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Getting The Deal Through

Market Intelligence

DISPUTE RESOLUTION 2023

Global interview panel led by Seladore Legal

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Seladore Legal, this Dispute Resolution volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

Litigation versus Arbitration
ADR Trends
The Client Experience
Litigation Funding

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About the editor



Simon Bushell

Seladore Legal

Simon Bushell of Seladore Legal is described as a forceful, determined and clear-sighted litigator and has consistently been ranked in Chambers UK from the early days of his career. He is frequently lauded in The Legal 500, having been recently inducted into its Hall of Fame for civil fraud expertise and praised as a Leading Individual in commercial litigation. Simon acts for a broad range of clients, including large corporates, private equity houses, financial institutions, banks and ultra-high net worth individuals, in addition to foreign government agencies and state-owned companies. He has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in coordinating parallel cross-border disputes. Prior to founding Seladore Legal with Gareth Keillor, Simon was a partner at Herbert Smith Freehills from 1997 to 2013, whereupon he joined Latham and Watkins and became chair of its litigation department in London. Simon has more than 30 years' experience in high-stakes commercial litigation.

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INSIDE TRACK

Nigeria

Uzoma Azikiwe, Senior Advocate of Nigeria (SAN), is a partner and the head of Udo Udoma & Belo-Osagie's litigation, arbitration and alternative dispute resolution team. He provides advice in maritime, aviation, employment and energy matters, and his specialisations include advising multinationals on oil and gas law, environmental matters, the provision, manning, and maintenance of vessels, cabotage issues, telecommunications, construction and infrastructure and administrative and constitutional law.

Festus Onyia is a partner at Udo Udoma & Belo-Osagie in Nigeria and specialises in civil, corporate and commercial litigation, arbitration and alternative dispute resolution (ADR). His other practice areas include labour, employment, industrial relations law and tax litigation. Festus has acted as lead counsel in ad hoc and institutional arbitrations, including under the ICC Rules of Arbitration.

Teddy Oyibo is a senior associate at Udo Udoma & Belo-Osagie's dispute resolution team. He is based at the firm's Port Harcourt office. Teddy manages the litigation matters of various local and multinational clients in a wide range of sectors across the firm's practice areas. He advises and represents clients in disputes relating to corporate and commercial issues, oil and gas and maritime and employment matters.

Michael Ugah is a senior associate in Udoma & Belo-Osagie's disputes team. Michael regularly represents clients in domestic and international arbitrations.



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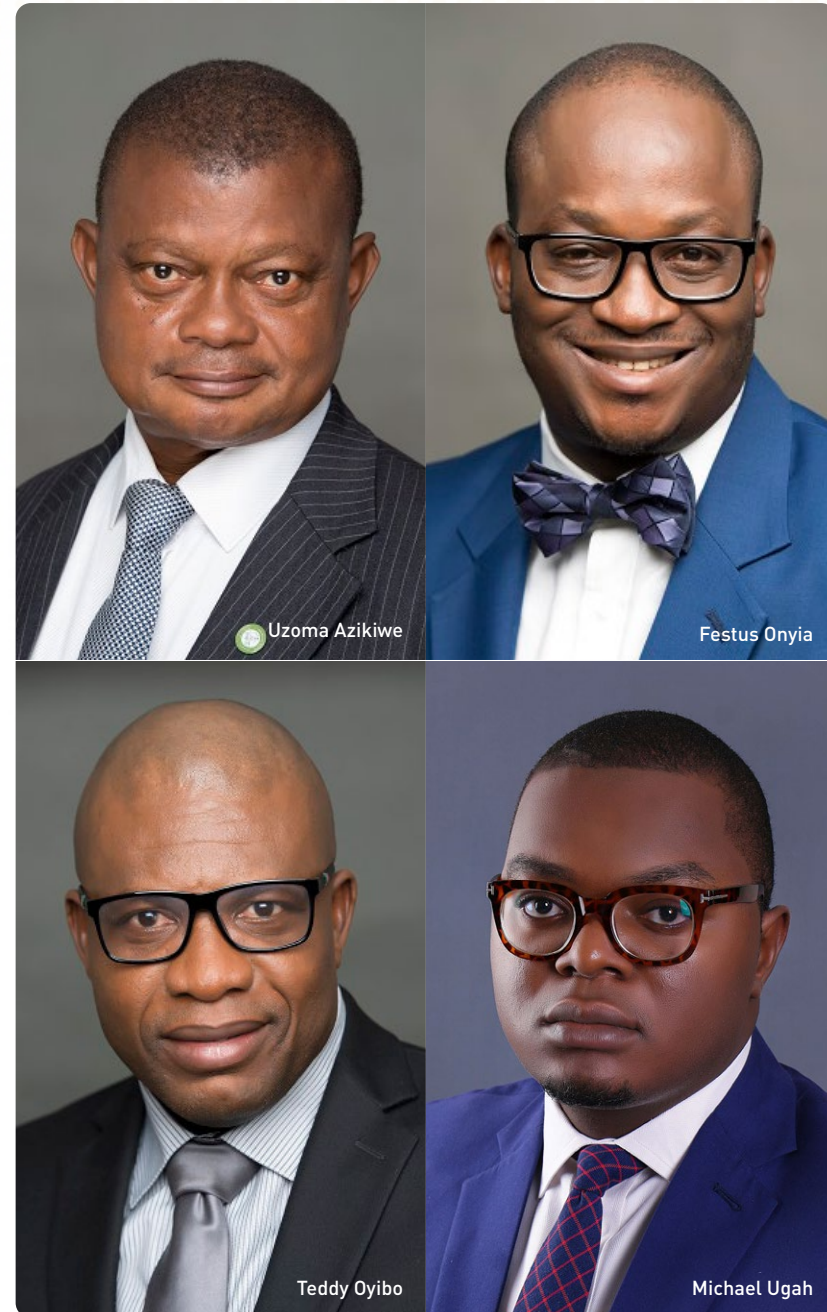


1 What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? What is the balance between litigation and arbitration? What are the advantages and disadvantages of the most popular dispute resolution methods?

The most popular dispute resolution methods in Nigeria are litigation and arbitration, although mediation is increasingly gaining traction. At present, most commercial contracts, particularly contracts with foreign counterparties, contain arbitration clauses.

There is an increasing preference for arbitration as a means of settling commercial disputes particularly in high-value transactions or transactions involving foreign counterparties.

Arbitration has several advantages, which makes it appealing to commercial parties. Some of the advantages that arbitration has are that it affords the parties a flexible method of resolving their dispute that they can adapt to suit their specific needs. Arbitration is a more expeditious means of dispute resolution relative to litigation. Arbitration affords the parties an opportunity to, as it were, choose their own 'judge' in that the parties can choose arbitrators who possess the required technical knowledge and experience that are suitable for the resolution of a particular kind of dispute. In relation to disadvantages, one of the main criticisms of arbitration is that it is increasingly becoming very expensive. Also, the prevalent practice whereby losing parties challenge arbitral awards mostly on frivolous grounds has created the impression that arbitration is but an expensive prelude to litigation. Relative to arbitration, litigation is less expensive. However, litigation in Nigeria is blighted by undue delays. Litigants in Nigeria have a constitutionally guaranteed right of appeal against court decisions that has been used or better still abused by litigants to bring frivolous appeals to frustrate the winning party. Unlike arbitration, which is conducted in private, court proceedings



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in Nigeria are not private, which means that confidential, sensitive or strategic commercial information that is disclosed in litigation can easily get into the public domain.

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- 2 Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences? What effect has Brexit had on choice of law and jurisdiction clauses?**
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The current trend in the formulation of applicable law and dispute resolution clauses in Nigeria is that foreign entities or local entities with significant foreign control are more inclined to choose foreign laws to govern their contracts and often insert multi-tier dispute resolution clauses in their contracts that provide for recourse to negotiation as a first step towards dispute resolution and thereafter arbitration where negotiation fails. In addition, there is a preference in international transactions to subject disputes arising from such transactions to the exclusive jurisdiction of foreign courts or, in relation to arbitration, to foreign seats, usually the English courts. This trend is not unconnected with the slow pace of litigation in Nigeria. The legal profession in Nigeria has accommodated these trends. Brexit has not had any immediately identifiable effect on the choice of law and jurisdiction clauses in Nigeria. On the contrary, English law and English courts remain the most popular choice of foreign law and jurisdiction in international contracts involving Nigerian parties.





3 How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction? How is the trend towards 'niche' or specialist litigation firms reflected in your jurisdiction?

The legal market in Nigeria is highly competitive due to the availability of a large pool of highly qualified and experienced dispute lawyers. In terms of recent changes affecting disputes lawyers, Nigeria held its general elections in February and March 2023, and it is reported that there are about 10,444 election petitions arising from the various elections. There are no standing electoral disputes courts in Nigeria. What this means is that election petitions tribunals are constituted by the judges in the regular courts. It is reported that about 258 judges have been drawn from the regular courts across the country to hear electoral disputes, which are time-bound. The implication of this is that these judges will not be available for several months to attend to their normal cases, including commercial cases. This will cause further delays in the adjudication of commercial disputes.

The disputes market is dominated by generalist law firms or practitioners, but there is a trend towards specialisations and niche practice in various practice areas ranging from energy, aviation, banking, oil and gas and admiralty. However, the practice among the big law firms appears to be to develop capacity in several niche areas such that they are able to service clients in those areas rather than focus on and be known for just one or two niche dispute areas.

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4 What have been the most significant recent court cases and litigation topics in your jurisdiction?

One of the most significant recent court cases in Nigeria in terms of both value and impact was the 2021 decision of the National Industrial Court of Nigeria (NICN) in which the court ordered a multinational telecommunications company in Nigeria to pay the sum of US\$8.5 million in damages for wrongful termination of the employment contract of some employees.

Similarly, in a judgment that was delivered in April 2022 also against another multinational telecommunications company in Nigeria, the NICN awarded the sum of 100 million naira as exemplary damages for wrongful termination of employment in addition to 60 million naira general damages (the equivalent of the claimant's salary for two years). These two decisions are significant not just because of their value but because they reinforce the trend of case law from the NICN, which points towards a departure (sometimes radical) from

“There have been arbitral awards of high value both for and against the Nigerian government and its ministries, departments, agencies and corporations.”

established common law principles in labour and employment cases, including the principle, based on the common law, that the measure of damages in a wrongful dismissal claim is the amount of money that is payable during the period of notice to be given by the employer as stipulated in the contract of employment plus any outstanding entitlements. Equally significant is the award of exemplary damages in these cases contrary to established case law to the effect that exemplary and punitive damages are not recoverable in breach of contract cases.

5 What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

As indicated above, in question 1, litigation in Nigeria is plagued by inordinate delays. Clients are, therefore, understandably frustrated

by the delays, and this frustration is one of the major reasons for clients pivoting towards arbitration and alternative dispute resolution generally. Clients are equally frustrated by escalating litigation expenses, mainly legal costs or professional fees that they incur as a result of frequent adjournment of matters or appeals that have been filed for purely strategic reasons in order to wear out the opponent. Another factor that adds to clients' frustration with litigation in Nigeria is the issue of uncertainty and lack of predictability in judicial outcomes occasioned by inconsistent decisions on similar factual scenarios. Contrariwise, although arbitration is becoming increasingly expensive, clients, particularly in international transactions, prefer arbitration because it is more expeditious.

6 Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

Shortly before and after the pandemic, the rules of many courts in Nigeria were revised to introduce or make more elaborate provisions on the use of technology in the adjudicatory process. In that period, the Federal High Court (Civil Procedure) Rules 2019; Federal Inland Revenue Service Practice Direction 2021; the Court of Appeal Rules 2021; the High Court of Lagos State (Civil Procedure) Rules 2019, to mention a few, were enacted. These rules introduced procedures for the electronic filing of court processes and established an electronic filing unit in the registry of every judicial division of those courts and electronic service of court processes such as by emails and WhatsApp. At the peak of the covid-19 pandemic, the Chief Justice of Nigeria and chief judges of some States of the Nigerian Federation also issued circulars and guidelines regarding the conduct of court proceedings virtually using various videoconferencing applications such as Zoom, Microsoft Teams, Skype or other audiovisual communication platforms approved by the relevant court particularly





for urgent or time-bound cases, such as bail applications and fundamental human rights enforcement proceedings.

To provide the required infrastructure support for the technological input, some courts, such as the High Court of Lagos, at the end of 2022, introduced a purpose-built portal for e-justice delivery, among other functions, including e-filing, tracking of cases through online case list and other dispute tracking directories and publication of notices for action, especially in succession matters. These portals ensure that filing can be done anywhere worldwide.

7 What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

There have been arbitral awards of high value both for and against the Nigerian government and its ministries, departments, agencies and corporations. In December 2020, the Lagos Judicial Division of the Federal High Court delivered a judgment recognising and upholding a landmark arbitral award in which the sum of US\$1.7 billion was awarded in favour of the Nigerian Petroleum Development Company Limited (NPDC), a limited liability company owned by the Nigerian government. The arbitral award arose out of arbitration between the Atlantic Energy Drilling Concepts Nig. Ltd, Atlantic Energy Brass Development Ltd and the NPDC.

Similarly, in 2019, ESSO Exploration and Production Nigeria Limited (ESSO E&P) and Shell Nigerian Exploration and Production Company Limited (SNEPCO) obtained a US\$1.8 billion arbitral award against the Nigerian National Petroleum Corporation (NNPC), Nigeria's state-owned oil company. The award arose from a dispute between multinationals and NNPC regarding the implementation of the production sharing contract between the parties. The arbitral award was subsequently set aside by a court in Nigeria, and an attempt by

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ESSO E&P and SNEPCO to enforce the arbitral award in the US, even though it had been set aside in Nigeria, was unsuccessful.

Perhaps the most significant (both by value and impact) arbitral award from our jurisdiction was the P&ID award in the sum of US\$6.6 billion that was rendered in favour of a British Virgin Islands-based resource company Process & Industrial Development Ltd (P&ID) following a dispute with the Nigerian government under a gas supply and processing agreement. Nigeria is currently challenging the award in the English courts.

8 What are the most significant recent developments in arbitration in your jurisdiction?

On 10 May 2022, the Senate of the National Assembly of the Federal Republic of Nigeria passed the Arbitration and Mediation Bill, a bill to repeal the Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria 2004 (the ACA). The ACA was fashioned after the

“There has been a steady increase in the number of disputes resolved through mediation in Nigeria, especially through the multi-door courthouses annexed to various High Courts in Nigeria. Recent trends show that disputes are increasingly being settled out of court through mediation.”

1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law) with some modifications, and the consensus in the arbitration community in Nigeria is that it is in dire need of a total overhaul. The Arbitration and Mediation Bill is largely based on the UNCITRAL Model Law 2006 and addresses some of the challenges identified in the ACA.

The Arbitration and Mediation Bill contains provisions that will, if enacted into law, positively impact the arbitration landscape in Nigeria. For instance, under the existing limitation law in Nigeria, an action to enforce an arbitration award has a six-year limitation period, calculated from the date the cause of action accrued instead of from the date of the award. However, the Arbitration and Mediation Bill provides that in computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded. Also, the Bill establishes an opt-in second-tier tribunal, known as the award review tribunal, to deal with any application by an aggrieved party to review an arbitral award on any of the new grounds highlighted in the Bill. One of the most significant and potentially impactful changes introduced by the Bill is the abolition of the torts of maintenance and champerty. Specifically, section 61 of the Bill provides that the torts of maintenance and champerty do not apply in relation to third-party funding of arbitration. This section applies to arbitrations seated in Nigeria and to arbitration-related proceedings in any court within Nigeria. The Bill also replaces the grounds for setting aside awards applicable under the ACA with grounds similar to those contained in the UNCITRAL Model Law 2006. The provisions relating to interim measures of protection under the Bill have been expanded and are more detailed than the provisions contained in the ACA.





9 How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

ADR mechanisms, particularly negotiation and mediation, are very popular in Nigeria. For instance, mediation is the most commonly used ADR mechanism in the settlement of commercial disputes at the Lagos Multi-door Court House (LMDC). In the High Court of Lagos, matters are mandatorily screened for suitability for referral to mediation at the LMDC. The Lagos State government has also promoted the use of mediation through the enactment of the Citizen Mediation Centre Law, 2007, established as a non-adversarial forum for mediation. In contrast, expert negotiation has not gained as much popularity.

There has been a steady increase in the number of disputes resolved through mediation in Nigeria, especially through the multi-door courthouses annexed to various High Courts in Nigeria. Recent trends show that disputes are increasingly being settled out of court through mediation.

10 What is the position in relation to litigation funding in your jurisdiction? Is funding available? Have there been any significant developments in this area in your jurisdiction?

Litigation funding is not applicable in Nigeria. This is because under common law, which is also applicable to Nigeria as part of the received English law, agreements for the funding of litigation by third parties are void and unenforceable on the grounds of public policy. However, section 61 of the Arbitration and Mediation Bill passed by the Senate of the National Assembly in Nigeria abolishes the torts of maintenance and champerty. Specifically, section 61 of the Bill

provides that the torts of maintenance and champerty do not apply in relation to third-party funding of arbitration. If the Bill is assented to by the President of the Federal Republic of Nigeria, the bar against third-party funding would no longer apply to arbitration. It is, however, arguable if the tort would still apply to litigation. Our view is that although the Bill expressly seeks to abolish the tort of maintenance and champerty with specific reference to arbitration, it would seem odd if the prohibition is allowed to remain in relation to litigation.

Uzoma Azikiwe

uzoma.azikiwe@uubo.org

Festus Onyia

festus.onyia@uubo.org

Teddy Oyibo

teddy.oyibo@uubo.org

Michael Ugah

michael.ugah@uubo.org

Udo Udoma & Belo-Osagie

Lagos

www.uubo.org

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The Inside Track

What is the most interesting dispute you have worked on recently and why?

One of the most interesting disputes that we worked on recently was the litigation involving an international oil company. The former Nigerian partners of the company had obtained judgments against the oil company in the Federal High Court and Court of Appeal prior to our firm being called in to join the company's legal team. We worked with other law firms to secure a major win at the Supreme Court for the client. The claim posed an existential threat to the company, and the Supreme Court win restored the client's confidence in the Nigerian legal system.

What do you consider to have been the most significant legal development or change in your jurisdiction of the past 10 years?

With a view to encourage amicable settlement of claims and reduce the courts' caseload, many new generation court rules now contain provisions that empower the courts to encourage parties to explore the possibility of resolving their disputes amicably by taking advantage of the use of the ADR mechanism provided within the court system, such as mediation through the Multi-door Court Houses or otherwise. Some court rules have imposed a set of pre-action protocols that requires a claimant to prove that he or she has explored an ADR option before approaching the court. This has helped in decongesting the courts' dockets and as well as engendering a culture of, at least, a genuine attempt at amicable resolution of disputes.

What key changes do you foresee in relation to dispute resolution in the near future arising out of technological changes?

While it is not likely that artificial intelligence or robots will replace disputes or courtroom lawyers in the near future, we foresee an increase in the deployment of technology in such areas as case management, research and prediction of case outcomes. We also anticipate an increase in the use of online dispute resolution (ODR) in the resolution of disputes, particularly small claims and claims arising from consumer transactions.