

## Commercial litigation in Nigeria - The near future

Written by Funke Adekoya SAN  
Thursday, 21 February 2013 00:00

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The past year has been very challenging for commercial litigation lawyers in Nigeria. The ongoing privatisation process continues to be bogged down in controversy.

Recent litigation, which challenged the transparency of the bidding process, has left investors unsure as to the security of their investments, while the commencement of privatisation within the power sector has sparked off threats of litigation by current employees of the Power Holding Company of Nigeria, another cause for concern to some investors. The infrastructure sector continues to be saddled with litigation between contractors and the federal government, while the unclear signals regarding the privatisation process in the aviation sector raises the potential for future litigation.

Shareholder suits are on the increase – the near collapse of the banking sector and the takeover and reconstruction of several banks by the Central Bank of Nigeria has sparked off several shareholder suits challenging the extent of the regulator's powers.

The crash of the stock market and the government's attempt to re-organise the main regulatory bodies: the Nigerian Stock Exchange and the Securities and Exchange Commission, has also resulted in some shareholder litigation.

Both the federal and state governments have become more aggressive in corporate tax collection, resulting in an increase in litigation by affected companies seeking either interpretations of tax legislation or its applicability, or challenges to tax assessments or due process collection procedures.

The expansion in residential real estate development in the past few years led to a surge in the construction of gated communities. We have noted the emergence of "class action" type litigation by residents to resolve issues resulting from the provision of services within such communities and their management. As the number of such estates continues to increase; the potential for an upsurge in such litigation exists.

Going forward, the proposed reforms within the power, infrastructure and the petroleum sectors have resulted in pending legislation, which have the potentials of expanding the frontiers of

litigation practice in a very significant way.

### MAJOR RECENT ACTIVITY IN NIGERIA'S COMMERCIAL LITIGATION SECTOR

In January 2012, there was a nationwide strike by Nigeria's labour unions following the deregulation of the downstream sector of the petroleum industry and the removal of the fuel subsidy. Nigeria has four refineries which are performing far below capacity. As a result, Nigeria, a major producer of crude oil, has to import refined products for its energy needs. In order to keep the prices of the refined products low and below the cost of importation, government pays a subsidy to importers. Over the years, less than honest civil servants and fraudulent importers have exploited the system by over invoicing fuel imports and collecting payments for them. The resultant increase in fuel prices, following the removal of the fuel subsidy sparked off mass protests and has led to calls for reform of the petroleum sector in order to ensure accountability and probity.

In reaction to these calls, the House of Representatives set up an ad hoc committee on the fuel subsidy management. The committee's report exposes not only the corruption in the management of the fuel subsidy programme but also the general malaise in the petroleum sector. Unfortunately, recent allegations of corruption against prominent members of the committee appear to have marred the implementation of the report. Presently, the government has commenced criminal proceeding against some individuals and companies involved in the subsidy scam. Perhaps, one of the greatest results of the nationwide strike is the strident call for a speedy passage of the Petroleum Industry Bill (PIB). The bill has been in the making for many years and several versions have been debated in the National Assembly. Only recently, the federal government sent a final version of the PIB to the National Assembly for consideration and passage into law. Passage of the bill will have significant effects upon the petroleum sector, and the proposed reforms have the potential to result in litigation arising out of frustrated or legislatively "novated" contracts.

Recently, the Nigerian Court of Appeal affirmed the decision of the Federal High Court in a claim by Dr John Abebe, against Statoil Nigeria to 1.5% of Statoil's profit from its interests in the Agbami Oil fields. Dr Abebe's claim at the lower court was that Statoil had agreed to pay him 1.5% of its profits in consideration for assisting the company expand in Nigeria in the 1990s. The decision of the Court of Appeal will certainly have significant implications in commercial circles, particularly for foreign companies who have come into Nigeria based on invitations from Nigerians.

The Dana air crash, which occurred in a densely populated part of Lagos on 3 June 2012 resulting in the deaths of over 153 people, has the potential to spark off litigation by relatives of

victims of the crash.

### LEGAL FRAMEWORK FOR THE RESOLUTION OF COMMERCIAL DISPUTES IN NIGERIA AND PROPOSED CHANGES

#### Litigation

Because of its colonial links with Britain, the Nigerian legal system is largely based on the English system. Nigerian law consists basically of Nigerian legislation, the received English law (ie common law, English statutes of general application in force in England as at 1 January 1900, and the doctrines of equity) customary law and judicial precedents. Like England, Nigeria also operates an adversarial system. There are three main methods for resolving commercial disputes: through litigation, arbitration and mediation/conciliation. Major commercial disputes are brought before the State High Courts or the High Court of the Federal Capital Territory Abuja, which have unlimited jurisdiction to hear all matters other than those that are within the exclusive jurisdiction of the Federal High Court. The State High Courts and the High Court of the Federal Capital Territory, Abuja have jurisdiction to determine civil proceedings where the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue. Section 251(1) of the Constitution of the Federal Republic of Nigeria gives the Federal High Court exclusive jurisdiction over matters of:

- revenue;
- company taxation;
- customs and excise;
- banking;
- aviation; and
- shipping

Appeals lie from the High Courts (Federal, State and Federal Capital Territory) to the Court of Appeal and thereafter to the Supreme Court, which is the apex court in Nigeria.

Many State High Courts have recently amended their civil procedure rules (CPR) to provide for a frontloaded case filing system, as well as the option of trying alternative dispute resolution mechanisms before actual trial commences. The Lagos State High Court has implemented a fast-track route for certain cases and other State High Courts are considering similar measures. Many of the State High Courts have created commercial divisions for the speedy resolution of commercial disputes, and particular judges may be assigned to hear specific types of commercial matters.

There are also specialised courts, which hear disputes arising in connection with the operations or administration of specific laws. For example, the Federal Inland Revenue Service (Establishment) Act, 2007 provides for the framework for the resolution of disputes between tax payers and the Federal Inland Revenue Service (FIRS). The Act provides that any person aggrieved by a decision of the FIRS may appeal to the Tax Appeal Tribunal within 30 days of the decision being made. Similarly, the Investment and Securities Act also creates the Investment and Securities tribunal to hear matters relating to the operations of the capital market. The newly established National Industrial Court, that has exclusive jurisdiction over labour and employment matters has also been quite busy.

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### Limitation periods

Limitation periods exist for filing claims. The periods vary depending on the nature of the claim. The limitation laws of the various states provide a limitation period of six years for actions based on simple or quasi-contract or torts. However, some statutory bodies have shorter limitation periods:

- Actions against the Nigerian National Petroleum Corporation must be begun within one year of the cause of action arising.
- Actions against public officers must be commenced within a three-month period.

The limitation period is triggered by the date when the cause of action is complete, and not the date when injury occurs.

### Enforcement of judgments

The enforcement of a judgment depends on its terms. Judgments for specific performance, damages and injunctions can be enforced through:

- the issue of a writ of execution;
- starting garnishee proceedings; and
- contempt proceedings.

Declaratory judgments are not capable of enforcement as they merely declare the rights of the parties. A domestic judgment of a court in one state in Nigeria can be enforced in the jurisdiction of another state court, on registration of the judgment in the enforcing court.

Nigeria has a Foreign Judgment (Reciprocal Enforcements) Act which is based on the principle reciprocity of treatment. Under the Act, judgments given in a foreign country can be enforced in Nigeria by Nigerian courts. However, the foreign judgment must be registered in the high court of the state where enforcement is sought.

An application to register a foreign judgment must be made within six years of the date of the judgment or any appeal in relation to that judgment. A judgment will not be registered if it is wholly spent, or it would not be enforceable in the country of the original court. A registration can also be set aside. Some of the grounds for setting aside include cases where the Foreign Judgments (Reciprocal Enforcements) Act does not apply to the judgment or where the judgment was registered in breach of the Act or where the original court lacked jurisdiction.

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Once the judgment has been registered, it has the same force and effect as a judgment of a Nigerian court.

Major clients in the commercial sector

- federal government of Nigeria;
- local and international oil companies;
- telecommunication companies;
- banks, stockbroking firms, discount houses and insurance companies;
- local and international airlines;
- manufacturing companies;
- multinational companies; and
- private individuals.

### PREDICTIONS

With the increasing privatisation and market liberalisation in the major sectors of the Nigerian economy, we predict many more disputes arising from the government's focus on public private partnership (PPP) initiatives and in the energy sector particularly, in cases where government reneges on its contractual obligations. There is also likely to be an increase in negligence claims against manufacturers, particularly in the pharmaceutical industry. We also foresee an increased use of arbitration as the preferred mode for the settlement of commercial disputes.

With respect to the petroleum sector, the PIB is likely to have a significant impact on the future of commercial litigation in Nigeria. We predict key litigation with regards to the following issues:

- how the Nigerian hydrocarbon tax regime which provides that tax may be also be collected in kind will be interpreted by the courts;
- delineating the overlapping functions of the various regulatory agencies under the PIB; and the effect of the PIB on current production sharing contracts.

The past two years have been very exciting and challenging for commercial litigators, who have been required to provide specialised or tailor made legal services to their clients. We foresee a more vibrant commercial litigation sector in the coming years, which will probably require greater collaboration between local and foreign law firms.