

THE EXCLUSIVE JURISDICTION OF THE INVESTMENTS AND SECURITIES TRIBUNAL (IST): A CONSTITUTIONAL PERSPECTIVE

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ABSTRACT

*Investment disputes have been settled by various commissions and courts before the establishment of the **Investments and Securities Tribunal (IST)** in 1999. The various settlement regimes have been ordered through different legislations. The advent of the 1999 Constitution, as amended, brought with it some constitutional changes in the area subject-matter jurisdiction of courts. For instance, restriction on the unlimited powers of the State High Courts, introduction of exclusivity in the jurisdiction of Federal High Courts and so on. In 1999, The Securities and Exchange Commission (SEC) Act established a new tribunal for the settlement of investment and securities matter and in 2007, the Investments and Securities Act (ISA) repealed the SEC Act and also gives the IST exclusive jurisdiction over investment and securities matters. This obviously raises some constitutional issues. The objective of this paper, therefore, is to critically explore the constitutionality or otherwise of the exclusive jurisdiction granted the IST by the Investments & Securities Act, 2007 vis-à-vis the wide jurisdiction of the State High Courts in contractual matters and exclusive jurisdiction of the Federal High Court in Companies and Allied Matters Act (CAMA) related matters. The paper concludes that the policy behind the ISA 2007 is to achieve a speedy disposal of investment matters and hence, the need for a specialized tribunal. However, it seems proper legislative enquiry was not carried out in ensuring that the proposed exclusive jurisdiction did not conflict with existing jurisdictional framework in the extant constitution. The paper finds that the exclusive jurisdiction of the IST conflicts with s.251 of the Constitution which already grants exclusive jurisdiction to the Federal High Court over Company Securities matters and s.272 which grants the State High Courts wide jurisdiction over contractual matters.*

INTRODUCTION

A foreign investor will want to have some assurances that his investment will meet a favourable legal framework that will ensure speedy resolution of investment disputes and ensure that business justice is guaranteed. Investment and securities related disputes are an aspect of our civil law that deserve not only timeous resolution but adjudication by a competent arbiter who has the necessary expertise in investment and securities matters.

To this extent, excising investment and securities matters from the regular courts that are bedevilled with technical justice, extremely delayed resolution process and high cost of litigation is a welcome development. As a matter of fact, it is now a common phenomenon in many jurisdictions to have a specialized tribunal to settle investment disputes. It is with this forward-looking dimension in mind that the Nigerian government decided to establish the Investments and Securities Tribunal to settle all claims arising out of Investment and Securities Disputes. This was as a result of the Dennis Odife Panel Report which 'found that an appropriate judicial machinery does not exist within the Capital Market for the speedy determination of all controversies and disputes that may arise within the Market' and therefore recommended 'the establishment of an Investment Services Tribunal (IST) to be structured along the lines of the Body of Tax Appeal Commissioners for the adjudication of all controversies and disputes arising within the Capital Market in a speedy 'informal' and yet business-like manner'. The government eventually opted for an 'Investments and Securities Tribunal' as against the Investment Services Tribunal suggested.²

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1. See the opinion expressed by **Ogunwuniju JCA** in *Nospecto Oil & Gas Ltd v Olorunimbe & Ors* (2012) 10 NWLR (Pt 1307) 115 at 161 para c
2. However, the Panel's recommendation that the Tribunal should be an inferior court whose decisions should lie to the Federal High Court was not adopted by the government. See the Dennis Odife Panel Report on the Review of the Nigerian Capital Market, 1996, p 60



Under the current constitutional framework, other superior courts like the Federal High Court and State High Courts also have jurisdiction over investment and securities matters alongside the Investments and Securities Tribunal.

This paper shall therefore, critically explore the scope of the jurisdictions conferred on the various regular courts and the Investments and Securities Tribunal particularly in the area of exclusivity. It will attempt to consider what possible effect a jurisdictional crisis among the courts/tribunal could have on effective and timeous disposal of investment matters. In doing this, an analytical survey of the enabling laws and judicial authorities shall be carried out with a view to addressing the above stated problems.

INVESTMENT AND SECURITIES DISPUTES IN NIGERIA BEFORE IST

Before the promulgation of the 1979 Constitution and its 1999 successor, the Capital Issues Commission (CIC) was vested with powers to adjudicate disputes in the Nigerian Capital Market by virtue of the Capital Issues Commission Decree No.3 of 1973. The CIC later metamorphosed into the Securities and Exchange Commission. This was how capital market disputes were settled until 1988 when the SEC Decree No. 29 of that year vested jurisdiction over such issues in the Federal High Court.³ Prior to the enactment of the Investments and Securities Act in 1999, investment and securities disputes were settled by litigants in the regular courts.⁴ The legal framework for settlement of investment and securities dispute before 1999 was provided for in the 1979 constitution⁵ and the Companies and Allied Matters Act, 1990.⁶

Relevant part of Section 230(1) of the 1979 Constitution, as amended by the Constitution (Suspension and Modification) Decree No. 107 of 1993, provides that:

Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters...

(e) arising from the operation of the Companies and Allied Matters Act or any other enactment replacing the Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act;

(p) the administration or the management and control of the Federal Government or any of its agencies;

(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies; and ...

The purport of these constitutional provisions is that the Federal High Court has exclusive jurisdiction in respect of any matter that arises from the operation of Companies and Allied Matters Act including companies' securities and the administration of a Federal Government agency (like the Securities and Exchange Commission) or any proceedings against it.

3. For a detailed historical account of the regulation of Capital Market and its disputes in Nigeria, see: John D.C, A Critical Appraisal of the Investments and Securities Tribunal in Nigeria, University of Ibadan Law Journal, Vol.1 No.2, 2011, pp.101-104, Akanle O., 'A Decade of Securities Regulations in Nigeria, 1980-1990' (1991) Lagos, NIALS; Sofowora O., 'The Investments and Securities Act of 1999: A Critical Analysis of Some Aspects of the Act' Journal of Capital Market, Law & Economic Development, p. 66-95; Agbadu-Fishim J.T., 'Regulatory Power of Securities and Exchange Commission: A Commentary' (2002) 6(3-4) Modern Practice Journal of Finance & Investment Law, 467-475; Abdullahi A., 'Twenty Years of Securities Regulations in Nigeria' (2001) 5(1) Modern Practice Journal of Finance & Investment Law; Abdullahi A., 'History of the Nigerian Capital Market: The Legal Perspective' (2001) (6)4 Law & Business Quarterly, 60-77; Ndanusa S.A., 'The Investments and Securities Act 1999' (2001) (6)4 Law & Business Quarterly, 48-59
4. See *Securities and Exchange Commission v Nechemtex Industries Plc*, (unreported) FHC/L/CS/832/94; *Nigerian Wire Industries Plc v Jethwani* (1996) FHCLR 826
5. The Investments and Securities Act, 1999 was enacted and took effect on 26th May 1999 shortly before the commencement of 1999 Constitution of the Federal Republic of Nigeria which took effect on 29th May 1999. So, technically speaking, one can say that as at the date the first ISA was enacted, it was the 1979 Constitution that was in operation
6. Now, Companies and Allied Matters Act, CAP C20, LFN, 2004



The Supreme Court in *NEPA v Edeghero*⁷ while construing the provisions of section 230 (1) (q), (r) and (s) of the 1979 which is *in pari materia* with s.251 (1), (q), (r) and (s) of the 1999 Constitution (as amended) did not mince words when it declared that:

From what I have said earlier in this judgment, the aim of paragraphs (q), (r) and (s) of sub-section (1) of section 230 was to vest exclusive jurisdiction in the Federal High Court in matters in which the Federal Government or any of its agents was a party.⁸

Usually, a number of investment and securities disputes are resolved by SEC through the Administrative Proceeding Committee (APC). More often than not, unsuccessful parties go to court to challenge the decision of the APC by suing SEC. Following from the above decision of the Supreme Court, it means that an action against SEC is an action against the executive or administrative action or decision by a Federal Government's agency, and to that extent, only the Federal High Court has jurisdiction over such cases.

In *Ceramic Manufacturers Nigeria Plc v N.I.D.B.*⁹ **Obadina JCA** puts it beyond any doubt that the Federal High Court has exclusive jurisdiction in entertaining issues arising out of the operation of CAMA when his lordship posits that:

The combined provisions of sections 180, 389 (1) (a) and 390 (1) of the Companies and Allied Matters Act 1990 deal with operations of an Act relating to Companies and Allied Matters and section 230 (1) (e) of the Constitution of the Federal Republic of Nigeria 1979 as amended by the Constitution (Suspension and Modification) Decree No. 107 of 1993, are so clear and unambiguous, and it leaves no one in any doubt that the only court having original exclusive jurisdiction in respect of causes of or matters arising from the operation of any Act or Decree relating to Companies and Allied Matters and any other common law regulating the operation of Companies is the Federal High Court.¹⁰

From the above provisions,¹¹ it goes without saying that the jurisdiction in respect of investment and securities dispute at least prior to the Investment and Securities Act, 1999 was vested in the Federal High Court in as much as such disputes arise from the operation of CAMA (i.e companies' securities)¹² or the review of the decision of Securities and Exchange Commission which is a Federal Government agency.¹³

7. (2002) 18 NWLR (Pt 798) 79. In this case, the Respondents were former employees of the National Electric Power Authority (NEPA), the Appellant. They embarked on an industrial action in August 1994 and their employment was subsequently terminated. They challenged the validity of the exercise at the High Court of Niger State. The Appellant objected to the jurisdiction of the lower court and claimed that by Constitution (Suspension and Modification) Decree 107 of 1993, only the Federal High Court had jurisdiction. The lower court and the Court of Appeal rejected the argument and held that the matter was a claim arising out of breach of contract of employment. The Supreme Court held, and we agree with that view, that only the Federal High Court had jurisdiction over that matter as the intention of the law maker is to vest all matters against the Federal Government in the Federal High Court. However, it must be mentioned that the same Supreme Court has qualified that decision in *NDIC v Okem Enterprises* [2004] 10 NWLR (Pt 880) 107, that it does not apply to cases of simple contract against the Federal Government

8. *ibid*, per **Ogundare JSC** at page 97. See also *Oloruntoba-Oju v Abdul-Raheem* (2009) 13 NWLR (Pt 1157) 83; see also *Federal College of Education v Ogbonna* (2008) 3 WRN 83

9. (1999) 11 NWLR (Pt 627) 397. The Applicant, by way of Originating Summons, applied pursuant to Sections 390, 391 and 393 of Companies and Allied Matters Act, 1990, for an order confirming the appointment of one Chief Uwakwe as the receiver over the assets and affairs of the Respondent. The Respondent contended that the Federal High Court has no jurisdiction as the action touched on indebtedness between a banker and her customer. The court resolved that the Federal High Court was properly seized of the matter since the claim was brought pursuant to provisions of the Companies and Allied Matters Act

10. *ibid* 390

11. i.e. sections 230 (1) (e) of the Constitution of the Federal Republic of Nigeria 1979 as amended by the Constitution (Suspension and Modification) Decree No. 107 of 1993

12. *African Cont. Seaways Ltd v Nig. Dredging Rd. and Gen. Wrks. Ltd* [1977] NSCC 323; *Minso Wadzani Gadzama v Rims Merchant Bank Limited* (1997) 4 NWLR (Pt 498) 234; *Okoya v Santilli* (2); *Attorney General of Lagos State v Eko Hotels Limited* [2006] 12 MJSC 1; *7up Bottling Co. Ltd v Abiola & Sons Ltd* (1996) 7 NWLR (Pt 463) 714

13. *Securities and Exchange Commission v Kasunmu* [2009] 10 NWLR (Pt 1150) 509; *Securities and Exchange Commission v Osindero & Anor* [2009] 5 NWLR (Pt 1134) 377; *Owena Bank (Nigeria) Plc v Nigeria Stock Exchange Limited in Re-Securities and Exchange COMMISSION* (1997) 8 NWLR (Pt 515) 1; *Securities and Exchange Commission v Nechemtex Industries Plc* (unreported) FHC/L/CS/832/94



On the other hand, some aspects of investment disputes especially those arising out of the buying and selling of shares of a company between private persons,¹⁴ share option agreements,¹⁵ and other matters of simple contract arising from companies operations¹⁶ may be vested in the State High Courts as matters of simple contract. This is subsumed under the wide jurisdiction of the State High Court over civil matters.¹⁷

INVESTMENT AND SECURITIES DISPUTES UNDER THE IST REGIME

Having presented above the legal regime of investment dispute resolution before the creation of the IST, we shall now consider same under the IST. The IST was first established under the Investments and Securities Act, 1999.¹⁸ The Act purported to vest jurisdiction in all investment and securities matters in the IST. In other words, the Tribunal could be said to have a co-ordinate jurisdiction with the Federal High Court and the State High Courts.

Section 234 of the Investments and Securities Act, 1999 provides as follows:

- (1) The Tribunal shall have power to adjudicate on disputes, and controversies arising under this Act and the rules and regulations made thereunder
- (2) The Tribunal shall in particular adjudicate on matters relating to—
 - (a) the interpretation of any law, enactment or regulations to which this Act applies;
 - (b) disputes between the Commission and a Securities Exchange or Capital Trade Point;
 - (c) disputes between Capital Market Operators and the Securities Exchanges or Capital Trade Point;
 - (d) disputes between Capital Market Operators;
 - (e) disputes between Capital Market Operators and their clients; and
 - (f) disputes between quoted companies and the regulators or the Securities Exchanges.

Section 235 of the same Act states that:

Save as provided elsewhere in this Act, no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred on the Tribunal by or under this Act.

The Act further provides that any person dissatisfied with a decision of the Tribunal constituted under this Act may appeal against such decision on points of law to the Court of Appeal upon giving notice in writing to the secretary to the Tribunal within thirty days after the date on which such decision was given.¹⁹

14. See *Summit Finance Company Ltd v Iron Baba and Sons Ltd* [2003] 48 WRN 81; *Garba v Sheba* (2002) 1 NWLR (Pt 728) 372. In this case, the court held that money deposited for purchase of shares becomes a liquidated debt if the transaction for whatever reason failed. However, where the transferee seeks to compel the company to effect his name on the register, then such a claim will fall under 'management, control and operation of a company'. See *Seedorff v Archbode Engineering Limited* [1996] 1 NWLR (Pt 423) 223

15. *First Bank of Nigeria Plc v Econet Wireless Nigeria Limited*, (unreported) Suit no: FHC/L/CS/878/03

16. *Nospecto Oil & Gas Ltd v Olorunimbe & ors* (supra)

17. See s 272 of the 1999 Constitution as amended; *Garba v Sheba* (supra). It must however be admitted here that there is a thin line of distinction between the jurisdiction of State High Court and Federal High Court in respect of the sale and transfer of shares. As Belgore J has observed, 'all agreements between two or more persons involving passing of consideration from one to the other is a form of contract in one form or another but some of these contracts are classified because of some special features relating to and they are protected by a separate law distinguishing them from ordinary contract. For example, an agreement between A and B for B to carry A's goods by shipping from Taiwan to Lagos is a contract but by its special nature it is an admiralty matter. It is not argument that this court has no jurisdiction on such a transaction because it is a contract between A and B. It is in a similar manner that an agreement within company matters are so classified. An agreement pertaining to or relating to Companies Act though is in the nature of common law contract; by its very nature it is within the purview of the matter relating to company law'...see *Emerald Packaging Co. Limited v Odua Investment Co. Limited* (unreported) FHC/L/58/91

18. Decree No. 45 1999. The 1999 Act has been repealed by the Investment and Securities Act, 2007

19. s 243, ISA 1999



The above provisions from the ISA, 1999 in clear words excluded both the State High Courts and the Federal High Court from exercising jurisdiction over those items listed under Section 234 of the Act. It placed the Tribunal at par with the courts of superior record and made appeals from the decision of the Tribunal lie to the Court of Appeal just like those of the High Courts and Federal High Court.

In 2007, another Investments and Securities Act²⁰ was enacted to repeal the 1999 law and to create the Securities and Exchange Commission as the apex regulatory authority for the Nigerian capital market. The 2007 Act provides for the establishment, functions and powers of the Securities and Exchange Commission. It also established the IST and provided for its jurisdiction.²¹ The IST is given exclusive jurisdiction in respect of:

- (a) a decision or determination of the Commission in the operation and application of this Act, and in particular, relating to any dispute:
 - (i) between capital market operators;
 - (ii) between capital market operators and their clients,
 - (iii) between an investor and a securities exchange or capital trade point or clearing and settlement agency;
 - (iv) between capital market operators and self-regulatory organization;
- (b) the Commission and self-regulatory organization;
- (c) a capital market operator and the Commission;
- (d) an investor and the Commission;
- (e) an issuer of securities and the Commission, and
- (f) disputes arising from the administration, management and operation of collective investment schemes.

Since the enactment of the ISA 2007 especially as it has expressly stated that the Tribunal shall have *exclusive* jurisdiction over matters listed for the Tribunal, there have been some uncertainties regarding which court has jurisdiction over investment and securities matters. What is the implication of the word 'exclusive' when used in statute particularly as it affects the jurisdiction of courts? **Muntaka-Coomassie, JCA** has indicated that where 'the law grants an exclusive jurisdiction to a particular court, no other court, not even the Supreme Court, can lawfully exercise jurisdiction on such matters'.²² The exclusive jurisdiction of the IST in respect of matters stated under Section 284 of ISA suggests that neither the Federal High Court nor the State High court can exercise jurisdiction in respect of those matters.

CONSTITUTIONALITY OF THE EXCLUSIVE JURISDICTION OF THE IST

It is trite in constitutional law that the constitution of the Federal Republic of Nigeria supersede all laws. It is the source from which all laws derive their validity. Any other law that is at variance with the constitution is null and void to the extent of its inconsistency.²³ Next in hierarchy to the constitution are the Acts of the National Assembly and then the laws of the State Houses of Assembly.²⁴

It is also indisputable that the constitution has given the National Assembly the power to make laws for the good governance of the country. It also has the power to establish courts. As a matter of law, the National Assembly can confer jurisdiction and right of appeal to the Court of Appeal or any Court or

20. Law no 29, 2007

21. Sections 274 -297

22. *National Union of Road Transport Workers, Federal Capital Territory, Abuja v Road Transport Employers Association Of Nigeria, Federal Capital Territory, Abuja and 7 ORS* [2001] 14 NWLR [Pt 733] 313

23. *NUEE v BPE* (2010)7 NWLR (Pt 1194) 538

24. *Labiya & Ors. v Anretiola & 5 Ors.* (1992) 8 NWLR (Pt 258) 139; *Captain Joseph M. Din (rtd.) v Attorney-General of the Federation* (2004) 12 NWLR (Pt 888) 459; *AG Oyo State v NLC* (2003) 8 NWLR (Pt 821) 1

25. See s 240 of the 1999 Constitution as amended



Tribunal it establishes.²⁵

Taking a critical look at the provisions of the ISA and the Constitution, it is glaring that there are apparent conflicts between the exclusive powers of the IST as given under ISA and the powers conferred on the Federal and State High Courts by the Constitution. The area of conflict between the constitutional provisions²⁶ and the exclusive provision of the IST could be broadly classified into three parts.

a. Companies' Securities Dispute

Company securities are the shares, stocks and debentures of a registered company and such securities are transferable. Shares of companies in particular are often traded on the Stock Exchange and where it is a public company, members of the public may be invited directly to subscribe to the shares of such company. The bulk of capital market disputes arise from dealings in these company securities. This may be as a result of dispute arising from public offer of shares, transfer and issuance of shares certificate.

The jurisprudence of our courts now seem to be that any issue affecting a company, which have specific provisions in the Companies and Allied Matters Act, would be regarded as a matter arising from the operation, running, control and management of a company and such matters are exclusively reserved for the Federal High Court by the Constitution²⁷ and the Federal High Court Act.²⁸

In *Nashtex International Ltd v Habib (Nig.) Bank Ltd & Anor*,²⁹ the Court of Appeal held that shares and shareholding are issues arising from the regulation, running and management of companies because CAMA makes provisions for such. The same reasoning was recently confirmed by the Supreme Court in *AG Lagos State v Eko Hotels & Anor*³⁰ that since CAMA provides for transfer and transmission of shares, no court or tribunal can exercise jurisdiction over same except the Federal High Court.

It would be observed that there are some provisions of CAMA that are reproduced in ISA. These provisions largely include issues like companies' securities, public offer and sale of securities, unit trust, merger, take-over, acquisitions, insider trading etc. that could be found under part XVII of CAMA. In fact all the regulatory functions to be performed under this part are vested in SEC.³¹ It can be said that these provisions are still in force as there has not been any direct amendment or repeal to CAMA by the National Assembly. All official documents released by CAC itself indicate that the Commission still refers to CAMA 1990 and the sections remained unchanged.³²

However, there seems to be an implied amendment to CAMA by Section 312(1) and (3) of ISA 2007.³³ The ISA provision states that CAMA shall be interpreted with such modification as it would bring it in line with ISA provisions. Subsection 3 of Section 312 specifically states that all provisions of any other enactment including CAMA that are in conflict with ISA shall be null and void to the extent of its inconsistency. Areas of such inconsistency will include the jurisdiction of Federal High Court in respect of companies' securities issues. While CAMA vests jurisdiction in Federal High Court, ISA vests it in the IST. Hence, to that extent and statutorily speaking, one can say that jurisdiction of the IST prevails.

26. i.e. s 251 (e) and (r) and s 272 of the 1999 Constitution as amended

27. s 251(e)

28. s 7, Federal High Court Act, CAP F12, LFN 2004

29. (2007) 17 NWLR (Pt 1063) 308

30. See *infra*

31. See ss 541-623

32. See Certificate of Incorporation usually issued upon registration by CAC and the recent Companies Regulations, 2012

33. Again, whether there is anything like implied repeal of an Act of parliament is doubted because of the decision of the Supreme Court per Iguh JSC that "It is a cardinal principle of the law that statutes are not repealed by reference or implication but by direct provision of the law." See *Ibidapo v Lufthansa Airlines* (1997) 4 NWLR (Pt 497) 124 at 163



Nevertheless, this conclusion itself may be unconstitutional. Issues of companies' securities are issues arising out of the operation of CAMA because they are inseparable from other provisions of CAMA. For instance, areas of transfer of shares, rights of shareholders, control and management of companies are all still regulated by CAMA. There are no way issues of mergers and acquisition, public offer for shares, sale of company's shares etc will not affect the activities of the directors and shareholders. The directors approve and disapprove transfer of shares and allotment of public offer for shares. The directors and shareholders' powers come into play were there to be any disagreement in mergers and acquisition. Hence, these issues will eventually arise out of the operation of companies. Hence, IST cannot be replaced with the Federal High Court.

Apart from the foregoing, Section 251(e) expressly stipulates that the Federal High Court has exclusive jurisdiction over matters arising from operation of Companies and Allied Matters Act 'or *any other enactment replacing the Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act*'. Assuming but not conceding that the ISA has effectively altered the provisions of CAMA, then it becomes an enactment replacing CAMA in respect of the provisions it has altered and as such, the Federal High Court is still vested with exclusive jurisdiction over such matters notwithstanding the fact that they are now under ISA.

In *FIS Securities Limited v Securities and Exchange Commission*,³⁴ the appellants were involved in fraudulent transfer of shares on the Nigerian Stock Exchange and the scam was reported to the respondent. SEC ordered its Administrative Proceeding Committee (APC) to investigate the alleged fraud and the appellants were found to be culpable. A number of orders were made against the appellants including payment of the monetary value of the transferred shares and some damages. In an attempt to challenge the decision of the Commission and the APC, the appellant approached the IST and among other things sought to set aside the decision of the respondent on ground of fair hearing and that the Tribunal and not the respondent has jurisdiction over the matter. In its decision, the Tribunal made the following remarks:³⁵

Next we consider whether the Tribunal and APC have powers to deal with matters contained in CAMA contrary to the provisions of section 251 (1) (e) of the 1999 constitution. The Tribunal agrees with the submission of the Respondent that both the Tribunal and the APC have jurisdiction with respect to the subject matter - capital market - and power to hear and adjudicate on the matters in issue considering the provisions of sections 234(2) and 255(2) of the ISA. *The Tribunal has jurisdiction to deal with matters specified in CAMA in so far as it deals with quoted companies, securities, transactions in those securities, merger, acquisitions etc.* The Tribunal finds no conflict at all between the ISA and the 1999 Constitution since capital market is an item under the exclusive Legislative list of the 1999 constitution. We further agree that when you read Sections 234(2), 255(2) and 261 of the ISA together with the Constitution it becomes clear that the Tribunal can deal with the subject matter notwithstanding the submission of the Appellant's counsel. It is settled law that when there is substantive jurisdiction and there is an ancillary matter, the court can assume jurisdiction on the whole.

It is submitted with respect that the decision of the Tribunal is wrong. By virtue of the Constitutional provisions and CAMA, only the Federal High Court has jurisdiction in actions relating to the operation of companies and particularly company securities viz- transfer of shares, public offers, mergers, take-overs etc. These are matters that border on operations of companies. Section 251 (e) of the Constitution for emphasis says any matter 'arising from the operation of the Companies and Allied Matters Act or any

34. (2004) NISL 116. See also; *Central Securities Clearing System (CSCS) v Securities and Exchange Commission (SEC)* [2004] 1 NISLR 41; *Lighthouse Assets Management Company Limited v Securities and Exchange Commission*, Appeal No. IST/APP/02/2003

35. Similar opinion was expressed by the Court of Appeal in *Ajayi v SEC* (2009) 13 NWLR (Pt 1157) 1. In this case, the Court affirmed that the IST has exclusive jurisdiction over matters stipulated under ISA



other enactment replacing the Act or *regulating the operation of companies incorporated under the Companies and Allied Matters Act*'. Let us assume for the purpose of argument that ISA has replaced CAMA in the areas aforementioned, but is the Act not seeking to regulate some aspect of activities of companies incorporated under CAMA. To that extent, the same conclusion will be reached that ISA cannot vest jurisdiction over company matters in IST let alone making it exclusive.

The Tribunal admitted that some of the issues raised in the case are matters under CAMA and then concluded that it had jurisdiction simply because the matters are contained in ISA and also because capital market is an issue under the exclusive list. If the Tribunal were to take the reasoning further, it would be that even the Federal High Court has no jurisdiction because; the jurisdiction of the Tribunal is exclusive.

The only conclusion that could be drawn from the exercise of exclusive powers by the IST in matters of company securities is that it would not only contradict the express provision of CAMA that grants Federal High Court the jurisdiction over any action arising under the Act or operations of companies but also violates the constitutional provision which grants Federal High Court *exclusive* jurisdiction of such matters. The exclusive jurisdiction granted the Federal High Court by the Constitution implies that the IST *cannot* even exercise any jurisdiction in respect of companies' securities.

The case of *AG Lagos State v Eko Hotels Ltd*³⁶ further buttresses that issues of companies' securities are issues arising from the operation of a company. In that case, the Lagos State Government owned 51% of the shares in the Eko Hotels Ltd. Sometimes in 1997, it reduced its shareholding to 25% by selling 1,040,000 of its previously held shares to Oha Ltd, the 2nd Respondent. As a result of this transfer, the shareholding of the 2nd Respondent grew from 49% to 75%, whilst that of Lagos State Government reduced to 25%. Lagos State Government set up a Tribunal of inquiry to determine among others, the regularity or otherwise of the procedure of sale of its shares in Eko Hotels Ltd. The action was challenged on the ground that the tribunal does not have jurisdiction over any conduct that emanates from the operation of Companies and Companies and Allied Matters Act. The Supreme Court held that:

When one looks at the provisions of the Companies and Allied Matters Act particularly *sections 151 to 157* thereof which deals with and makes provisions for transfer and transmission of shares of a Company and how such transfers can be entered in the register of transfers, it becomes very clear that Legal Notice No 10 of 1999 deals with matters "arising from the operation" of the Companies and Allied Matters Act and as such only the Federal High Court has exclusive jurisdiction to entertain the suit. The sections of the Act referred to supra provide for what is to be done for a transfer of shares of a Company to be effective notwithstanding anything in the Articles of a Company." I hold the view that one of the ways a transfer of shares of a Company can be effected is by sale and since the Tribunal of Inquiry was constituted to investigate among others the sale of shares it falls within the operation of the Companies and Allied Matters Act, contrary to the submission of learned Counsel for the Appellant.

In *Blue Chip Acquisition and Investment Company Limited v Zenith Bank Plc & Ors*,³⁷ the Applicant subscribed and duly paid for 10,000 units of Zenith Bank shares at the rate of N10.90k per unit during Zenith Bank initial public offering of its shares in July 2004. The initial public offer closed on July 29th 2004 and the Respondents failed to provide the Applicant with share certificate for the shares subscribed. The Applicant approached the IST to compel Zenith Bank to issue it the share certificates. The tribunal accepted the originating application and found for the Applicant on the basis that the issue raised is covered by ISA.

If the decision of the Supreme Court in *AG Lagos v EKO Hotels* is anything to go by, then the IST has wrongly assumed jurisdiction over that matter simply because, the issue of allocation of shares (which is

36. [2006] 12 MJSC 1

37. [2007] 2 NISLR 61



one of the ways of becoming a member of a company) has to do with the operation of a company. The Tribunal's conclusion that public offer of shares is regulated by ISA with due respect does not hold water. Section 251(e) has included all enactments that would replace CAMA or deal with companies registered under CAMA.

In this respect, we submit that the ISA provisions cannot stand in view of the constitutional provision which grants exclusive jurisdiction to the Federal High Court in matters affecting the operation of companies. To this extent, the ISA provision with respect to the exclusive jurisdiction of the IST is void to the extent of its inconsistency in so far as it relates to companies securities whether private or public.

b. Actions against the Commission with respect to its Operation/Application of the Act:

The constitution grants the Federal High Court exclusive jurisdiction in matters affecting the activities of Federal Government or its agencies. It is crystal clear that SEC is an agency of the Federal Government established under the ISA. It is meant to supervise the observance of the provisions of the Act. It is empowered to take disciplinary measures against non-conformist operators/investors.³⁸ In other words, in a situation where anyone is aggrieved by the activities of SEC particularly if it is in connection with its operation of the Act, then it is only the Federal High Court that has jurisdiction to entertain such grievance(s). Some of these issues include dispute between SEC and self-regulatory organizations and capital market operators etc.

In *NEPA v Edeghero*, the Supreme Court per **Ogundare JSC** pointed it out that:

It is not in dispute that the defendant - NEPA - is a Federal Government Agency, the two courts below made a finding of fact to this effect and this has not been challenged by the plaintiff. It is also not disputed that the cause of action in this matter arose out of the administrative action or decision of the defendant. The action is for a declaration and an injunction and the principal purpose of it is to nullify the decision of the defendant terminating the appointments of the plaintiffs and others. In the light of all these, therefore, the action on hand came squarely within the provision of section 230(1)(s) of the 1979 Constitution. It would appear on the surface, therefore, that the action would be one within the exclusive jurisdiction of the Federal High Court

Also, in *Nospecto Oil & Gas Ltd v Olorunimbe*,³⁹ it was reiterated that:

The aim of section 251(1)(p)(q) and (r) of the 1999 Constitution was to vest exclusive jurisdiction in the Federal High Court in matters in which the Federal Government or any of its agency is a party. In the instant case, the principal claims were against Federal government agencies wherein the validity of their executive decision to freeze the accounts of the appellant was being challenged. There is no doubt that the Federal high court has exclusive jurisdiction in respect of the principal claims. This is because no matter how laudable and practical the intendment of the Investments and Securities Act, its provisions cannot override the provisions of the Constitution donating exclusive jurisdiction to the Federal High Court when the Federal government or any of its agency is being challenged over any executive or administrative action it took.⁴⁰

Prior to the establishment of IST, actions against SEC in respect of its disciplinary powers over capital market issues have always been subject to the jurisdiction of the Federal High Court.⁴¹ Considering these authorities and the clear constitutional provision, it goes without saying that the IST cannot validly assume jurisdiction in contravention of the Constitution when an aggrieved party has a complaint against

38. See s 34, ISA 2007

39. (2012) 10 NWLR (Pt 1307) 157

40. At p.160. See also *Oloruntoba-Oju v Dapamu* (2008) 7 NWLR (Pt 1085) 1; *NUEE v BPE* (2010) 7 NWLR (Pt 1194) 538

41. See *Owena Bank (Nigeria) Plc v Nigeria Stock Exchange Limited*, In *Re-Securities and Exchange Commission* (1997) 8 NWLR (Pt 515) 1; *Securities and Exchange Commission v Osindero Oni & Anor* (2009) 5 NWLR (Pt 1134) 377



SEC being an agent of Federal Government particularly if the alleged wrong arises from SEC's operation or application of the provisions of the ISA. What should be noted here is that majority of the cases being litigated at the IST are against SEC.⁴² The reason for this is not far-fetched. More often than not, petitions over capital market issues generally are presented before SEC whose Administrative Proceeding Committee (APC) would investigate and give directions and/or sanctions in most cases. It is where parties felt aggrieved with the APC's result that an appeal will be lodged at the IST challenging SEC's decision. Although, an originating application could be entertained by the IST but that is contingent upon SEC's refusal to act on a petition.

The area of conflict in this instance is where the ISA has provided that the IST shall have exclusive jurisdiction in such matters. It means the Act has ousted the jurisdiction of State High Courts or Federal High Court as the case may be. In effect, the exclusivity of the jurisdiction of the IST in this circumstance cannot stand. This aspect of the ISA shall also be void to the extent of its inconsistency. It is in this respect that we agree with the position of Galinje JCA in *Professor A. B. Kasunmu, SAN (Practicing under the name and style of Professor A. B. Kasunmu's Chambers) v Attorney-General of the Federation*⁴³ expressed thus:

The question now is, can the Federal High court's jurisdiction, constitutionally guaranteed be ousted by an Act of Parliament? Clearly, the answer is No...The Securities and Exchange Commission is without doubt a Federal agency. The respondent's claims at the lower court sought for declarations affecting the validity of its decision which sought to compel the respondent to register with it before he can act or be appointed a solicitor to a company in a public issue of its shares.

Clearly, the respondent's claims fall within the ambit of section 251(l) (r) of the Constitution... Where a Constitution has clearly conferred jurisdiction on the court in any matter, it will be naive for such a court to abdicate from its responsibility of doing justice in the matter on the ground that such jurisdiction has been taken away by an inferior legislation. From the foregoing even if the Tribunal were in place, it would have not made any difference as the Act is incapable of ousting the jurisdiction of the Federal High Court. I therefore agree with the learned trial judge that the Federal High Court rightly assumed jurisdiction over the respondents' claims

Having pointed out the areas of conflict between the Constitution and the Investments and Securities Act, what option do we have to wriggle out of this potential constitutional crisis. The Constitution is the apex law and every other law derive validity from it. I would rather argue that the way out is to amend the Constitution in order to give effect to the policy behind the enactment of the Investments and Securities Act- timeous and effective disposition of investment disputes.

Where the conflicting provisions of ISA are allowed to stand, it will definitely be challenged up to the apex court in the nearest future. The implication will be that litigants will continue to waste and energy pursuing their claims before the regular courts. So, in that circumstance, amending the constitution by excising the provisions that may impede the exclusive jurisdiction of the IST may be a better option.

c. The Implication of Residual Jurisdiction of the States' High Court

The next question to be determined is if for any reason, investment and securities matters do not fall under the jurisdiction of the Federal High Court, will such matters then not be covered under the residual jurisdiction of the State High Courts?⁴⁴ If this question is answered in the affirmative, can the ISA then

42. See for instance *Central Securities Clearing System (CSCS) v Securities and Exchange Commission (SEC)* [2004] 1 NISLR 41; *Lighthouse Assets Management Company Limited v Securities and Exchange Commission*, Appeal No. IST/APP/02/2003; *Union Bank of Nigeria (UBN) Plc v Securities & Exchange Commission*, Appeal No. IST/APP/03/2003; *FIS Securities Limited v Securities and Exchange Commission* (2004) NISL 116

43. [2009] 10 NWLR (Pt 1150) 509

44. For instance; an action against a capital market operator by an investor for failure to perfect instruction; an action between two capital market operators (e.g a capital market engaging another to carry out certain share transactions); an action between an investor and a company's Registrar in respect of restitution of monetary value of illegal transfer of shares negligently authorised by the Registrar etc



limit such residual jurisdiction of the State High Courts or can the Act totally exclude the State High Courts from exercising jurisdiction over such matters. The answer to these questions has been succinctly given by the Supreme Court in *Adisa v Oyinwola*.⁴⁵ To better understand the rationale behind the answer given by the apex court, the following excerpt from the decision of the court is apt:

Before the promulgation of the 1979 Constitution, High Courts both in the Northern as well as in the Southern States were regarded as courts of unlimited jurisdiction by virtue of their status as superior courts of record. In *Olaniyi v Aroyewun* (1991) 5 NWLR (Pt 194) 652, Bello CJN, said: "Prima facie the High Court, being a Superior Court of Record, was a court of unlimited jurisdiction..."

I suppose that the jurisdiction is described as unlimited only because it is presumed to exist in any case unless it is expressly curtailed by statute, as has been done in several regional or state laws before the promulgation of the 1979 Constitution.

The coming into force of the 1979 Constitution had a considerable impact on the jurisdiction of the High Court of the states. While prior to that constitution there was no express vesting of judicial power in the judicature and the jurisdiction of the High Courts of the state was to be found in the State legislation which tendered to vary from State to State, a change was affected by section 236(1) of the 1979 constitution which provided as follows:

Subject to the provision of the constitution and in addition to such other jurisdiction as may be conferred upon it by law the High Court of a State shall have unlimited jurisdiction to hear and determine any civil proceeding in which the existence or non-existence of a legal right, power, duty, liability, privilege, interest, obligation, or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

The provisions of section 236(1) of the 1979 constitution did not permit the 'unlimited' jurisdiction vested in the High Court of a State to be limited other than as the constitution itself may have provided. That was said by this court in the recent case of *Okulate v Awosanya* (supra) in consonance with similar views expressed in *Bronik Motors Ltd. v Wema Bank Ltd* (1983) 1 SCNLR 296, and *Savanah Bank of Nigeria Ltd v Pan Shipping and Transport Agencies Ltd* (1987) 1 NWLR (Pt 96) 212. The answer to the question whether the jurisdiction of the High Court of a State is curtailed after the 1979 Constitution had come into effect is, therefore, not to be found in State legislation but, solely, in the Constitution itself...

Consequent upon the decision of the apex court in *Adisa v Oyinwola*, it goes without saying that if for whatever reason, a Federal High Court would not exercise jurisdiction over any matter stipulated under ISA, then such would be covered by the wide jurisdiction of the State High Court. At best, the matters may be vested in both the State High Courts and the IST concurrently, but the Investments and Securities Act cannot exclude the High Courts (and Federal High Courts) from taking such matters.

THE IST AND OTHER SIMILAR TRIBUNALS/COURTS

This segment of the paper will consider the constitutional status of other Tribunals/Courts that shared the same formation processes with the IST with a view to further buttressing the arguments put forward in the preceding segment on the constitutionality of the exclusive jurisdiction of the IST.

The IST is very similar with other similar Tribunal/Courts of inferior records established at various times by the government through various Acts. Some of these Tribunals/Courts include VAT Tribunal,



45. (2000) 10 NWLR (Pt 674) 116

National Industrial Court (before the third alteration to the 1999 Constitution), Tax Appeal Tribunal etc. The position of the law has been that any court not listed under Section 6(3) and (5) of the 1999 Constitution as amended is not a superior court of record and as such their jurisdiction is subjected to the supervisory role of the superior courts of record. Therefore, they are not in any way to compete with the superior courts.

The question of the constitutionality of the provision of Section 20 of the Value Added Tax Act 1993⁴⁶ which established the defunct VAT tribunal (the predecessor of the recently constituted Tax Appeal Tribunal) came up for determination before the Court of Appeal sitting in Ibadan in *Stabilini Visinoni Limited v Federal Board of Inland Revenue*.⁴⁷ In this case, the Court of Appeal unanimously declared the provision of Section 20 of the Value Added Tax Act unconstitutional, null and void for being inconsistent with the provision of Section 251 (1) of the 1999 Constitution. The court had no difficulty in holding that the establishment of the VAT Tribunal violated the provisions of Section 251(1)(a) of the 1999 Constitution which vests exclusive jurisdiction on the Federal High Court on causes or matters relating to federal taxation and revenue of the Federal Government and therefore null and void. The same conclusion was recently reaffirmed by the Court of Appeal in *Cadbury v Federal Board of Inland Revenue*.⁴⁸ On the basis of these decisions, it is submitted that the IST is not different from the VAT Tribunal and a proper construction of Section 284 of the IST will lead to no other conclusion that it is in conflict with Section 251 of the 1999 Constitution as amended particularly as it relates to challenging the activities of SEC and matters bordering on management and operations of companies registered under CAMA.

The Supreme Court was called upon in *National Union of Electricity Employees v Bureau of Public Enterprises*⁴⁹ to determine the constitutionality of granting exclusive jurisdiction in trade disputes to the National Industrial Court as against the unlimited jurisdiction of the State High Court. The decision of the court is as follows:

In summary, the implication of conferring exclusive jurisdiction in trade disputes on the National Industrial Court is to exclude the wide powers of the state High Court thus causing conflict between Decree No.47 and Section 272 of the 1999 Constitution and as I have outlined above any inconsistency with Section 272 of 1999 Constitution in that regard is void to extent of the inconsistency.

Also, the court ruled that that any court (and of course tribunals) not listed as a superior court of record under Section 6 of the Constitution shall be subject to the supervisory role of the State and Federal High Courts. **Chukwuma Ene** JSC, puts the record straight as follows:

It means therefore that by decree No. 47 of 1992, arrogating to the National Industrial Court a superior court of record as has been contended by the appellants, does not by that token make the said National Industrial Court a Superior Court of Record without an amendment of the provision of section 6(3) and (5) of the 1999 constitution which has listed the only superior court of record recognized and known to the 1999 constitution and the list does not include the National Industrial Court; until the constitution is amended, it remains a subordinate court to the High Court and I cite with approval the Court of Appeal decision in *Attorney General of Oyo Sate v Nigeria Labour Congress* (2003) 8 NWLR (Pt 821) 1 at 3 indeed a case on all fours with the instant case to the same effect.

46. Formerly Value Added Tax Decree 1993 but was saved and metamorphosed into an Act of the National Assembly by virtue of section 315 of the 1999 constitution

47. (2009) 13 NWLR (Pt 1157) 200

48. (2010) 2 NWLR (Pt 1179) 561

49. (2010) 7 NWLR (Pt 1194) 538



CONCLUSION

This paper has explored the historical perspective to settlement of investment and securities disputes in Nigeria right from the Capital Issues Commission to the present Investment and Securities Tribunal. The enabling laws were critically examined vis-à-vis the 1979 and 1999 Constitutions.

All the potential laws conferring jurisdiction on courts over investment and securities matters were juxtaposed with a view to exposing the inconsistencies and conflicts therein. While, it is noted that the law makers are desirous of establishing an efficient and effective specialised tribunal to boost investors' confidence, necessary due diligence checks were not carried out to harmonise the various enabling laws.

It is discovered that the Federal High Court has exclusive jurisdiction over matters arising from operation of CAMA. Such matters include issues of companies securities provided for in CAMA. The State High Courts may also be seized of same matters where it involves private transactions in securities. The IST is also vested with exclusive jurisdiction in respect of investment and securities matters.

It is concluded that provisions of the ISA conferring exclusive jurisdiction over investment and securities matters cannot stand in the face of the constitutional provisions conferring same exclusive jurisdiction on Federal High Court and non-exclusive residual jurisdiction to State High Courts. To that extent, the ISA provision is void to the extent of its inconsistency.

It is strongly recommended that the National Assembly should utilize any opportunity, whenever it presents itself, to amend Section 251 (e) and (r) with a proviso that will save the exclusive jurisdiction of the IST in matters of companies' securities and review of decisions of SEC.

The National Assembly needs to be more proactive in its legislative duties. It should always ensure that new bills to be passed into law are harmonised with existing ones so as not to have duplication of laws. For instance, repetition of securities issues in ISA without amending those in CAMA is not a tidy one. It is high time CAMA and the Federal High Court Act were formally amended to divest the Federal High Court of its jurisdiction in areas of companies' securities, merger, take-overs and other securities related matters.

