M&A LITIGATION

Nigeria

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M&A Litigation

Consulting editors

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Kirkland & Ellis LLP

Quick reference guide containing side-by-side comparison of local insights into M&A litigation, including types of shareholder claim; class or collective actions; derivative litigation; interim relief and early dismissal; claims against third-party advisers or counterparties; limitations on claims; standards of liability; legal restrictions on indemnities; challenges to particular clauses or terms; pre-litigation tools and procedure; the role of directors' and officers' insurance; forum and discovery considerations; damages and settlements; directors' duties regarding unsolicited or unwanted M&A proposals; types of counterparty claim; and recent trends.

Generated 18 April 2023

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

Identify the main claims shareholders in your jurisdiction may assert against corporations, officers and directors in connection with M&A transactions.

Shareholders' claims may be classified according to grounds, capacity and reliefs. The grounds may include directors' breach of fiduciary duty, breach of contract and violations of shareholders' statutory rights. These actions can be commenced in various capacities. The shareholder may sue in a personal or representative capacity (in each case, as and for itself or other shareholders) or commence a derivative action (on behalf of the company). Various classes of reliefs such as damages, injunctions and orders to disclose information are available in each of these actions.

As to grounds, the possible grounds are numerous. Four groups of them are common enough to be mentioned briefly here.

First, both in equity and by statute, a director has a fiduciary duty to avoid conflicts of interest (including situations that confer unnecessary benefits or secret profits on such a director).

Second, it is common for shareholders to have contractual rights to challenge M&A transactions. For example, pre-emptive rights on transfer or issues of shares are often available by statute, in the articles of association, and in shareholders' or investment agreements.

Third, by statute, a company cannot either be dissolved and then merged into another company or sell over 50 per cent of its assets by value except with a supermajority vote of its shareholders by value.

Fourth, a minority shareholder cannot be 'squeezed out' of a company in a tender offer situation except following a statutory procedure that includes, inter alia, the determination by a court of the fair value of their shares (section 147 of the Investments and Securities Act 2007).

Law stated - 29 April 2022

Requirements for successful claims

For each of the most common claims, what must shareholders in your jurisdiction show to bring a successful suit?

The common requirement for every shareholder action is to establish shareholding: either via a share certificate issued by the company or by having its name entered in the register of members. Other factors will depend on the nature of the claim and the subject matter of the suit and must be considered on a claim-by-claim basis.

To recover compensation for breach of contract, the shareholder must show that he or she has suffered a financial loss as claimed. To obtain an equitable relief like an injunction, the claimant must show that damages will not be an adequate remedy and that it has not acted sluggishly or reprehensibly – in the traditional terminology, 'delay defeats equity' and 'he who comes to equity' must 'do equit' and 'come with clean hands'.

There are many other granular requirements that are relevant in each category of claim. For example, in 'squeeze out' situations, a complaining minority shareholder who seeks a higher price than that offered must show that he elected to transfer his or her shares to the offeror or demanded fair value for his or her shares, applied to the court within 20 days of the offeror's failure to pay a fair price to the dissenting shareholders, and he or she did not elect to accept the offeror's bid.

Beyond proof of shareholding, the basic elements of grounds to be established vary. For example, for a claim based on a contract, a valid contract and contractual terms must be proven.

Similarly, for claims based on fiduciary duty, the existence of a fiduciary duty must be shown and so must a breach or violation of that duty. Critically, only directors and employees owe fiduciary duties to the company. A majority shareholder does not, except to the extent that he or she is also a director or employee, owe a fiduciary duty to the company. However, promoters of a company stand in a fiduciary relationship with the company. Section 86 of the Companies and Allied Matters Act 2020.

Ordinarily, a shareholder cannot be compelled to sell or keep his or her shares simply because a majority of the other shareholders want him to sell or keep them, as the case may be.

There are 'squeeze out' provisions with detailed rules as to steps to be taken to complete a 'squeeze out' and for determining pricing, but they work only where at least 75 per cent of the shareholders by value, sometimes even 90 per cent, approve.

A shareholder commencing a derivative action must show that:

- a cause of action has arisen involving negligence, default, breach of duty or trust by a director or former director;
- the shareholder has given reasonable notice to the directors of his or her intention to sue;
- the directors do not bring, diligently prosecute, defend or discontinue the action;
- the shareholder is acting in good faith; and
- the suit is in the best interest of the company.

In a representative action, the shareholder must prove that he or she is a shareholder of the company, had indeed obtained the consent of the class of shareholders on whose behalf the action is commenced, and that those shareholders have a genuinely common interest.

In an action for unfair prejudice, the shareholder must show that the conduct or affairs of the company, an actual or proposed act or omission by or on behalf of the company, or a resolution or proposed shareholder resolution is either oppressive or unfairly prejudicial to, or unfairly discriminatory against the shareholder or shareholders, or disregards the interests of the shareholder or shareholders as a whole.

Law stated - 29 April 2022

Publicly traded or privately held corporations

Do the types of claims that shareholders can bring differ depending on whether the corporations involved in the M&A transaction are publicly traded or privately held?

Yes. Certain claims are peculiar to publicly-traded companies, others are peculiar to privately-held companies and then there are claims that are common to both publicly-traded and privately-held companies. The vast majority of claims (eg, claims based on fiduciary duties, and claims seeking to challenge formal mergers and asset sales) are common to both publicly-traded and privately-held companies.

All of the statutory rules relating to tender offers are peculiar to publicly-traded companies. The statutory provisions on rights of pre-emption and the agreements following them apply mainly to privately-held companies.

Grounds that are based on contractual agreements (as distinct from statutes or fiduciary duties) are more often invoked in respect of private companies. But in principle, the rules also apply to public companies.

Law stated - 29 April 2022

Form of transaction

Do the types of claims that shareholders can bring differ depending on the form of the transaction?

Yes, but only as to the grounds for the claim, not as to litigant capacity or remedy. Capacities and remedies cut across grounds. As to the grounds, for example, all remedies relating to 'squeezing out' a dissenting minority in a listed company are confined to tender offers for listed companies, the 75 per cent minimum requirement for schemes of arrangement applies only to formal mergers, and the 75 per cent minimum requirement for sales of 50 per cent of assets is confined to asset sales.

Law stated - 29 April 2022

Negotiated or hostile transaction

Do the types of claims differ depending on whether the transaction involves a negotiated transaction versus a hostile or unsolicited offer?

No.

Law stated - 29 April 2022

Party suffering loss

Do the types of claims differ depending on whether the loss is suffered by the corporation or by the shareholder?

Yes, but a financial loss is key only in respect of claims for compensation. One can only recover damages for financial loss suffered, except in the rare cases where punitive damages are available for egregious bad faith and oppressive conduct. Claims for declaratory orders or injunctions do not require proof of financial loss.

Where loss is relevant, it has to be the claimant who has suffered a loss. One cannot recover damages for the loss suffered by another except in derivative or representative actions. In derivative actions, the company needs to have suffered the loss. In representative actions, the 'represented' shareholders need to have suffered the loss.

Law stated - 29 April 2022

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

Where a loss is suffered directly by individual shareholders in connection with M&A transactions, may they pursue claims on behalf of other similarly situated shareholders?

Yes. Representative actions are permissible but class actions are not. (Conceptually, the two are different: the former needs the consent of those who are to be represented, and the members of that category need to be ascertainable; the latter only requires a court order certifying the class and appointing a person or persons to sue on their behalf.)

Shareholder class actions are not provided for either by statute or by rules of court. Class actions are restricted to only cases concerning trademarks, copyright or patents and designs. See, for example, Order 9 Rule 4 of the Federal High Court (Civil Procedure) Rules 2019; and Emenuwe v INEC et al (2018) LPELR-46104(CA). Representative actions are

provided for by statute. (Sections 46(4) and 344(1) of the Companies and Allied Matters Act 2020.)

In a representative action, the shareholder must prove that he or she is a member of the company, that he or she had indeed obtained the consent of the other shareholder to sue on their behalf (see section 46(4) of the Companies and Allied Matters Act 2020), and their entitlement to the corporate rights sought to be enforced by the representative action.

Law stated - 29 April 2022

Derivative litigation

Where a loss is suffered by the corporation in connection with an M&A transaction, can shareholders bring derivative litigation on behalf or in the name of the corporation?

Yes. The shareholder may also intervene in pending litigation involving the company (see section 346(1) of the Companies and Allied Matters Act 2020). The leave of court must be sought and obtained. For the court to grant such leave, the court must be satisfied that:

- a cause of action has arisen from an actual or proposed act or omission involving negligence, default, breach of duty or trust by a director or a former director of the company;
- the shareholder has given reasonable notice to the directors of the company of his or her intention to sue;
- the directors of the company do not bring, diligently prosecute, defend or discontinue the action;
- the notice contains a factual basis for the claim and the actual or potential damage caused to the company;
- the shareholder is acting in good faith; and
- the action sought to be brought, prosecuted, defended or discontinued is in the best interest of the company.

See section 346(2) of the Companies and Allied Matters Act 2020.

Law stated - 29 April 2022

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

What are the bases for a court to award injunctive or other interim relief to prevent the closing of an M&A transaction? May courts in your jurisdiction enjoin M&A transactions or modify deal terms?

Our law recognises two classes of injunctive reliefs prior to closing: interim relief and interlocutory relief. The first is available ex parte, without notice to the other side. The other is available only with notice given to the other side. Ex parte interim reliefs are available only in cases where giving notice would in effect delay giving a remedy until it would be too late, and then only temporarily until a time, typically not more than two weeks, sufficient to give the other side notice of an application for interim or interlocutory relief.

Peculiar to interim reliefs are the points about the risk of injustice if some temporary relief is not given immediately. The other legal requirements common to both species of reliefs are as follows.

- Presence of a legal right to be protected.
- There is a serious issue of law to be tried in the suit, and the applicant has a real possibility, not a probability of success on the merits.

- The balance of convenience is on his or her side; that is, more justice will result in granting the application than in refusing it.
- Damages will not adequately compensate for the damage or injury if he or she succeeds at trial.
- The applicant's conduct is not reprehensible (eg, that he or she is not guilty of any delay or bad faith).
- He or she has given an undertaking as to damages. The seminal judicial authority is Kotoye v CBN et al (1989) 1 NWLR (Pt. 98) 419, which arose from a struggle between equity investors for the control of the corporation in issue.

Courts in Nigeria do not modify the terms of M&A transactions. Nigerian courts uphold the sanctity of contract to the effect that parties are bound by the contracts that they freely enter into, and courts do not modify or re-write contracts for parties. See Arjay Ltd v AMS Ltd (2003) LPELR-55 SC. However, courts may order the rectification of contracts, where appropriate, to make the words in the documents consistent with the true, common intentions of both parties. See Tonimas (Nig.) Limited v Chigbu (2020) 6 NWLR (Pt. 1720) 237.

Law stated - 29 April 2022

Early dismissal of shareholder complaint

May defendants seek early dismissal of a shareholder complaint prior to disclosure or discovery?

Yes, where only points of law are in issue and the facts are not in dispute such that witnesses are not required to be examined. For example, where the defence is based on a point of law as to jurisdiction or time-bar (section 251(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended); and Madukolu v Nkemdillim (1962) 2 SCNLR 341), or where a key legal element that needs to be proved cannot be proved (such as where a mandatorily-required notice or regulatory approval in tender offers, is lacking). INEC v Ogbadibo Local Government et al (2015) LPELR-24839 (SC); and Agip Nigeria Ltd v Agip Petroli International (2010) 5 NWLR (Pt. 1187) 348.

Other methods for early dismissal or termination of a shareholder's complaint will depend on the type of claim. For representative claims, the defendant or the court may do so if it is in the interest of justice. For derivative claims, a challenge to the shareholder applicant's standing to sue may do so.

Law stated - 29 April 2022

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

Can shareholders bring claims against third-party advisers that assist in M&A transactions?

Yes. Shareholders who have suffered loss can sue for the tort of conspiracy and in tort for negligent statements where sufficient 'privity' can be shown and there is no disclosure. However, these are limited options. Ordinarily, shareholders cannot sue in tort or in contract because there is rarely, if ever, a duty owed by such third parties to shareholders (as distinct from the company itself). The right to sue, if any, is typically in the hands of the company itself, not the shareholders. Except where the shareholders sue derivatively, they cannot sue the third parties directly.

Shareholders can sue directly where they can prove direct loss. Where the shareholder has a derivative claim, the shareholder can sue as the company could have sued.

The shareholders can also incite professional disciplinary proceedings against third-party advisers who are subject to professional disciplinary regimes (eg, lawyers and accountants).

Law stated - 29 April 2022

Claims against counterparties

Can shareholders in one of the parties bring claims against the counterparties to M&A transactions?

Yes. Shareholders can sue counterparties of M&A transactions if they can prove loss or damages. Shareholders may also bring derivative suits against third parties where the directors fail to act in actions relating to:

- breach of contract;
- breach of warranties;
- misrepresentation or fraud (a misrepresentation is a false statement of a material fact made by one party which affects the decision of the other party in entering into the M&A transaction); and
- indemnity claims (which gives a party right to reimbursement in the event of a breach of warranties or other conditions in the contract).

Please see the cases below on the rights of shareholders to sue counterparties in M&A transactions:

- Beluonwu v O K Isokariari Sons (1994) 7 NWLR (Pt. 358) 587;
- Bioku Inv Property Co Ltd v Light Machine Ind (Nig.) Ltd. (1986) 5 NWLR (Pt. 39) 42;
- Lagos State Govt v Toluwase (2013) 1 NWLR (Pt. 1336) 555; and
- A G, Lagos State v Purification Tech (Nig.) Ltd (2003) 16 NWLR (Pt. 845) 1.

Claims for aiding and abetting breach of fiduciary duty are not yet a recognised cause of action maintainable by shareholders.

Law stated - 29 April 2022

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

What impact do the corporation’s constituting documents have on the extent board members or executives can be held liable in connection with M&A transactions?

Corporate constitutional documents and contracts cannot exempt directors from personal liability for bad faith conduct or breaches of fiduciary duty (see section 91(1) of the Companies and Allied Matters Act 2020). Beyond that, directors and officers are generally liable only to the extent that they have contracted to be liable or for fault-based tort as there is no rule of ‘strict’ no-fault liability for directors.

On matters involving special expertise, a director will not be liable for negligence unless he has held himself out as having special expertise on such matters. There is no presumption that on every given issue there is only one non-negligent course that a director may take. However, directors are required to exercise that degree of care, diligence and skill that a reasonable prudent director would exercise in comparable circumstances and may be liable for negligence and breach of duty where he or she fails to take reasonable care (see section 308 of the Companies and Allied Matters Act 2020). To that extent, directors can exercise their discretion.

Law stated - 29 April 2022

Statutory or regulatory limitations on claims

Are there any statutory or regulatory provisions in your jurisdiction that limit shareholders' ability to bring claims against directors and officers in connection with M&A transactions?

Yes. The most pervasive ability-limiting rules in issue are the rules on standing to sue and the rules recognising that directors typically have a range of options to choose from and can exercise their discretion.

As to standing, where the corporation has a right against its directors or other officers, the corporation is the one to sue to protect that right and not any shareholder. The shareholder can sue in the company's stead only where the statutory rules on derivative actions permit.

Strictly speaking, the constitutional documents of a corporation are binding as a contract among the corporation, its shareholders and its officers (see section 46 of the Companies and Allied Matters Act 2020). Thus, a shareholder can sue the directors directly for violating the constitutional documents. This dimension of the law is untested in practice and not as relevant as may appear at first sight. Shareholders can certainly, and in practice do, sue the corporation itself directly on the constitutional documents (so that they do not need to sue the directors separately and directly). Moreover, there is no precedent for recovering damages (as distinct from getting an injunction or declaration) in an action founded on constitutional documents alone.

Law stated - 29 April 2022

Common law limitations on claims

Are there common law rules that impair shareholders' ability to bring claims against board members or executives in connection with M&A transactions?

Yes. General law rules limit the extent to which shareholders can sue officers and directors as much as they limit the extent to which shareholders can sue anyone else. For example, the usual statutory limitation rules apply to make claims time-barred after five or six years, depending on the limitation law of the state (Nigeria has 36 states and a Federal Capital Territory) where the cause of action in question arose.

Further, while the business judgment rule is not expressly applicable in our jurisdiction, directors continue to have the right to exercise their discretion, which cannot be fettered. Therefore, in principle, a director will not be held liable and cannot be proceeded against for exercising his discretion in good faith, with intent to further the interests of the company (see Section 305 of the Companies and Allied Matters Act 2020).

Law stated - 29 April 2022

STANDARD OF LIABILITY

General standard

What is the standard for determining whether a board member or executive may be held liable to shareholders in connection with an M&A transaction?

Directors owe fiduciary duties to the company. Directors, in carrying out their duties and exercising their powers, are required to do so honestly, in good faith and in the best interest of the company; and shall exercise that degree of care, diligence and skill that a reasonably prudent director would exercise in comparable circumstances. (See section 308(1) of the Companies and Allied Matters Act 2020.) Thus, the directors must satisfy an objective standard when determining liability. A breach of this duty of care and skill is grounds for an action for negligence and breach of duty.

Executive and non-executive directors owe the same standard of care as directors in relation to the company. Officers of a company are liable to the company for any default, negligence or breach of trust in relation to the Company. See section 91(1) of the Companies and Allied Matters Act 2020.

Law stated - 29 April 2022

Type of transaction

Does the standard vary depending on the type of transaction at issue?

No. The standard does not vary based on the type of transaction.

Law stated - 29 April 2022

Type of consideration

Does the standard vary depending on the type of consideration being paid to the seller's shareholders?

No. The standard does not vary based on the type of consideration paid to the seller's shareholders.

Law stated - 29 April 2022

Potential conflicts of interest

Does the standard vary if one or more directors or officers have potential conflicts of interest in connection with an M&A transaction?

No. The standard does not vary if the director or other officer has a potential conflict of interest in connection with an M&A transaction.

The law requires directors to avoid conflicts of interest. Directors are also prohibited from making secret profits from transactions to which the company is a party. A director who has a conflict of interest must make full disclosure of the conflict of interest, and recuse himself or herself from participating in meetings to discuss the matter in issue or from voting on a decision on it. Where the director discloses his or her personal interest in a transaction before the transaction is consummated or the secret profit is made, he or she may escape liability. However, if the disclosure is made afterwards, the director will be liable to disgorge the profits and the transaction may be unwound.

Law stated - 29 April 2022

Controlling shareholders

Does the standard vary if a controlling shareholder is a party to the transaction or is receiving consideration in connection with the transaction that is not shared rateably with all shareholders?

No. The standard does not vary in this case.

Law stated - 29 April 2022

INDEMNITIES

Legal restrictions on indemnities

Does your jurisdiction impose legal restrictions on a company's ability to indemnify, or advance the legal fees of, its officers and directors named as defendants?

Yes. Generally, the company may indemnify, or advance legal fees to its officers or directors in litigation arising from an M&A transaction. However, this will not apply where the director has acted fraudulently or is sued in a personal capacity for breaches of duty or crimes committed in the course of an M&A transaction. It is immaterial whether those breaches were purportedly committed to advance the interests of the company. (Section 91(2)(b) of the Companies and Allied Matters Act 2020.)

Law stated - 29 April 2022

M&A CLAUSES AND TERMS

Challenges to particular terms

Can shareholders challenge particular clauses or terms in M&A transaction documents?

A shareholder can challenge a clause that tends to preclude third-party bidders only where that shareholder has both standing and grounds for challenging the clause.

As to standing, the shareholder will need either privity of contract (eg, as a shareholder seeking to resist a violation of the Memorandum and Articles of Association) or an independent cause of action (eg, the tort of conspiracy). Otherwise, the shareholder must be able in law to pursue a derivative action and then stand in the place of the corporation as the party contracting and sue as such.

As to the grounds, the existence or application of the clause will need to have breached either a statutory provision, a fiduciary duty (such as the rules against conflicts of interest), a contract, or a right protected under the law of tort.

Law stated - 29 April 2022

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

What impact does a shareholder vote have on M&A litigation in your jurisdiction?

Except in instances where a contract (eg, shareholders agreement) or the articles may contain veto provisions requiring shareholder vote on litigation, shareholders are typically not required to vote on litigation by the company. That power usually lies with the directors. Where a shareholder votes in favour of an M&A transaction, that vote will exonerate the company from liability for failure to obtain shareholder consent (where shareholder consent is required for the M&A transaction).

Statutory processes, such as a scheme of arrangement or merger, which may be used in M&A transactions, require the sanction of the Federal High Court. Shareholder votes carrying the requisite majority approving the scheme are required to bring an action in court to sanction the scheme.

Law stated - 29 April 2022

Insurance

What role does directors' and officers' insurance play in shareholder litigation arising from M&A transactions?

Directors' and officers' liability insurance protects directors and officers from liability arising from M&A transactions where the directors have not acted fraudulently.

Insurance is permissible in law for directors and officers and is usually provided for them in corporations that are larger or take corporate governance conventions seriously. The extent to which insurance influences shareholder litigation in M&A contexts is unclear. In our experience, insurance is not a major factor in determining how such litigation is framed or conducted, or in assessing its outcome or likelihood of success.

Law stated - 29 April 2022

Burden of proof

Who has the burden of proof in an M&A litigation – the shareholders or the board members and officers? Does the burden ever shift?

The burden in an M&A litigation lies with the claimant. The general rule is that the person who makes a claim is the one who has to prove it. Thus, the shareholder or company suing an officer or director will bear the burden of proving the elements of its claim against the officers and directors.

Law stated - 29 April 2022

Pre-litigation tools

Are there pre-litigation tools that enable shareholders to investigate potential claims against board members or executives?

Yes, there are pre-litigation tools available, but for two reasons they are not as significant as they may appear to be at first sight.

First, shareholders have no right to inspect all the books of the company. They may inspect registers of shareholders and directors and minutes of general meetings, for example, but they have no right to inspect minutes of directors' meetings. (Sections 112(1)-(2) and 219(1) of the Companies and Allied Matters Act 2020.) The lack of access to minutes of directors' meetings is understandable, as otherwise there would be little confidentiality attached to sensitive information reviewed at such meetings.

Second, the civil procedure rules have always allowed pre-trial discovery. We have seen that these rules are not critically relevant in the real world. (See Order 43 of the Federal High Court (Civil Procedure) Rules, 2019; and Order 29 of the Lagos State High Court (Civil Procedure) Rules 2019.)

Law stated - 29 April 2022

Forum

Are there jurisdictional or other rules limiting where shareholders can bring M&A litigation?

Yes. Where the subject matter of the dispute relates to the affairs of companies, such matters should be instituted at

the Federal High Court. (See section 251(1)(d) of the Constitution of the Federal Republic of Nigeria 1999 (as Amended); and NDIC v Okem Ent (2004) 10 NWLR (Pt. 880) 107 .)

The Investments and Securities Tribunal, established under section 274 of the Investments and Securities Act 2007, has exclusive original jurisdiction in all cases between the Securities and Exchange Commission and an investor or issuer of securities.

Law stated - 29 April 2022

Expedited proceedings and discovery

Does your jurisdiction permit expedited proceedings and discovery in M&A litigation? What are the most common discovery issues that arise?

Expedited proceedings are possible under general civil procedure rules that provide for accelerated hearings in deserving cases. (See Order 12 of the Federal High Court (Civil Procedure) Rules 2019.) The rules for accelerated hearings are invoked in M&A litigation as often as they are in other kinds of litigation.

Nigerian courts' civil procedure rules allow discovery in M&A litigation as in other litigation. (See Order 43 of the Federal High Court (Civil Procedure) Rules, 2019 and Order 29 of the Lagos State High Court (Civil Procedure) Rules 2019.) In practice, the rules are rarely invoked or tested in any kind of litigation. Other rules of civil procedure insist that documents to be relied on by a claimant in litigation must be 'front-loaded' along with the pleadings when the pleadings are filed.

This means that the defendant will ordinarily see all the important documents well before the trial of witnesses begins and that there is less need for discovery than would otherwise be the case.

In any event, the prevailing practice is for the courts to resist 'fishing expeditions', so that counsel frequently does not seek discovery. Thus, the almost complete absence of discovery in Nigerian M&A litigation is less of a problem in practice than it could otherwise have been.

Moreover, where the points in issue are points of law rather than fact, there will be no need for a trial. Procedures that do not call for a trial (eg, 'originating summons', 'summary judgment' or 'judgment based on admission') may then be adopted to minimise the delay.

Law stated - 29 April 2022

DAMAGES AND SETTLEMENTS

Damages

How are damages calculated in M&A litigation in your jurisdiction?

As in the rest of Nigerian law, damages in M&A litigation may be general, special or punitive, and may extend to recovering expenses and losses of profits as long as the claimant will not in effect get compensated twice for the same head of loss.

General damages are fairly nominal. Special damages are awarded only for loss actually proved, such as expenditure made and wasted or the loss of profits that would have been made had the violation of the law in issue not occurred. The most basic rule of quantifying damages throughout Nigerian and other common law jurisdictions is that a claimant can insist on being put in the position in which it would have been if there had been no breach.

Punitive damages are awarded only in very rare instances where there is egregious bad faith or 'oppressive' conduct on the part of the defendant. The rules on quantifying punitive damages are not well developed. The usual common law

rules as to mitigation and remoteness of damage apply.

Law stated - 29 April 2022

Settlements

What are the special issues in your jurisdiction with respect to settling shareholder M&A litigation?

Two points are noteworthy. First, a settlement typically has two dimensions, and each of these involves a different set of consequences: a court judgment, breaches of which are sanctionable with an attachment of assets, fines and imprisonment; and a contract between the parties, sanctionable by awards of damages and injunctions. The parties are at liberty to pursue either set of sanctions or both.

Law stated - 29 April 2022

THIRD PARTIES

Third parties preventing transactions

Can third parties bring litigation to break up or stop agreed M&A transactions prior to closing?

Yes, they can, but such third parties will need to establish grounds for doing so under the general law. The most obvious instances here would be the third party had earlier entered into an M&A contract with the company (such that entering into a later M&A contract would in effect amount to committing the economic tort of inducing a breach of contract) and a third party has rights to veto or approve of the transaction (eg, a private equity investor has 'drag along' rights or is a lender), and the company seeks to ignore it.

Law stated - 29 April 2022

Third parties supporting transactions

Can third parties in your jurisdiction use litigation to force or pressure corporations to enter into M&A transactions?

Generally, in the absence of contractual nexus or other specific grounds to base such action, third parties cannot use litigation to pressurise corporations to enter into M&A transactions. However, it is possible for third parties to use litigation to pressurise corporations to enter into M&A transactions. For example, where there are rival bidders, one of them can instigate a third party to sue its rival or threaten to sue the directors of the company for fraud if they should fail to cause the company to enter into an M&A transaction. Regulators are known in effect to force parties to enter into M&A transactions by threatening either not to give requisite approval or to intervene directly in the affairs of one of the parties who may be financially vulnerable.

Law stated - 29 April 2022

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

What are the duties and responsibilities of directors in your jurisdiction when the corporation receives an unsolicited or unwanted proposal to enter into an M&A transaction?

Where the proposal is made to the company, the directors have fiduciary duties to consider the proposal and make a

determination as to whether the proposed M&A transaction is in the best interest of the company; advise the company and the shareholders on the desirability of the proposal; and where, the transaction requires shareholder consent, put the proposal before the shareholders for their approval. Further, directors will be responsible for procuring third-party advisers and solicitors to assist with a review of the proposal and provide sundry services with regard to the proposed M&A transaction.

Where the proposal is made to the shareholders, the directors have statutory duties to act as administrators of the process, and to some extent, form an opinion about it and advise the shareholders.

Law stated - 29 April 2022

COUNTERPARTIES' CLAIMS

Common types of claim

Shareholders aside, what are the most common types of claims asserted by and against counterparties to an M&A transaction?

The more topical types of claims by shareholders include claims for breaches of the memorandum and articles of association and shareholders agreements; violations of the statutory procedure for the M&A process in issue; and for higher valuations of shares in publicly-traded companies than the offeror is offering for the time being.

As to claims by the parties to the M&A deals themselves, claims for breaches of contract, especially representations and warranties, come to mind more readily than other claims.

Law stated - 29 April 2022

Differences from litigation brought by shareholders

How does litigation between the parties to an M&A transaction differ from litigation brought by shareholders?

The key differences are the grounds and timing. For example, grounds such as breaches of the M&A deal documentation are available only to deal parties themselves while breaches of pre-existing shareholder agreements are available only to the shareholders. As to timing, a shareholder who is not a party has little control over the timing of the deal and is therefore more likely to want to act quickly before it may be too late to act. A party to a deal may have little such pressure as he or she will ordinarily know that the M&A deal cannot close without it and will often have the right to seek indemnities or enforce warranties even after closing.

Law stated - 29 April 2022

UPDATES AND TRENDS

Recent developments

What are the most current trends and developments in M&A litigation in your jurisdiction?

Applications filed in bad faith seeking injunctions have long been a key concern for all M&A transactions, especially with publicly-held targets. Further, applications for higher valuations of shares in ‘squeeze out’ situations are a growing concern.

The covid-19 pandemic has created challenges and engineered innovations in justice delivery. Courts now make provisions for electronic hearings of suits and electronic filing of court processes. Again, the requirement for the

physical presence of witnesses in court may be waived allowing courts to take the examination of witnesses abroad with the aid of audio-visual technology.

Law stated - 29 April 2022

Jurisdictions

Belgium	Ashurst
China	Jincheng Tongda & Neal
Japan	Mori Hamada & Matsumoto
Nigeria	G Elias
Singapore	Sim Chong LLC
South Korea	Bae, Kim & Lee LLC
USA	Kirkland & Ellis LLP