

SECURITIES LITIGATION

Nigeria



Securities Litigation

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Quick reference guide enabling side-by-side comparison of local insights, including into the local framework and climate; claims and defences; remedies, pleading and evidence; liability; collective proceedings; funding and costs; special issues regarding investment funds and structured finance; cross-border issues; and recent trends.

Generated 01 August 2023

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GENERAL FRAMEWORK

General climate

Describe the nature and extent of securities litigation in your jurisdiction.

Securities litigation in Nigeria generally entails disputes between capital market operators (any individual or corporate duly registered by the Securities and Exchange Commission (SEC) to perform specific functions in the capital market), investors, securities exchanges, the issuers of securities and clearing agencies and the SEC arising from the administration, management and operation of investment schemes relating to securities transactions.

When a party files a complaint with the SEC (a federal government agency and apex regulator of the capital market in Nigeria) against an operator of any securities transaction, the complaint is referred to the SEC's Administrative Proceedings Committee (APC) for determination. The decision of the APC is appealable to the Investment and Securities Tribunal (IST). Parties may also commence an action directly with the IST. The Investment and Securities Act 2007 (the 2007 Act) prescribes that all actions by the IST must be concluded within three months. The IST has exclusive jurisdiction to hear and determine:

- any question of law or dispute involving a decision or determination of the SEC in the operation of the Investment and Securities Act;
- disputes between:
 - capital market operators;
 - capital market operators and their clients, investors and securities exchanges, capital trade points or clearing and settlement agencies;
 - capital market operators and the SEC;
 - the SEC and self-regulatory organisations;
 - the SEC and investors or issuers; and
- disputes arising from the administration, management and operation of collective investment schemes.

The decisions of the IST are appealable to the Court of Appeal and subsequently to the Supreme Court of Nigeria.

However, section 251 of the Constitution vests jurisdiction relating to companies' management and operations with the Federal High Court (FHC). Some disputes relating to company securities are filed at the Federal High Court under a fundamental rights enforcement procedure and supervisory jurisdiction by prerogative writs, such as mandamus and certiorari. There is conflicting jurisprudence as the FHC, in some cases, seeks to exercise supervisory authority over the SEC and capital market disputes without deferring to the jurisdiction of the IST.

Law stated - 20 July 2023

Courts and time frames

What experience do the courts in your jurisdiction have with securities litigation? Are there specialist courts for securities disputes? What is the typical time frame for securities litigation in your jurisdiction?

Yes, there is a tribunal exclusively for security disputes in Nigeria called the Investment and Securities Tribunal (IST). The IST has the exclusive jurisdiction to determine securities litigation under the Investment and Securities Act 2007.

The Investment and Securities Act (ISA) 2007 prescribes that cases must be concluded within three months of the closure of pleadings at the IST. By section 289 (5) of the ISA, the IST is to avoid undue delays and deliver judgment within three months from the commencement of the substantive hearing. Some of the important factors that may affect the scheduling include the exercise of the party's constitutional right to change counsel, which may require more time by the new counsel to review the already filed processes and make amendments. Others are the unavailability or substitution of witnesses due to exit from employment or the reconstitution of the panel, which may stall the proceedings, etc.

Law stated - 20 July 2023

Government regulation and enforcement

What is the relationship between private securities litigation and government regulation and enforcement in your jurisdiction?

No specific statutory provision distinguishes matters that may be addressed in private litigation and those that the government may address.

However, private securities litigation usually concerns disputes arising from the creation, management, and operation of a securities transaction. The ISA empowers an aggrieved private party to institute private civil litigation at the IST or Administrative Proceedings Committee (APC). The personal litigation could commence at the APC (an administrative proceeding), and a party not satisfied with the decision may appeal to the IST. Other forms of private litigation could be brought directly before the IST under the ISA 2007. Personal securities litigation is also commenced at the FHC under various statutes and devices, including the Companies and Allied Matters Act 2020.

On the other hand, the SEC is the apex regulator of Nigeria's capital market, empowered by section 13 of the ISA to protect the integrity of the securities market against all forms of capital market abuses, including insider trading. The SEC can levy penalties and administrative costs on any person for breaches of the provisions of the ISA relating to investments and securities business, intervene in the management and control of capital market operators that it considers have failed or failing, or in crisis, including entering the premises and doing whatsoever, it deems necessary for the protection of the investors. The law does not expressly distinguish matters that may be addressed in private litigation from cases that the government may address, thus creating room for overlap in responsibilities. However, in practice, disputes arising from management are typically addressed by private litigation, and the government addresses disputes arising from gross market abuse.

Law stated - 20 July 2023

CLAIMS AND DEFENCES

Available claims

What types of securities claim are available to investors?

Securities claims available to investors in Nigeria can be categorised under statutory and common law claims. For instance, where an investor believes that losses arising out of his or her securities transaction were because of the operator's negligence, the investor is entitled under the law to seek claims against the operator based on the alleged negligence. However, the investor has the burden of proof to the Tribunal that the operator was negligent in handling the transaction.

Other types of claims available to the investor include:

- misappropriation of clients' funds by a stockbroker;

- non-remittance of issue proceeds by an issuing house to the issuer or company;
- non-remittance of dividends by a registrar, public company or stockbroker;
- late transfer or registration of shares or stocks by a stockbroker;
- disputes or claims arising from misrepresentations; and
- false statements in offer documents or in securities transactions.

Some of the areas that commonly give rise to litigation include negligence, misstatement of facts, abuse of the securities market, interpretation of Securities and Exchange Commission (SEC)'s statutory powers, insider trading, interpretation of SEC's statutory powers, etc. The Tribunal exercises jurisdiction over such areas and any other matters as may be prescribed by an Act of the National Assembly. The Investment and Securities Act (ISA) is the principal legislation governing securities litigation and applicable to all the states in the country. Any claim outside the principal legislation may rob the Investment and Securities Tribunal (IST) of its jurisdiction to determine the matter as a securities litigation under the ISA.

Recently, the SEC has made efforts to combat Ponzi schemes in line with the SEC's mandate under the 2007 Act to protect the integrity of the securities market against all forms of abuses. In one such case, the SEC appointed administrators sanctioned by a court to take over the assets of a Ponzi scheme's promoters to realise the assets and return investors' monies to them. The SEC has powers to investigate such schemes and refer any criminal elements to criminal prosecuting authorities, such as the Economic and Financial Crimes Commission or the Attorney-General of the Federation, for further investigation and prosecution.

Law stated - 20 July 2023

Offerings versus secondary-market purchases

How do claims (or defences to claims) arising out of securities offerings differ from those based on secondary-market purchases of securities?

There is no specific statutory provision or case law that creates a difference in relation to claims or defences arising out of securities offerings from those of security market purchases. However, claims arising out of securities offerings primarily relate to the misrepresentation in an offering document, while claims regarding secondary-market purchases generally feature breach of continuing disclosure obligations, negligence, false trading, market manipulation and minority protection actions against the company.

Law stated - 20 July 2023

Public versus private securities

Are there differences in the claims or defences available for publicly traded securities and for privately issued securities?

Yes, there are differences in the claims available for public and private securities. For instance, in publicly traded securities, the SEC and Nigerian Exchange Limited (NGX) can sanction the issuer or capital market operators for negligent conduct, while, for privately issued securities, the NGX and SEC generally have no jurisdiction over same. However, the standard of proof in obtaining damages against both or defending the claim is the same, that is, on the balance of probabilities. There are also differences in the claims or defences available to public or private companies. For private companies, majority rule and corporate democracy is given prominence. Minorities utilise the provisions of the Companies and Allied Matters Act (CAMA 2020) and contractual terms in shareholders' agreements to protect themselves. For public companies, compliance is paramount and additional compliance obligations are imposed by the

ISA and various corporate governance codes.

Law stated - 20 July 2023

Primary elements of claim

What are the elements of the main types of securities claim?

The claims are either statutory claims or common law claims and do not differ between jurisdictions, as the ISA is applicable to all states in Nigeria. For statutory claims, liability exists for untrue statements in a prospectus. Section 85(1) of the ISA provides that where a prospectus invites persons to subscribe for shares in a company, all persons who subscribe for shares or debentures are entitled to compensation for the loss or damage they suffer by reason of their reliance on any untrue statement or misstatement included in the prospectus.

The elements of a common-law claim for negligent misrepresentation are as follows:

- there was a duty of care based on a 'special relationship' between the representor and the representee;
- the representation was false or misleading;
- the representee reasonably relied upon the misrepresentation;
- the representor acted negligently in making the misrepresentation; and
- the reliance was detrimental to the representee, in the sense that harm resulted.

Law stated - 20 July 2023

Primary defences

What are the most commonly asserted defences? Which are typically successful?

There are some defences available to the defendant depending on the claim. For instance, in the market-information based claims, if it is established that at the time when the defendant recorded or stored the information, he or she had no reasonable grounds for expecting that the information would be available to any other person, he or she may escape liability. See sections 107–108 of the ISA.

The defendant may also not be liable if it can be shown that the prospectus was issued without his knowledge or consent and on becoming aware of its issue, reasonable notice was given to the public or after the issuance of the prospectus and before allotment, he or she, upon becoming aware of the misstatement, withdrew his or her consent in writing. See section 85 of the ISA.

Some of the commonly asserted defences to common law claims are hinged on the discharge of the duty of care owed to the claimant. The IST would therefore determine the issue on the probability of the evidence placed by the parties. Sometimes, the defendant may also raise technical objections, which may range from a statute of limitation, condition precedents to be fulfilled before the commencement of the suit, locus standi and where the grounds have merit, the IST would resolve the case in favour of the defendant.

Law stated - 20 July 2023

Materiality

What is the standard for determining whether the misstated or omitted information is of sufficient importance to be actionable?

The standard for determining whether the misstated or omitted information is actionable in Nigeria is whether the

statements in the offering documents or contracts relied upon by the investor are untrue, false and misleading. However, an expert is exempted from civil and criminal liabilities for misstatements in the offering documents not attributed to them as an expert during the preparation of such documents. For claims emanating from common law, the onus is on the applicant to prove that not only was the representation misleading and inaccurate but that the misstatement affected the price, which occasioned a minimal level of loss. If the applicant is unable to show the loss suffered as a result of the misstatement, the court may not intervene. The standard of proof is based on the preponderance of evidence and the balance of probabilities. Where the misrepresentation has criminal liabilities, it may be referred to the Attorney General of the Federation for criminal action to be instituted against the defendants; or the Economic and Financial Crimes Commission for prosecution under section 304 of the ISA. The standard of proof for the criminal action would be beyond a reasonable doubt. In a criminal action filed by the Economic and Financial Crimes Commission against the defendants, the defendants were arraigned on an amended 15-count charge bordering on conspiracy and obtaining with intent to defraud the sum of 855 million naira on the false pretence that a company was in active profit-making manufacturing and trading activities, thereby purporting same to be paid for the purchase of shares under a Private Placement. The Court convicted and sentenced the defendants to five years' imprisonment for 855 million naira fraud. Worthy of note is that the fourth defendant was discharged and acquitted as he gave evidence that the fraud he was accused of began not less than two years before he joined the financial institution. The matter is pending at the Court of Appeal in Appeal No-CA/L/141/2019 *Anayo Nwosu v Federal Republic of Nigeria*.

Law stated - 20 July 2023

Scienter

What is the standard for determining whether a defendant has a culpable state of mind to support liability? What types of allegation or evidence are typically advanced to support or defeat state-of-mind requirements?

The requirement for determining whether the defendant has a culpable state of mind would generally depend on the claim's nature. For instance, where the claim bothers on false trading and market rigging transactions, the applicant must show that the defendant knowingly, recklessly or negligently disseminated false information likely to induce the sale or purchase of securities or likely to have the effect of raising, lowering, maintaining or establishing the market price of securities. On the other hand, where the claim relates to misstatements in the prospectus, the applicant should be able to prove that the defendant's principal officers, employees who participated in the production of the prospectus, issuing house, etc, omitted to state material facts in order to make the prospectus misleading.

In negligence cases, breach of a duty of care is sufficient to ground liability. In *Union Bank of Nigeria Plc (Registrar's Dept) v Securities & Exchange Commission Appeal No. IST/APP/03/2003*, the Tribunal held that the registrar, as custodian of shares, owed shareholders and other market operators a duty of care and due diligence and was therefore liable to restore the shareholders' original position in the event of wrongful transfers. Failure to reverify dematerialised certificates sent back from the Central Securities Clearing System was held to be a breach of the statutory duty to investors and other capital market operators who relied on information from the registrar. Failure to perform their duty made the registrar culpable and liable to pay compensation for damages.

Law stated - 20 July 2023

Reliance

Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

Under section 94 of the ISA, proof of reliance is not required for an applicant to bring an action for rescission of all allotments against the defendant if the prospectus contained a material statement, promise or forecast that was false or misleading. All the applicant is obligated to show is that the prospectus contained deceptive statement(s).

However, under section 85(1) of the ISA, while it does not also require the applicant to show that he or she relied on the untrue statement or misstatement to institute the action, defendants are liable to pay compensation to only persons who relied on the prospectus and incurred loss or damages because of the untrue statement. In *Dr Sunday Folorunso Kuku & 2 Ors v Geoff Ohen Ltd & 2 Ors* in Suit No. FHC/L/CP/25/12 delivered on 7 May 2018, the Federal High Court found that one of the applicants and the third defendant participated in the production of a false document and thus held that the applicant could not benefit from the transaction. Worthy of note is that the matter is currently on appeal.

Law stated - 20 July 2023

Causation

Is proof of causation required? How is causation established? How is causation rebutted?

Section 85(1) of the ISA requires that the negligence or breach of duty that led to misstatements be the direct cause of the loss or damages suffered. The applicant must show that the defendant was reckless or negligent in managing the investment or in disseminating false information. Causation may, however, be rebutted by the defendant by showing that it acted in good faith and followed best practices.

Law stated - 20 July 2023

Other elements of claim

What elements or defences present special issues in the securities litigation context?

Another element of claim in the securities litigation context would be on grounds of insider trading. Section 111 of the ISA prohibits the dealing in securities by insiders and any transaction done in contravention of same is avoidable at the instance of the SEC. Furthermore, for an aggrieved party to be entitled to compensation, the aggrieved party is obligated to show that he has suffered loss by reason of the difference between the price at which the securities would have likely been dealt in such a transaction at the time when the first mentioned transaction took place if the transaction had not occurred. Worthy of note is that section 116 of the ISA notes that the amount of compensation for such an aggrieved party is either the amount of loss sustained by the party, or any other amount as may be determined by SEC or the Tribunal.

Law stated - 20 July 2023

Limitation period

What is the relevant period of limitation or repose? When does it begin to run? Can it be extended or shortened?

The relevant limitation period in Nigeria is three years if the action is on the grounds of a tort such as a misleading statement, an untrue statement or misrepresentation on the prospectus. Where the action is based on breach of contract, it would be six years. Time begins to run from the date of discovery of the misrepresentation and cannot be extended after the relevant limitation period. There are no special limitation periods under the ISA. We rely on the generally applicable limitation statutes.

Law stated - 20 July 2023

REMEDIES, PLEADING AND EVIDENCE

Remedies

What remedies are available? Do any defences present special issues in the context of securities litigation? What is the measure of damages and how are damages proven?

Some of the available remedies depending on the nature of the claim may include damages or declaratory reliefs against the defendant. There is no specific statutory provision or case law that has deemed any type of defence as a special issue in securities litigation.

The Investment and Securities Act 2007 (the ISA), however, provides for an exemption from liability for a director, an employee, the issuing house and its principal officers if the persons mentioned above withdrew consent in writing before the issue of the prospectus stating that it was issued without their authority or consent or the prospectus was issued without their knowledge or consent and on becoming aware of its issue, they immediately gave reasonable public notice that it was issued without their knowledge or consent. Defendants may also be able to limit liability by raising contributory negligence on the part of the investor. They may also be able to deny liability entirely if they can show that they did not act negligently but the loss was as a result of market collapse.

Law stated - 20 July 2023

Pleading requirements

What is required to plead the claim adequately and proceed past the initial pleading?

The applicant is required to file an originating application. The originating application is a statement that sets out the necessary facts that support the claim and the applicant is also required to attach the documents it intends to rely upon, alongside necessary witness statements. The applicant must show that he or she has a reasonable cause of action against the defendant; and his or her right has been breached by the act of the defendant. The pleading standard applicable to civil claims is based on the preponderance of evidence. However, where an element of fraud is pleaded in a civil claim, the pleading standard shifts to beyond reasonable doubt to prove the elements of the crime. On the other hand, the pleading standard applicable to criminal claims are beyond reasonable doubt. By virtue of section 304 ISA, criminal claims are referred to the Attorney General of the Federation for criminal action to be instituted against the defendants.

Law stated - 20 July 2023

Procedural defence mechanisms

What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pretrial resolution?

The IST rules provide that even where the defendant has a preliminary objection that may dispose of the claim, it would only be entertained by the Tribunal at the stage of adoption of the final arguments (ie, after the evidence of the parties). In essence, the IST does not entertain applications by the defendant to terminate the claim at an early stage of proceedings. However, where the Tribunal is of the view that the grounds of the preliminary objection would most likely terminate the suit, it would entertain the preliminary objection by the defendant. In Suit No. IST/LA/05/18 Mr Benson Onokurhefe v Lead Capital Plc & Anor, the Tribunal entertained the preliminary objection at the preliminary stage on the grounds that the action was res judicata and the suit was struck out at an early stage of proceedings.

The IST Rules allow the Tribunal to promote reconciliation among the parties to the action, encourage and facilitate the amicable settlement of the dispute. The Tribunal may with the consent of parties refer a dispute to the Tribunal's Alternative Dispute Resolution (ADR) Centre. A decision reached at the ADR Centre arising from walk-in, may by leave of the Tribunal be made the judgment or order of the Tribunal and enforced in the same manner as a judgment or order of the Tribunal.

The IST Rules do not set out any conditions to be satisfied for resolution through the ADR Centre. It merely allows the Tribunal to promote reconciliation through the ADR Centre, which means if in the opinion of the Tribunal such dispute can be settled without going to full trial, then it will refer the matter to its ADR Centre.

Law stated - 20 July 2023

Evidence

How is evidence collected and submitted to the court to support securities claims and defences in your jurisdiction? What rules and common practices apply to the introduction of expert evidence and how receptive are courts to such evidence?

The applicant is required to file an 'originating application' – a statement setting out the necessary facts supporting the claim. The applicant is also required to attach all the documents it intends to rely upon to support its claim. Rule 2 of the IST Rules provides that upon being served with the originating application, the defendant must indicate any objection or otherwise to the admissibility of the documents. The grounds for objection would be argued over by the parties at the hearing. The documents to which the defendant does not object form the 'Agreed Bundle of Exhibit' and are accordingly marked for hearing. The defendant is also expected to file its defence to the substantive claim, provide a summary of any witnesses to be called and attach all documents it will use in support of its defence.

Rule 10 of the IST Rules provides that a party may call an expert as a witness or submit an expert's report as evidence. If a party calls an expert as a witness or puts an expert's report in evidence, the party must identify the subject in which the expert will provide evidence and, where practical, identify the expert in that subject on whose evidence the party seeks to rely.

Where parties wishing to submit expert evidence cannot agree on who should be the expert, the IST may select the expert from a list prepared by the parties or direct which expert is to be selected, as it deems appropriate. If the IST views that a technical question has arisen, for which it is desirable to have the assistance of an expert, it may arrange for a person having the appropriate qualifications to issue a report on the matter and require that the expert be present at the hearing to answer questions from the parties.

Law stated - 20 July 2023

LIABILITY

Primary liability

Who may be primarily liable for securities law violations in your jurisdiction?

Where the claim relates to misstatements in the prospectus, the principal officers, employees who participated in the production of the prospectus, issuing house and its principal officers, etc, may be held liable. Section 86(1) of the Investment and Securities Act (ISA) provides that any director or officer who authorised the issue of the prospectus commits an offence. Where the statement in lieu of prospectus contains violations, any person who authorised the delivery of the statement in lieu of prospectus for registration commits an offence.

In the recent criminal action filed by the Economic and Financial Crimes Commission against some defendants, the

defendants were arraigned on an amended 15-count charge bordering on conspiracy and obtaining with intent to defraud the sum of 855 million naira on the false pretence that a company was in active profit-making manufacturing and trading activities, thereby purporting same to be payment for the purchase of shares under a Private Placement. The Court convicted and sentenced the defendants to five years' imprisonment for 855 million naira fraud. The fourth defendant was discharged and acquitted as he gave evidence that the fraud he was accused of began not less than two years earlier before he joined the financial institution. The matter is currently pending at the Court of Appeal in Appeal No-CA/L/141/2019 *Anayo Nwosu v Federal Republic of Nigeria*.

Although the ISA does not define a 'maker' of a statement, the Evidence Act (section 83(4)), which is applicable to how evidence is tendered under securities litigation, provides that a statement shall not be deemed to have been made by a person unless the document or the material part of it was written, made or produced by him or her with his or her own hand, or was signed or initialled by him or otherwise recognised by him or her in writing as one for the accuracy of which he or she is responsible.

Law stated - 20 July 2023

Secondary liability

Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

The concept of vicarious liability is available against a company under common law and specific statutory provisions, where it can be established, or it is acknowledged, that an officer acted on behalf of their company.

The concept of 'controlling person' liability is recognised mainly with respect to prospectus liability. The liability extends to persons who were not directly involved in the preparation of the prospectus, but were in positions to exert control over the misleading or untrue prospectus. Furthermore, section 305 of the 2007 Act provides that where the Securities and Exchange Commission (SEC) is satisfied that a person (corporate or individual) took, or refrained from taking, any action to encourage another person to take action in violation of the 2007 Act, the SEC may impose a penalty of such an amount, or of such a nature, that it considers appropriate.

There are also statutes that have created personal criminal liability for officers of companies involved in securities transactions. For example, in the wake of the 2009 financial banking crisis in Nigeria, many of the directors and top managers of the country's banks, the shares of which were quoted and traded on the Nigerian Stock Exchange, were charged with criminal offences in relation to securities pricing manipulation, cheating and share buybacks under general and specialised statutes, such as the Criminal Code, the 2007 Act and the Banks and Other Financial Institutions Act.

Law stated - 20 July 2023

Claims against directors

What are the special issues in your jurisdiction with respect to securities claims against directors?

Section 308 of the Companies and Allied Matters Act places a duty of care and skill on directors. Directors are required to exercise a reasonable degree of care, diligence and skill while carrying out the functions of the office. Subsection 3 of the above provision makes every director of a board individually and collectively liable for actions of the board, save where the director can, for example, justify his or her absence at a board meeting at which the alleged decision was reached. The extent to which Nigerian courts give deference to directors' decisions based on the Business Judgment Rule is uncertain as the jurisprudence is still developing. Under the BJR the court is not supposed to substitute its views for those of the directors who are better placed to decide on the business interest of the company.

From the above, there need not be an actual intention to issue a misleading prospectus in civil cases; however, a major element for criminal liability is the intention to commit fraud.

Law stated - 20 July 2023

Claims against underwriters

What are the special issues in your jurisdiction with respect to securities claims against underwriters?

Underwriting may either be on a firm or standby basis in accordance with Rule 87 of the SEC Rules and any dispute arising from same shall be resolved via arbitration in accordance with Rule 90 of the SEC Rules. Where an underwriter defaults in payment when the risk falls, the issuer shall be entitled to the proceeds plus accrued interest at the prevailing Nigeria Inter-bank offer rate in accordance with Rule 305 of the SEC Rules. In practice, the SEC may explore mediation between the parties before the matter is referred to arbitration. The SEC played this role in the African Petroleum 2008 public offer dispute against the underwriters. The decision of SEC was in all fours with the eventual award where the underwriters were found liable to pay the subscription shortfall.

Law stated - 20 July 2023

Claims against auditors

What are the special issues in your jurisdiction with respect to securities claims against auditors?

Auditors are bound in performance of their duties to exercise all such care, diligence, and skill as is reasonably necessary for each particular circumstance. Thus, where a company suffers loss or damages as a result of the failure of the auditor to discharge his or her fiduciary duty, the auditor may be liable for negligence and the directors may institute an action against him or her. Furthermore, section 185 of the ISA provides that the Commission may sanction an auditor for failure to report a material significance of financial impact that is likely to cause or has already caused a financial loss to any investor or creditor.

Law stated - 20 July 2023

COLLECTIVE PROCEEDINGS

Availability

In what circumstances does your jurisdiction allow collective proceedings?

The circumstances that allow for collective proceedings in Nigeria are as follows:

- interested persons, class or some members of the class cannot be ascertained or cannot readily be ascertained;
- interested persons, class or some members of the class, if ascertained, cannot be found;
- although the persons, class or the members of the class can be ascertained and found, it is expedient for the purpose of efficient procedure that one or more persons be appointed to represent the persons, class or member of the class (the judge may make the appointment during the proceedings and the decision is binding); and
- the necessary permission of the court is obtained or a direction is given.

In addition, some of the standard points that must be established for the class action to proceed include numerosity (a class of large plaintiffs), commonality (there must be questions of law and fact that are common to the class),

typicality (the claims and defences in issue should be typical for the class) and the parties will be adequately represented. The Investment and Securities Act (ISA) and Securities and Exchange Commission (SEC) Rules do not provide for any specific claims that may be brought under class actions. However, Order 4 Rule 8 of the Investment and Securities Tribunal (IST) Rules 2014 provides for the Case Management powers of the Tribunal and states that parties or persons having the same interest in a subject matter may apply to the Tribunal for direction on how to proceed with their claims. Moreover, Order 9 Rule 4 of the Federal High Court Rules 2019 makes provision for class actions.

Law stated - 20 July 2023

Reliance, causation and damages

Can reliance, causation and damages be determined on a class-wide basis, or must they be assessed individually?

Generally, damages are assessed individually. However, the nature of the injuries of the class action will determine the nature of the assessment. There is no specific rule or procedure for assessment in Nigeria. Order 4 Rule 15 of the IST Rules 2014, however, provides that where there are a wide class of matters touching on related issues of fact and law, the Tribunal may order a Group Proceedings Direction (GPD) and where a decision is given, the decision would be binding on all the other matters as to the extent to which the Tribunal shall direct.

Law stated - 20 July 2023

Court involvement and procedure

What is the involvement of the court in collective proceedings and what procedures must be followed to achieve collective treatment of claims? What is the procedure for settling collective proceedings and what is the extent of the court's involvement in settlement?

The IST entertains applications for group proceedings. An application for group proceedings must be accompanied by a summary of the nature of the action, the number of parties likely to be involved, and the common issues of fact and law that are likely to arise in the proceedings. Upon submission, a group register shall be established, in which the applications to be managed under the register are entered.

There are no specific statutory provisions on the procedure for settling collective proceedings. The parties may therefore inform the IST of their intention to explore a settlement and request for time to report the outcome of the settlement discussion. The Tribunal may also advise parties to explore a settlement, but the parties may choose to proceed with the hearing of the case if the settlement discussion proves abortive.

The IST Rules allow the IST to promote reconciliation among the parties to encourage and facilitate the amicable settlement of the dispute. The IST may, with the consent of the parties, refer a dispute to its Alternative Dispute Resolution (ADR) Centre. A decision reached at the ADR Centre arising from a voluntary application filed by parties involved in a walk-in may, by leave of the IST, be made the judgment or order of the IST and enforced in the same manner.

Law stated - 20 July 2023

Opt-in/opt-out

In collective proceedings, are claims opt-in or opt-out?

Nigerian law stipulates that in any class proceedings, a person, class or some members of the class may apply to the

court or a judge in Chambers to opt in or opt out of the class action as provided in Order 9 Rule 4(3) of the Federal High Court Rules 2019. A court or judge in Chambers may on good and justifiable cause permit any person, class or members of the class represented in a class action to opt in or opt out.

Law stated - 20 July 2023

Regulator and third-party involvement

What role do regulators, professional bodies and other third parties play in collective proceedings?

Regulators such as the SEC, self-regulatory organisations such as NGX, professional bodies such as the Capital Market Solicitors Association of Nigeria also play an important role in collective proceedings. For instance, in ordinary schemes of arrangement, SEC is expected to provide the court with an independent report on the fairness of a scheme. As a regulator, it has the power to intervene and to initiate various types of collective proceedings such as winding up, schemes of arrangements, to approve M&A schemes to be sanctioned by the court, to regulate and look into investments schemes, to appoint trustees over Ponzi schemes issues and procure the intervention of the court to empower these trustees to resolve these Ponzi scheme issues. The NGX and other professional bodies and even third parties may also be called upon by the Court directly or at the request of stakeholders in the collective proceedings to provide information, expert opinion or advice to the court or be appointed by the court to undertake certain assignments for the purpose of an efficient resolution of the collective proceedings.

Law stated - 20 July 2023

FUNDING AND COSTS

Claim funding

What options are available for plaintiffs to obtain funding for their claims? What are the pros and cons of each option, including any ethical issues relating to litigation funding?

In Nigeria, third-party funding is frowned upon by the courts based on the common law principles of champerty and maintenance which: (1) prohibits a third party from funding litigation between disputants (in which the funder has no legitimate interest); and (2) render an agreement to provide such funds illegal and void, on the ground of public policy. It is instructive to note that under Rule 50(4) Rules of Professional Conduct for Legal Practitioners, a lawyer shall not enter a contingency fee arrangement without first informing the client of the potential effects.

A contingency fee arrangement is only permissible in the following circumstances, where:

- it is a civil matter, whether contentious or non-contentious;
- the contract is reasonable in the circumstances of the case, including risk and uncertainty of compensation;
- the contract is not vitiated by either fraud, mistake or undue influence; and
- the contract is not contrary to public policy.

Law stated - 20 July 2023

Costs

Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

The general rule is that costs will follow the event. Therefore, the winning party's expenses are not always repaid or

compensated. Costs are usually at the discretion of the court. The successful party may be asked to pay costs if they conducted themselves in an improper manner that caused a delay, if the other party was successful on part of their claim, or if an action was filed or an omission was improperly made to the detriment of another party. Some of the factors the court considers in awarding costs include the cost of legal representation and assistance of a successful party, travel and other expenses of the parties and witnesses, and other such expenses that the judge determines ought to be recovered.

Costs are usually determined by the judge. However, where the judge cannot determine the quantum, it will be referred to a taxation officer. Where the court awards costs, further proceedings may be stayed until payment is made.

Law stated - 20 July 2023

Privilege

What types of legal privilege exist between litigation funders and litigants?

There are no specific legal privileges that exist between litigation funders and litigants as the practice is not common in Nigeria.

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Law stated - 20 July 2023

INVESTMENT FUNDS AND STRUCTURED FINANCE

Interests in investment funds

Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

The major investment funds in Nigeria are unit trusts, venture capital funds, open-ended investment companies, real estate investment schemes and specialised funds. The volume of litigation involving investment funds in Nigeria is relatively low. The most notable claim relates to the breach of fiduciary duty of the fund's investment manager.

There are special issues involving intermediated securities and assets or funds belonging to the investors, beneficial owners or account holders but being held by or in those trusts, funds or firms that the Investment and Securities Act (ISA) generically describes as capital market operators.

The ISA provides for rules of bookkeeping and segregation of those assets, fiduciary obligations of the capital market operators (CMOs) vis a vis the investors, clients or account holders. The ISA also provides for a special Investor's Protection Fund to protect investors. See sections 39–42 of the ISA and sections 197 and 198 of Part XIV of ISA.

In the event of insolvency of these intermediaries, there are special issues or priority or ranking of claims that arise that are in derogation of the general ranking and pari passu insolvency rules. The ISA provides for the Court's consideration of special treatment of securities, funds or assets being held by third parties (the CMOs) but beneficially owned by the investors such that investors are accorded super priority in collective proceedings for those assets being held in trust by the insolvent firm. These issues are also paramount to the Securities and Exchange Commission as a regulator and would usually lead same to initiate the collective proceeding.

Law stated - 20 July 2023

Structured finance vehicles

Are there special issues in your country in the structured finance context?

The most common types of structured finance vehicles in Nigeria are mortgage-backed securities, asset-backed securities and credit risk. Two major issues with structured finance vehicles in Nigeria are the high rate of interest and the costs of securitisation. This problem arises due to the low percentage of vehicles in Nigeria that are assigned investment-grade credit rankings.

Another issue is a systemic bias towards lower-quality loans among securitised loans. Underwriting, credit rating and investor due diligence are not properly performed in Nigeria. There are, however, ongoing attempts by the credit reporting agencies to entrench due diligence in credit reporting, and there are calls for improvements to be made in the area of credit ratings.

Law stated - 20 July 2023

CROSS-BORDER ISSUES

Foreign claimants and securities

What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

By virtue of section 78 of the Companies and Allied Matters Act (CAMA 2020) a foreign company having the intention to carry on business in Nigeria shall not carry on business or exercise any of the powers of a registered company until so incorporated. Thus, if the foreign holder of securities wishes to exercise any of the powers of a registered company, it shall take all necessary steps to obtain incorporation as an entity in Nigeria for that purpose. These requirements do not affect any foreign company that has been exempted under any treaty to which Nigeria is a party or any foreign company that has been granted exemption from the provisions of section 78 of CAMA.

Law stated - 20 July 2023

Foreign defendants and issuers

What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

Rule 405 of the Securities and Exchange Commission (SEC) Rules provides for the regulation of foreign investments. By virtue of Rule 407 of the SEC rule, any foreign entity that wishes to carry on investment and securities business in Nigeria must be registered with the SEC before operating in the Nigerian capital market. Where the foreign defendant is in Nigeria, the claim based on extra-territoriality of a law will be possible. However, where the foreign defendant is not within the geographical territory of Nigeria, the claim may be subject to the principles of conflict of laws. The parties may also agree on choice of law that could be a foreign law and the Nigerian court would apply the agreed law to resolve the dispute.

Law stated - 20 July 2023

Multiple cross-border claims

How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

Whenever there are identical claims between the same parties in a foreign jurisdiction, the Tribunal may stay the whole or part of any proceedings or exclude an issue from consideration pursuant to its case management powers as provided in Order 4 Rule 7 of the IST Rules 2014. Some of the factors that would guide the decision of the Tribunal include where the defendant resides, where the contract was entered or to be performed, forum convenience, governing law, etc.

Law stated - 20 July 2023

Enforcement of foreign judgments

What are the requirements in your jurisdiction to enforce foreign court judgments relating to securities transactions?

Nigeria is yet to adopt an international instrument facilitating the enforcement of foreign judgments, unlike its position on the enforcement of foreign arbitral awards.

Currently in Nigeria, foreign judgments can be recognised and enforced either by an action at common law or statutorily based on reciprocity or reciprocal enforcement.

Common law

For enforcement by action at common law, the element of reciprocity is not expressly required, although, in practice, it is easier to scale the recognition aspect rather than the enforcement aspect. Often, the enforcement proceedings are fraught with technicalities, such as non-submission to the foreign court or substantive issues of differences of law and policy. Usually, these proceedings are started by way of an originating summons by the foreign judgment creditor on the basis that the facts are not disputed or via a summary judgment procedure. Thus, there is no need in such a case for a lengthy trial. They feature declaratory (recognition) and enforcement reliefs as prayers to the court.

Also, since foreigners have full access to justice in Nigeria, they sometimes file a fresh suit in Nigeria, which is strengthened by the evidence of the foreign judgment and may usually be disposed of in less time. The key aspect is that such a foreign judgment may be enforced in Nigeria under common law, irrespective of whether the foreign court would have reciprocally enforced judgments of Nigeria's courts. This distinguishes it from the other method of enforcing foreign judgments in Nigeria, namely through the requirements outlined under the Nigerian statute of Foreign Judgments (Reciprocal Enforcement) Act (Cap F35, LFN, 2004). A second major distinguishing factor is that the nature of such a foreign judgment is not limited to monetary judgments.

Statute

Provided the statutory requirements for validity and enforcement of such judgments are satisfied, the foreign judgment creditor will commence an action in a High Court in Nigeria, using the judgment and reliefs obtained as the basis of his or her enforcement action and appropriate reliefs.

The statute-based option of foreign judgments is regulated by two statutes: the Reciprocal Enforcement of Judgment Ordinance of 1922 (the Ordinance) and the Foreign Judgments (Reciprocal Enforcement) Act (Cap F35, LFN, 2004 the Act).

The Ordinance, which is built on the historical heritage of the Commonwealth, extends recognition and enforcement

through registration of the Foreign Judgment to the following countries: the United Kingdom and several former colonies and protectorates of Her Majesty, the Queen of England including the Supreme Court of Ghana, Sierra Leone, Supreme Court of Gambia, Supreme Court of the State of Victoria, Barbados, Bermuda, British Guiana, Gibraltar, Grenada, Jamaica, Leeward Island, St Lucia, St Vincent and Trinidad and Tobago.

The Act, on the other hand, extends recognition to other countries listed in the Order made by the Minister of Justice pursuant to sections 3 and 10 of the Act. However, the Minister's Order has not been made leaving the Act essentially inchoate.

Requirements for recognition and enforcement by the courts

The governing statutes have similar requirements for recognition, save for the timelines for applying for recognition. These requirements include:

- the judgment must have been pronounced by a superior court of the country of the original court, with competent jurisdiction to determine the action;
- the judgment debtors must have participated or submitted to the jurisdiction of the original court, with requisite notice of the pendency of the action;
- the judgment must be a money judgment for a certain sum, excluding tax or penalty;
- the judgment must be final and conclusive between parties – there must be no pending appeal; and
- the original court affords reciprocal enforcement to judgments of Nigerian courts.

With respect to the timeline, the Ordinance provides for a 12-month window from the day of judgment or some other period as may be extended by the registering court. The Act, without the possibility of an extension, prescribes a six-year period. However, in the event that an appeal is lodged against the judgment, time does not begin to run until the determination of all appeals against the judgment.

The grounds for setting aside registered judgments are further guides for the requirements on registration as well. They include:

- where the original court lacked jurisdiction to entertain the action;
- where the judgment was obtained by fraud;
- where enforcement would be contrary to public policy in Nigeria;
- where the applicant is not the person vested with rights under the judgment;
- where the matter had been decided by some other competent court; the matter was *res judicata*; and
- that the judgment, as at the date of application, is not executable in the country of the original court.

Law stated - 20 July 2023

ALTERNATIVE DISPUTE RESOLUTION

Options, advantages and disadvantages

What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

The major alternatives to litigation for the redress of losses on securities transactions are arbitration, mediation and conciliation, collectively referred to as Alternative Dispute Resolution (ADR). The NGX also maintains an Investors

Protection Fund that was set up to compensate investors with genuine claims of pecuniary loss against dealing member firms in various securities transactions.

The Investment and Securities Tribunal (IST) has an ADR Centre; the primary aim of the Centre is to provide opportunities for parties to mutually settle disputes that will thereafter be reduced into a written document, signed by the parties, and entered as a judgment of the Tribunal. The various techniques adopted at the Centre involve mediation, neutral fact finder, early neutral evaluation, conciliation, judicial appraisal, negotiation, among others. These techniques are used to assist the parties depending on the peculiarities of each case.

Generally, the type of parties will determine the nature and process of ADR proceedings. The IST ADR Centre is, so far, the common resort of parties involved in a securities dispute. Despite the option of being able to resort to the IST ADR centre, where the losses incurred against a dealing member firm are eligible under sections 198 and 212 of the Investment and Securities Act 2007, upon compliance with the due process for making claims, an investor may be paid compensation from the Investors Protection Fund. Where a claim is, however, rejected, the NGX will forward a letter to such investor communicating the rejection and the reasons for same.

A major advantage of arbitration over litigation of securities disputes in Nigeria is the speedy resolution of such dispute. We note, however, that the Investment and Securities Act stipulates that every dispute at the Tribunal must be disposed of within 90 days; so when disputes take place at the Investment and Securities Tribunal, they are quickly dispensed with. Upon a dissatisfied party's appeal of the Tribunal's decision to the Court of Appeal, this advantage of speedy resolution through arbitration comes to play because matters at the Court of Appeal could be protracted for years. Also, where such dispute is litigated upon in the Federal High Court instead of the Investment and Securities Tribunal, it could also be protracted for years as opposed to arbitration that the parties can agree on a short timeline for conclusion. Another advantage is the availability of experts in arbitration proceedings; parties would usually appoint arbitrators who are professionals in securities and they in turn have a greater level of expertise than the trial judge. The nature of securities disputes requires a requisite level of knowledge about the industry, hence the need for experts. Again, arbitration is final and binding on parties whereas, in litigation, an aggrieved party may continue to appeal the decision of the courts up to the Supreme Court.

In practice, cost is a disadvantage of arbitration in securities disputes. Arbitration is usually expensive since it involves the appointment of private persons who are usually experts on securities transactions as arbitrators. The parties have to bear the arbitrators' fees and other administrative expenses that would have been otherwise incurred by the state in litigation with minimal filing fees being paid by the parties.

Law stated - 20 July 2023

UPDATE AND TRENDS

Key developments of the past year

What are the most significant recent legal developments in securities litigation in your jurisdiction? What are the current issues of note and trends relating to securities litigation in your jurisdiction? What issues do you foresee arising in the next few years?

One of the most recent legal developments is the enactment of the Federal Competition and Consumer Protection Act (FCCPA), which has repealed sections 118–128 of the Investment and Securities Act (ISA) dealing with mergers and acquisitions (M&A). The new Act has established the Federal Competition and Consumer Protection Commission (FCCPC) as the administering regulator for this new legislation and a Tribunal that is vested with jurisdiction to determine disputes on mergers and acquisitions and competition issues.

The Securities and Exchange Commission (SEC) retains control of regulation of securities transactions generally notwithstanding FCCPA. The only thing transferred to FCCPC is the merger control issue that has to do with the

competition effect of a merger. The general fairness of even a merger among the shareholders as distinct from the market impact is still within SEC purview and not FCCPC. To that extent, the repeal of the provisions of ISA on M&A and the M&A, which usually requires a court to sanction the same and rely on the SEC's report as to the fairness of the deal may be an area of future litigation or engagement between the two regulators to clarify the scope of their respective mandate.

There was also a recent decision by the Court of Appeal in Appeal No: CA/743/15- SEDC West Multipurpose C Society v SEC delivered on 24 June 2019. The Court held that the SEC owed a statutory duty of care to the appellant in ensuring that the statutory ratio of allotment based on its publications was followed and the SEC failed to discharge the duty of care. The Court further held that it was a statutory duty of care and not a shared duty so the appellant had no part to play, and therefore awarded the sum of 1,118,481,000 naira in favour of the appellant. Worthy of note is that SEC was not represented by counsel at the Appeal Court and has appealed against the said judgment to the Supreme Court. However, subject to the outcome of the proceedings at the Supreme Court, the implication of the Court of Appeal judgment is that a statutory duty under the ISA is not a shared duty even in relation to offerings and the SEC can be held liable for any statutory negligence if it failed to provide the duty of care to the claimant.

Law stated - 20 July 2023

Jurisdictions

	Brazil	Araújo e Policastro Advogados
	Germany	Clifford Chance
	India	Khaitan & Co
	Japan	Tokyo International Law Office
	Luxembourg	GSK Stockmann
	Netherlands	Pels Rijcken
	Nigeria	Punuka Attorneys & Solicitors
	United Kingdom	Stewarts
	USA	Cadwalader Wickersham & Taft LLP