, therefore, increases stability and predictability when resolving disputes internationally.

George Kounoupis

Kounoupis: There has been an increase in employment law litigation.

Q9. Have there been any noteworthy case studies or examples of new case law precedent in the past year?

Godwin Omoaka

Omoaka: There have been a number of new case law precedents that have been delivered in the course of the past year. One important case that will be discussed was with respect to taxation.

The Tax Appeal Tribunal ("TAT") sitting in Lagos on 28 February 2020, delivered judgement in the consolidated tax appeal filed by Tetra Pak West Africa Ltd ("The Appellant") against the Federal Inland Revenue Service ("FIRS" / "The Respondent") where it pronounced on the deductibility of demurrage in Companies Income Tax ("CIT") computations. According to the TAT, demurrage payments incurred by the Appellant were wholly, exclusively, necessarily and reasonably incurred for its business operations. Having met the statutory threshold for tax deductibility, therefore, demurrage charges are deductible in the computation of the Appellant's assessable profits.

Succinctly, the position of the FIRS was mainly whether the demurrage expense was wholly, exclusively, necessarily and reasonably incurred by Tetra Pak as it was, in its view, an avoidable expense being a fine or penalty. Notwithstanding that there is no provision in the CITA which provides, in particular, that demurrage expenses were not tax

deductible, FIRS' arguments appeared to be hinged on the fact that expense would only be deductible if consistent with public policy.

Through the decision of the TAT in this regard, the TAT has provided the much-needed guidance on the treatment of demurrage as a tax-deductible expense which before now was fraught with uncertainties. This has expanded the legal framework for allowable deductions for CIT purposes in Nigeria. It is our belief that a good number of on-going disputes on demurrage payments will be laid to rest by this decision.

Emmanuel Ekpenyong

Ekpenyong: Enforcement of money judgment in Nigeria is regulated by the provisions of the Sheriffs and Civil Process Act, CAP S LFN 2004 ("the SCPA") and the Judgments Enforcement Rules, a subsidiary legislation to the SCPA. The SCPA sets out, amongst other things, the various methods by which successful litigants may enforce money judgments. These are by writ of *fieri facias*, ("writ of FiFa") garnishee proceedings, a charging order, a writ of sequestration or an order of committal on judgment debtor summons. However, writ of FiFa and garnishee proceedings are the most commonly used method.

One major obstacle often faced by judgment creditors seeking to enforce judgments against governments and their agencies is the requirement under the SCPA that a judgment creditor will obtain consent of the Attorney General of the Federation or Attorney General of a State as the case may be, before such judgments can be enforced by garnishee proceedings.

Interestingly, in *CBN v Interstella Communications Ltd* (2017) All FWLR (Pt 930) 442, the court provided some clarification on the requirement for the consent of the Attorney General. The court stated that the rationale behind this decision is that seeking the Attorney General's consent is to avoid any embarrassment to the government that may arise from making attachment orders against public funds in the custody of a public officer which has been appropriated for a purpose without notice to the government.

This means a judgment creditor does not require the consent of the Attorney General to attach and secure private funds in the hand of a public officer. It is the owner of the funds that determines whether the holder of the funds is a public officer and not the status of the person who is in custody of the funds.

George Kounoupis

Kounoupis: In international litigation we have seen interesting case studies relating to the interpretation of the EU data protection legislation. In employment law, there have been case studies relating to COVID-related ADA, FMLA and CARES Act provisions. Under Greek law, we have seen restrictions on evictions and actions on debts.

> *"In employment law, there have been case studies relating to COVID-related ADA, FMLA and CARES Act provisions. Under Greek law, we have seen restrictions on evictions and actions on debts."*
> *- George Kounoupis -*

Q10. Looking beyond COVID-19, how is the current litigation & dispute resolution landscape comprised in your jurisdiction?

Stephen Wilson

Wilson: The TCI are a constitutional democracy under the British Crown. The judges and magistrates appointed to preside or sit in any court of the TCI in the exercise of their judicial functions are independent from the legislative and executive branches of government which is a constitutional requirement. The legislature and the Cabinet are constitutionally required to uphold the rule of law and judicial independence and are required to ensure that adequate funds are provided to support the judicial administration in the Islands.

The Judicial Service Commission for the TCI is created by section 86 of the Constitution of the TCI. It advises H.E. the Governor with respect to judicial appointments, disciplinary control over persons holding the offices of Chief Justice, President of the Court of Appeal, Registrar and Deputy Registrar, and removal from office of persons holding or acting in the offices of Registrar and Deputy Registrar (section 87). The Chairman of the Judicial Service Commission is appointed by H.E. the Governor acting in his/her discretion; two other members are appointed by H. E. the Governor acting after consultation with the Premier and Leader of the Opposition from among persons who hold or have held high judicial office.

The Magistrate's Court

The Magistrate's Court for the TCI is a statutory body established by section 3 of the Magistrate's Court Ordinance (CAP. 2.03) with summary jurisdiction for both criminal and civil cases (up to $10,000) and family matters except for divorce.

The Supreme Court

The Supreme Court of the TCI is a Superior Court of Record, being constituted by section 77 of the Constitution and the Supreme Court Ordinance (CAP. 2.02) (the "*SCO*"). Pursuant to section 3 of the SCO, in addition to any jurisdiction previously exercised by the Supreme Court or conferred upon it by the SCO or any other law, the Supreme Court has within the Islands the jurisdiction vested in the following Courts in England:

- The High Court of Justice; and
- The Divisional Court of the High Court of Justice as constituted by the Supreme Court of Judicature (Consolidated) Act 1925, and any Act of the Parliament of the United Kingdom replacing that Act.

Subject to the SCO and any other law, the jurisdiction of the Supreme Court is exercised in accordance with the Rules of the Supreme Court 2000 which are based on the former Rules of the Supreme Court of England and Wales prior to the Civil Procedure Rules of England and Wales. In any matter of practice or procedure for which no provision is made by the SCO or any other law or by any rules, the practice and procedure in similar matters in the High Court of Justice in England shall apply so far as local circumstances permit and subject to any directions which the Supreme Court may give in any particular case.

Most criminal trials on indictment and a limited category of civil trials are heard by a Justice of the Supreme Court sitting with a jury pursuant to the Jury Ordinance (CAP. 2.09). Juries ordinarily consist of seven members but all cases of treason, murder and piracy require juries of twelve persons (s.22 Jury Ordinance). In civil cases, save for the limited category of cases referred to above, trials are before a judge alone.

Both the Magistrate's Court and the Supreme Court have jurisdiction in relation to children and family matters under various recent legislation including the Matrimonial Causes Ordinance (CAP. 11.04), the Domestic Proceedings Ordinance (Cap. 11.03) the Family Law (Guardianship, Custody and Access to Children) Ordinance 2015 and other Ordinances.

The Court of Appeal

The Court of Appeal for the TCI is established by section 80(1) of the Constitution with a President and Justices of Appeal appointed by H.E. the Governor acting after consultation with the President of the Court. It currently sits three times per year and in each case for three weeks.

The practice and procedure of the Court of Appeal is governed by the Court of Appeal Ordinance (CAP 2.01) and the Court of Appeal (Practice and Procedure) Rules which provide that the Court of Appeal Rules for the Bahama Islands shall apply *mutatis mutandis* to appeals from the Supreme Court of the TCI.

The Privy Council

Pursuant to the Turks and Caicos Islands (Appeal to Privy Council) Order[1] a final appeal from a judgment of the Court of Appeal lies with leave to Her Majesty in Council.

Pursuant to section 3, an appeal shall lie––

- as of right from any final judgment, where the matter in dispute on the appeal amounts to or is of the value of £300 or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards; and
- with the leave of the Court of Appeal, from any other judgment, whether final or interlocutory, if, in the opinion of the Court of Appeal, the question involved in the appeal is one which, by reason of its great or general importance or otherwise, ought to be submitted to Her Majesty in Council for decision.

Other courts and tribunals

The Coroners Ordinance (CAP. 2.05) provides for a Coroner for the TCI. The Magistrate is the *ex officio* Coroner of the Islands. The Coroner may appoint from time to time a deputy coroner.

The Labour Tribunal is a statutory body established by section 93 of the Employment Ordinance (CAP. 17.08). It has jurisdiction to hear and determine any labour dispute or complaint or other matter referred to it under the Employment Ordinance or any other Ordinance. The composition of the Labour Tribunal is prescribed by section 94 of the Employment Ordinance. There has been a recent revision of this Ordinance which now requires the President of the Labour Tribunal to be an attorney with at least seven years' practicing experience.

Godwin Omoaka

Omoaka: 2020 will go down in history as the year in which most stakeholders in the administration of justice have had cause to reflect more deeply than they ever have on what the future holds for legal practice in Nigeria.

In the landscape of dispute resolution, we have observed that technology will continue to redefine our justice delivery system, from court/arbitral proceedings, service and filing of processes, and more.

There will also be greater opportunities for alternative dispute resolution mechanisms, such as arbitration, conciliation, negotiation, and mediation. This is partly premised on the unavoidable fact that, despite the increased use of technology in our court system, there are still significant teething issues we have to deal with in terms of facilities,

1. (U.K. Statutory Instruments No. 1863/1965 and No. 1084/1973)

Q10. Looking beyond COVID-19, how is the current litigation & dispute resolution landscape comprised in your jurisdiction?

Godwin Omoaka

expertise and growing backlog of cases. As such, some potential litigants may employ alternative dispute resolution mechanisms in resolving their disputes more speedily and effectively. The courts will also be encouraging or even requiring parties to use alternative dispute resolution as a first resort.

There will also be an increased appetite for settlement. The significant delays in resolving disputes through the traditional litigation route and financial pressure caused by COVID-19 will make litigants more willing to resolve disputes to avoid long and expensive court/arbitral proceedings. These can be achieved through virtual or physical discussions between counsel and their clients.

Emmanuel Ekpenyong

Ekpenyong: 2020 was undoubtedly a challenging year for many businesses and individuals. The pandemic made parties to a dispute more interested in employing ADR mechanisms to resolve their disputes.

Mediation involves the appointment of a neutral middleman to facilitate a discussion between the parties and their legal representatives. It offers parties the chance to put their respective positions privately to each other in a confidential and conciliatory manner away from the public, so that the mediator can try to settle the dispute. Often, the mediator has a more specialist background befitting of the technical dispute than a Judge at conventional courts.

Parties are bound by the Civil Procedure Rules ("CPR") to consider taking part in ADR as a way of resolving a dispute and this obligation continues even after court proceedings have begun. This is why mediation is offered at the Multi-door Court House attached to some courts in Nigeria.
The social distance protocol occasioned by the pandemic has led both litigation and ADR mechanism practitioners to consider virtual proceedings as a veritable platform to conduct hearings to meet the end of justice.

Virtual mediation will become the mainstay of resolving disputes even when things return to normal. This is because virtual mediations have led to improved efficiencies and prevents parties from needing to travel long hours to attend proceedings. This reduces stress and anxiety for participants. Whilst there was a general reluctance to engage in anything "virtual" in the pre-COVID era, there will be a marked change in how dispute resolution is dealt with in a post-COVID world.

Q11. How do judicial shortages pose a threat to the court system?

Godwin Omoaka

Omoaka: The effective operation of the courts is under continuous threat due to the lack of significant judicial recruitment to adequately staff the various courts. The lack of adequate judges to handle the technical disputes that are filed daily and the corollary issue of the deteriorating working conditions of these understaffed judges are increasing the already heavy workloads. This worrisome state of affairs poses a great danger to the administration of justice and also undermines the global perception of the judicial system and its ability to protect the legal interest and rights of its citizens.

Emmanuel Ekpenyong

Ekpenyong: Lack of or inadequate infrastructures such as deteriorating and ill-equipped physical facilities in some courts severely undermine fair and speedy administration of justice in Nigeria. Justice can hardly be speedy when Judges lack adequate facilities to enable them to function effectively and efficiently. In most cases, the court facilities are overcrowded, badly equipped, and under-funded.

Some litigants do not understand English, the language of the court in Nigeria. Most courts have few interpreters to interpret court proceedings to the litigants. In some cases the interpreters are poorly trained. Court libraries are inadequate. There are few functional computers, photocopiers, or other modern equipment. Judges may even have to supply their own paper and pen to record proceedings in longhand. If litigants need a transcript of proceedings, they would have to pay for the transcript themselves. This encourages corruption which impugns the justice system in many ways.

Also, records of court proceedings and judgments are not stored in satisfactory conditions. This makes them susceptible to damage or intentional destruction by unscrupulous court staff. Absence of modern facilities provides an enabling environment for corrupt and unethical court staff to tamper with evidence and even court records.

Parties are limited in the kinds of technological and visual aids available throughout litigation. The courtrooms are not equipped to handle audio, slide and other visual presentations that assist fact-finding in understanding a case in order to reach a just decision. Where a litigant is unable to present technical evidence because of inadequate infrastructure, he is significantly disadvantaged and left to suffer his fate.

Also, inadequate facilities, especially erratic power supply, contribute to delays as court proceedings are often interrupted or adjourned due to power outages. All these erode public confidence in the court system. This is why the Chief Judge of the 36 states and the Chief Justice of the Federation have taken various steps and made practice directions to address these anomalies in Nigeria's judicial system.

George Kounoupis

Kounoupis: I have not noticed this yet, locally. But COVID-19 has caused delays.

Q12. What are the dangers of decreased access to legal aid to those who need it most?

Godwin Omoaka

Omoaka: According to the United Nations Principles and Guidelines, legal aid covers legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. Justice delivery will be truncated and the public confidence in the justice system will be significantly reduced if indigent litigants do not have access to legal aid, because legal aid for indigent litigants is a key test of the quality of any legal system.

Indeed, legal aid is a right in itself and an essential precondition for the enforcement of human rights. Such is also an important safeguard that helps to ensure fairness and public trust in the administration of justice.

Q12. What are the dangers of decreased access to legal aid to those who need it most?

Emmanuel Ekpenyong

Ekpenyong: The Constitutional right to a fair hearing extends to the right to fair and public trial as well as respect for the principle of equality before the law. Legal aid ensures that the right of an individual to be heard before a competent court is not limited by the financial status of the individual. There is a recognised connection between the right to legal assistance and the general interest in guaranteeing the right to fair hearing. However, in contrast to criminal cases, an individual's entitlement to free legal aid in civil cases is not absolute.

Legal aid is a service delivered free of charge to indigent and vulnerable individuals to better understand their rights; educate them on the procedures to enforce their rights; improve their access to courts and other dispute resolution bodies and to get legal representation. In Nigeria, the Legal Aid Act Cap L9, Laws of the Federation of Nigeria, 2004 was replaced by the Legal Aid Act, 2011. The new Act expanded the civil mandate of the Council and also expanded its criminal jurisdiction to include armed robbery.

A decrease in legal aid would ensue that the poor have unequal access to justice and this undermines the possibility of equality in the society because the poor will be left with limited access to justice. Legal problems which are unaddressed, can cause emotional distress and in some cases economic shock which may push a vulnerable person into poverty, depression and even suicide.

Labour related disputes such as wrongful termination and failure to pay full wages; unlawful ejection from residential premises, accruing debts and matrimonial causes can produce challenging financial problems to those near the poverty line. The inability to enforce child support and alimony will bring untold hardship to children of a marriage. It is without doubt that lack of access to legal aid makes individuals to seek justice through extra-judicial means, thus creating chaos and lawlessness in the society.

George Kounoupis

Kounoupis: Most individuals with a claim under $10,000 will have great difficulty finding a good lawyer to take the case.

Q13. What advice would you give to clients involved in cross-border disputes?

Stephen Wilson

Wilson: If you haven't been able to ensure that any dispute is going to be played out on home turf or in the jurisdiction in which the party you are claiming against has assets, at least always ensure you get the best local legal advice in each country involved in the dispute.

Godwin Omoaka

Omoaka: There is currently no legislation regulating conflict of laws in Nigeria. Consequently, common law principles have been applied in determining whether Nigerian courts should assume jurisdiction where parties have ceded jurisdiction over their dispute to a foreign court. As such, when parties are drafting their contracts, they must bear in mind that as a general rule, where the intention of the parties regarding the law governing the contract is expressed in words, this expressed intention determines the proper law of the contract. However, to be effective, the choice of law must be real, genuine, bona fide, legal and reasonable. The choice of law must not be absurd. A foreign governing law must have some relationship and be connected with the realities of the contract considered as a whole.

Emmanuel Ekpenyong

Ekpenyong: As nations continue to move towards globalisation and companies are continuing to expand sales into new markets they may find themselves facing litigation in more than one jurisdiction. Cross-border commercial disputes can be complex, difficult to assess and are often complicated by the number of jurisdictions involved.

When trans-border issues occur, the parties should be allowed to go into informal negotiation in an attempt to resolve the dispute. Here, the parties will lay out their grievances and attempt to reach a resolution through direct exchanges with each other, and perhaps between counsels, but without engaging a third-party neutral to assist. The first exchanges might take the form of demand letters.

The parties in trans-border conflict may wish to resort to mediation to settle their disputes. Mediation uses a neutral third party to assist the parties in negotiating a resolution to their dispute. Mediation may occur at the outset of a dispute, or it may be done at some point during the process of an action in arbitration or litigation.

Conciliation is another form of dispute resolution that is very similar to mediation. Conciliation is conducted in the same manner as mediation except the third-party neutral will at some point suggest settlement terms to the parties rather than simply communicating their offers back and forth.

If parties are unable to resolve their dispute by any of the ADR mechanisms, they will need to turn to arbitration or litigation. Arbitration is generally a binding procedure, in which the parties submit their dispute to an arbitrator or a panel of arbitrators who fully and finally make factual and legal determinations and issue an award.

A party to a cross-border dispute may decide to bring a civil lawsuit in a court rather than dispute by any ADR mechanism. He may choose to do so if the ADR mechanism, such as negotiation and mediation, fails. While a court action offers certain advantages such as appellate rights and a greater receptivity to motion practice, litigating international disputes in courts often takes longer and is more expensive than domestic commercial litigation. In particular, disputes involving foreign parties raise complex jurisdictional, evidentiary, and enforcement issues that litigants must navigate in the early stages of the litigation and throughout the proceedings.

"Conciliation is conducted in the same manner as mediation except the third-party neutral will at some point suggest settlement terms to the parties rather than simply communicating their offers back and forth."
- Emmanuel Ekpenyong -

Q13. What advice would you give to clients involved in cross-border disputes?

Ben Knowles

Knowles: For both claimants and counterclaimants, one of the very earliest things to be considered, no later than when you consider the merits of your case (and ideally way before that, at the time you enter into your contract) is your enforcement strategy. There is usually little point in going through the time and cost of an extensive cross border litigation or arbitration, only to find that you are successful on the merits but don't have a route through to get paid.

There are at least two elements to the enforcement strategy which need to be considered together. Is your counterpart good for the money, and what are the mechanisms that you can use to enforce your counterpart to pay? In terms of the first question, this can be broken down further. Is your counterpart good for the money today, and will it be good for the money by the time you have completed your legal proceedings? Is your counterpart a trading entity with material assets or have you only contracted with a subsidiary that may be little more than an empty shell?

That then leads on to the legal questions. What is your legal route through to enforcing any award or judgment? Is there interim relief that you may need and which may be available to secure assets for later enforcement? Is there a third party who may be responsible for paying any award? It is not uncommon for us to be approached to handle cases where little or no consideration has been given to this issue, and we would always be reluctant to advise a client to proceed, without giving serious consideration to these issues.

George Kounoupis

Kounoupis: Consider proper subject matter jurisdiction. Consider if you have personal jurisdiction. Consider what law will apply: Is there a conflict of laws? Can a judgment in one court be enforced where it needs to be in another? Will you require international discovery? If a country doesn't have discovery does this influence your choice and how will you deal with this? How will you prepare and present evidence from one country to the next?

Q14. What impact, if any, will Brexit have on UK and European litigation and dispute resolution?

Emmanuel Ekpenyong

Ekpenyong: There appears to be little or no impact to be caused by Brexit on UK and European litigation resolution as the Withdrawal Act, the legislation that came into force at 11pm on 31st December 2020, preserves existing EU law within the UK legal system. While new developments from the EU legislature will not automatically become binding in the UK after this time, most existing EU law will be retained. With this, the Rome Regulations that determine governing law will be incorporated into the English law.

Unlike the issues of service, jurisdiction and enforcement, the application of the Rome Regulations is purely a matter of legal interpretation for the individual courts that does not require any cooperation, or reciprocity, between the jurisdictions of the UK and EU member states.

However, with regards to service of legal documents in legal proceedings, at the end of the transition period the Service Regulation, which regulates the way legal proceedings are served within the EU, will no longer apply to English Court proceedings. Instead, the Hague Service Convention 1965, to which the UK and the EU are both parties, will apply. The Convention sets out how proceedings may be served and requires signatories to designate a central authority to receive and execute requests to serve out of the jurisdiction.

As a result of Brexit, many parties dealing with cross-border transactions are already choosing to have disputes dealt with by arbitration and, in contrast to litigation, international arbitration is largely unaffected by the impact of Brexit.

On matters of jurisdiction, the parties' election for arbitration is binding and post-Brexit, parties will be able to apply to the English Courts for an anti-suit injunction to prevent any court proceedings commenced in another EU state. Arbitration, including enforcement of arbitral awards, is unaffected by Brexit. As a result of this, businesses which resolve their disputes through arbitration do not have much cause for concern.

Ben Knowles

Knowles: Post-Brexit, in terms of litigation, there are outstanding issues to be resolved concerning the enforcement of court judgments between the UK and European jurisdictions as well as rights of audience for international lawyers operating outside their licenced jurisdiction. Some fixes have already been identified, and it is likely that those firms with strong European platforms will be well placed to operate relatively seamlessly in this new environment.

In terms of the market itself, it is inevitable that the considerable dislocation caused by Brexit is going to lead to a rise in trade related disputes, in the short to medium term. There are going to be cross border contracts that counterparts are either not able to perform, or which no longer make commercial sense for them to do so. There will also be investments that have been made in the expectation of a wider trade deal between Europe and the UK, and some of those investments will no longer make sense, both because of Brexit, and the additional economic pressures post-COVID. Those investments may need to be wound down, and that will, again, likely lead to an uptick in disputes.

Looking further ahead, and moving into the realms of investment law, there will be relatively little protection for UK investors investing in Europe, and European investors investing in the UK, at the treaty level. The Trade and Cooperation Agreement between the UK and EU only allows for arbitration at a state to state level, and does not directly give protection to investors themselves. And those existing Bilateral Investment Treaties are likely to fall away, post the Achmea decision.

It remains to be seen whether investors will be given greater protection at some point in the future, but in the meantime, the existing protections enforceable by treaty arbitration, will fall away, save to the extent investors restructure their investments through this party jurisdictions, which they may be well advised to consider.

George Kounoupis

Kounoupis: It is not yet clear what deals will be made or have been discussed on this—including the effect of post exit cooperation agreements. There will be issues in investigation, work rights and enforcement of business litigation.

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- Ben Knowles -

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