



# ICLG

The International Comparative Legal Guide to:

## Patents 2019

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# Nigeria

Ijeoma Uju



Osayi Ogbeta



## Templars Barristers & Solicitors

### 1 Patent Enforcement

#### 1.1 Before what tribunals can a patent be enforced against an infringer? Is there a choice between tribunals and what would influence a claimant's choice?

Patent infringement proceedings may be brought at the Federal High Court “the Court” of Nigeria, as a court of original jurisdiction. The proceedings shall be conducted with specialist assessors attached to each Court, who have expert knowledge where matters are of a technological or economic nature. Infringement claims may alternatively be brought before an arbitral tribunal, where the parties have a prior agreement which contemplates arbitration or other dispute resolution mechanisms to resolve any dispute arising out of such agreement.

#### 1.2 Can the parties be required to undertake mediation before commencing court proceedings? Is mediation or arbitration a commonly used alternative to court proceedings?

Yes. Where a matter is before the Court for the first time, the Court has discretion to direct the parties to the suit to explore the possibilities of settlement of the dispute. The time limit within which to resolve the dispute shall not exceed 30 days. Where the parties fail to resolve the dispute, they shall proceed to trial.

Yes. Mediation and arbitration are other methods of dispute resolution, which are increasingly utilised in dispute resolution amongst parties in Nigeria. This is because it is considered to be less time-consuming and costly compared with litigation before Nigerian courts.

#### 1.3 Who is permitted to represent parties to a patent dispute in court?

The person permitted to represent a party to a patent dispute in Court is the party in person, his legal practitioner or his agent. Such representative must have the relevant qualification to appear before the Court in Nigeria. This means the representative must be a member of the Nigerian Bar Association, who has been neither suspended nor disqualified.

#### 1.4 What has to be done to commence proceedings, what court fees have to be paid and how long does it generally take for proceedings to reach trial from commencement?

To initiate proceedings for infringement of a patent, the claimant shall file a writ of summons, showing evidence of payment of the required fees. The writ shall be accompanied by a statement of claim, copies of every document to be relied on at the trial, a list of non-documentary exhibits, a list of witnesses to be called at the trial, and written statements on oath of witnesses. The fee amount is set in a schedule of fees for filing, and is not dependent on the value of the matter before the Court.

A petition shall be used to initiate an application for nullification of a patent.

#### 1.5 Can a party be compelled to disclose relevant documents or materials to its adversary either before or after commencing proceedings, and if so, how?

Yes. Either party may be compelled to disclose relevant documents to the other party either before or during proceedings. This is typically in the form of interrogatories and discoveries.

Interrogatories are applications made before the Court, requesting a party to respond to specific queries. The responding party shall do so by Form 31. Where an interrogated party omits to answer or answers insufficiently, the judge shall on application issue an order requiring him to answer or to answer further as the case may be.

Discoveries are applications made to the Court, requesting the other party to make discovery on oath of the documents that are or have been in his possession, custody, power or control, relating to any matter in question in the case.

A party may apply for an Anton Piller order (which can be granted *ex parte*), which allows the claimant to enter the defendant's residence to collect evidence. The basis for this application is in circumstances where a delay in granting the order sought would entail irreparable damage or serious mischief to the party making the application.

#### 1.6 What are the steps each party must take pre-trial? Is any technical evidence produced, and if so, how?

The pre-trial steps include filing a statement of claim, a list of witnesses to be called to trial, a written statement on oath of the

witness, copies of all the documents to be relied on at the trial as well as a list of non-documentary exhibits, together with any evidence being relied upon.

The defendant shall file a statement of defence, list of witnesses to be called to trial, written statement on oath of the witness, copies of all the documents to be relied on at the trial as well as a list of non-documentary exhibits. Both parties shall give statements alternatively and must do so within a 14-day interval after service of a response.

Pleadings shall contain a statement in a summary form of the material facts they rely on for their claim. Pleadings are deemed to be closed if there is no reply at the expiration of 14 days. Any technical evidence is expected to be provided by a party pre-trial in addition to other documents mentioned above, or during trial by an application to amend a plea by either party, before said party files its written address.

### 1.7 How are arguments and evidence presented at the trial? Can a party change its pleaded arguments before and/or at trial?

See question 1.6 above. After pleadings/arguments are entered, the trial shall commence. The claimant shall open his case by presenting his witnesses to adopt his already filed witness statement, and tender the relevant documents. The defendant shall cross-examine the witness, and the claimant shall have an opportunity to re-examine the witness to resolve any ambiguity created during cross-examination. The case for the claimant is closed and the case of the defendant is opened. The process of adoption of the witness statement, examination in chief and cross-examination occurs as above. After this, the defendant enters its final written address, the claimant also enters its final written address, and the defendant may have an opportunity to respond. Upon filing same, the parties shall appear in Court to give their final written addresses.

A party may amend their processes and pleadings during any point in the trial but before entering its final written address. Such amendment is limited to a total of three amendments.

### 1.8 How long does the trial generally last and how long is it before a judgment is made available?

There is no set timeline within which a patent matter must be resolved. It is dependent on the nature of the dispute.

### 1.9 Are judgments made available to the public? If not as a matter of course, can third parties request copies of the judgment?

Yes. Judgments are typically delivered in open court and are available to the public.

### 1.10 Are courts obliged to follow precedents from previous similar cases as a matter of binding or persuasive authority? Are decisions of any other jurisdictions of persuasive authority?

Yes. Courts are bound to follow the decisions of a higher court on issues before it.

Nigerian courts may also refer to or make use of foreign decisions. However, they have a persuasive status, and they must show preference to Nigerian decisions over foreign decisions.

### 1.11 Are there specialist judges or hearing officers, and if so, do they have a technical background?

No, there are no specialist judges for patent matters; however, the Court shall have two assessors with expert knowledge where matters are of a technological or economic nature. They are tasked as evaluators of the matter and provide expert advice to the judge; however, final judgment will be given by the judge of the federal high court.

### 1.12 What interest must a party have to bring (i) infringement, (ii) revocation, and (iii) declaratory proceedings?

- (i) In the case of infringement proceedings, the claimant must be the owner or joint owner of the patent or an exclusive licensee. Where there is a joint ownership, the co-owner must be joined in the proceedings.
- (ii) For proceedings of revocation of a patent, the interest for the claimant is the same as (i) above.
- (iii) A party may apply for declaratory judgments and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.

### 1.13 If declarations are available, can they address (i) non-infringement, and/or (ii) claim coverage over a technical standard or hypothetical activity?

No. Declarations are made to address infringement, and not to address non-infringement and/or claim coverage over a technical standard or hypothetical activity.

### 1.14 Can a party be liable for infringement as a secondary (as opposed to primary) infringer? Can a party infringe by supplying part of, but not all of, the infringing product or process?

Yes, a party can be liable as a secondary infringer. Infringement occurs where the third party (without the licence of the patentee) does or causes to be done any act which is conferred on the patentee, i.e.: with respect to a product, the act of making, importing, selling or using the product, or stocking it for the purpose of sale or use; and with respect to processes, the act of applying the process, or carrying it out in respect of a product obtained directly by means of the process.

### 1.15 Can a party be liable for infringement of a process patent by importing the product when the process is carried on outside the jurisdiction?

No. There is a presumption that any product subject to a patent, which has been manufactured by someone other than the patentee, in the absence of proof, will be taken to have been manufactured by that process.

### 1.16 Does the scope of protection of a patent claim extend to non-literal equivalents?

Equivalents are not relevant in Nigeria.

**1.17 Can a defence of patent invalidity be raised, and if so, how? Are there restrictions on such a defence e.g. where there is a pending opposition? Are the issues of validity and infringement heard in the same proceedings or are they bifurcated?**

Yes, a defence of patent invalidity can be raised: see question 1.18 below. There are no restrictions to such defence. An application for the nullification of a patent has the following stages and requirements:

- (i) the application shall be by petition;
- (ii) the petition shall set out particulars of the petitioner's objections to the validity of the patent, and specify every ground on which the validity of the patent is being challenged;
- (iii) if the grounds include want of novelty or inventive step, the particulars must state the manner, time and place of every prior publication or user relied upon;
- (iv) the respondent to this action has to file and answer to the petition within 21 days of receiving the petition;
- (v) the petitioner, within one month of the answer or after the expiration of 21 days, is required to apply to the Court by a summons for directions as to the place and mode of trial;
- (vi) the respondent can take preceding steps if the petitioner does not do this;
- (vii) the petition will not be set down for trial unless and until the summons for directions has been taken out and the directions given and complied with; and
- (viii) where the Court directs that evidence is to be given by affidavit, the respondents or witnesses (expert witnesses inclusive) will be cross-examined, unless with the permission of the Court the parties agree otherwise. In addition to oral evidence, the petitioner and the respondent may also provide documentary and electronic evidence during the trial.

No. The proceedings for invalidity and infringement are not bifurcated, and the defendant may raise a defence of invalidity in the same proceedings in which the plaintiff has raised a claim for infringement of patent. The Court has discretion to choose which claim to address first, although in practice, it normally begins with the claim on invalidity.

The standard of proof is on the balance of probabilities.

**1.18 Other than lack of novelty and inventive step, what are the grounds for invalidity of a patent?**

The grounds for invalidity, other than lack of novelty and inventive step, include:

- (i) that for the same invention a patent has been granted in Nigeria as the result of a prior application or an application benefiting from an earlier foreign priority;
- (ii) that with respect to the description of the patent, the relevant plans and drawings disclose the relevant invention in a manner sufficiently clear and complete for the invention to be put into effect by a person skilled in the art or field of knowledge to which the invention relates; and/or
- (iii) that the claim or claims referred under the invention clearly defines the protection sought and shall not go beyond the limits of the said description.

**1.19 Are infringement proceedings stayed pending resolution of validity in another court or the Patent Office?**

Infringement proceedings shall only be brought before the Federal High Court as a court of original jurisdiction. Proceedings may

be stayed where it is brought to the attention of the Court that the dispute arose from an agreement that is subject to arbitration agreement.

**1.20 What other grounds of defence can be raised in addition to non-infringement or invalidity?**

The defendant may raise the defence that they were granted a licence by the patentee under contract, or granted a compulsory licence or expiration of the patent. Furthermore, the third party can show that, as of the date on which the patent application was filed, the defendant was (i) conducting an undertaking in Nigeria, and (ii) in good faith and for the purposes of the undertaking, was manufacturing the products or applying the process or made serious preparations with a view to doing so.

**1.21 Are (i) preliminary, and (ii) final injunctions available, and if so, on what basis in each case? Is there a requirement for a bond?**

- (i) Yes. A preliminary injunction called an interim injunction may be granted on application, and in matters of urgency. The Court will grant such application where it can be shown that the applicant will suffer irreparable damage if the order is refused.
- (ii) Yes. At the conclusion of the matter, the Court may also grant a mandatory injunction, which prevents the defendant from further infringement.

**1.22 On what basis are damages or an account of profits assessed? Are punitive damages available?**

Monetary damages may be awarded. Damages awarded may be nominal, general, punitive or special, and the plaintiff is required to prove that they are entitled to the damages that they wish to claim. It is through the plaintiff's arguments that an estimation of loss to the plaintiff is determined.

**1.23 How are orders of the court enforced (whether they be for an injunction, an award of damages or for any other relief)?**

An order of the Court will depend on the nature of the case and the reliefs claimed by the claimant. Orders of the Court may be enforced through the following methods, undertaken by the court bailiffs:

- (i) for monetary claims through garnishee proceedings (being the most common);
- (ii) writ of fife;
- (iii) writ of sequestration;
- (iv) writ of attachment; or
- (v) writ of possession, etc.

**1.24 What other form of relief can be obtained for patent infringement? Would the tribunal consider granting cross-border relief?**

The Court may make an order that will require the defendant to account for the profits they have made through their infringement of the patent and/or deliver the infringing items for destruction. A successful party may also be awarded costs of litigation.

**1.25 How common is settlement of infringement proceedings prior to trial?**

A good number of cases of patent infringement are settled before they reach trial.

**1.26 After what period is a claim for patent infringement time-barred?**

There is no time bar for commencing a patent infringement action.

**1.27 Is there a right of appeal from a first instance judgment, and if so, is it a right to contest all aspects of the judgment?**

Parties may appeal against the entirety of the decision or parts of the decision. The party making the appeal must state the grounds for appeal.

**1.28 What are the typical costs of proceedings to first instance judgment on (i) infringement, and (ii) validity? How much of such costs are recoverable from the losing party?**

Matters of infringement and validity may be dealt with at the same trial. It is difficult to estimate the typical costs of proceedings to first instance judgment, as this will be dependent on the nature of the matter and the time it takes to conclude proceedings.

**1.29 For jurisdictions within the European Union: What steps are being taken in your jurisdiction towards ratifying the Agreement on a Unified Patent Court, implementing the Unitary Patent Regulation (EU Regulation No. 1257/2012) and preparing for the unitary patent package? Will your country host a local division of the UPC, or participate in a regional division? For jurisdictions outside of the European Union: Are there any mutual recognition of judgments arrangements relating to patents, whether formal or informal, that apply in your jurisdiction?**

Foreign judgments (with respect to patents or not) may be enforced where the judgment emanates from a country that has been listed in the foreign judgment (reciprocal enforcement ordinance).

With respect to foreign judgments outside the aforementioned legislation, the courts may enforce a foreign judgment, where an application is made within 12 months of the judgment.

It is important to note that the enforcement of foreign judgments is limited to monetary judgments.

**2 Patent Amendment****2.1 Can a patent be amended *ex parte* after grant, and if so, how?**

Yes, a patent can be amended after grant by the Registrar. The Registrar has the authority to amend any document or drawing, relating to an invention on such terms as the Registrar may direct.

**2.2 Can a patent be amended in *inter partes* revocation/invalidity proceedings?**

Yes, a patent can be amended in *inter partes* revocation/invalidity proceedings. The registrar may grant amendments of patents during any legal proceedings where they have received the necessary documents, in order to rectify any irregularity in the procedure.

**2.3 Are there any constraints upon the amendments that may be made?**

Yes. The extent of amendments to be made by the Registrar may only be with respect to any document or drawing (for products); and amendment relating to irregularity with respect to procedure (for processes).

**3 Licensing****3.1 Are there any laws which limit the terms upon which parties may agree a patent licence?**

Yes. Where a licence is granted by the patentee, the licence must be registered and appropriate fees paid, otherwise the licence shall be of no effect against third parties.

A patentee may not include a clause or clauses which do not derive from the rights conferred by the patent, or which is/are unnecessary for the safeguarding of said rights granted by the patent. Also, where the contract is silent, the licensor may grant further licences to other persons or may himself exploit the patent. In addition, the licence shall not be assignable by the licensee, and the licensee shall not be entitled to grant further licences.

**3.2 Can a patent be the subject of a compulsory licence, and if so, how are the terms settled and how common is this type of licence?**

Yes, a patent can be the subject of an application for a compulsory licence granted by the Court. Where the Court decides that a compulsory licence may be granted, and the parties are unable to decide on the terms, the Court shall fix the terms, which shall constitute a valid contract between the parties. The terms decided by the Court may include adequate royalties.

**4 Patent Term Extension****4.1 Can the term of a patent be extended, and if so, (i) on what grounds, and (ii) for how long?**

No. The term of a patent is 20 years from the date of application and this cannot be extended.

**5 Patent Prosecution and Opposition****5.1 Are all types of subject matter patentable, and if not, what types are excluded?**

No. Subject matter that cannot be the focus of a patent relates to plant or animals varieties, or essentially biological processes

for the production of plants or animals (other than microbiological processes and their products); or inventions whose publication or exploitation would be contrary to public order or morality.

**5.2 Is there a duty to the Patent Office to disclose prejudicial prior disclosures or documents? If so, what are the consequences of failure to comply with the duty?**

There is no duty on the Patent Office to disclose prejudicial prior disclosure/documents.

**5.3 May the grant of a patent by the Patent Office be opposed by a third party, and if so, when can this be done?**

The Patent Office does not have a mechanism for the opposition of a patent by a third party. Disputes involving a third party are typically resolved by the Court.

**5.4 Is there a right of appeal from a decision of the Patent Office, and if so, to whom?**

Appeals on decisions from the Patent Office go to the Federal High Court.

**5.5 How are disputes over entitlement to priority and ownership of the invention resolved?**

The right to a patent is vested in the statutory inventor, this being the person who is the first to file, or validly claim a foreign priority for, a patent application at the Patent and Design Office.

**5.6 Is there a “grace period” in your jurisdiction, and if so, how long is it?**

Patent law provides for a six-month grace period.

**5.7 What is the term of a patent?**

Subject to regular payment of the annual fees due, patents shall be valid for 20 years from the date of the filing of the relevant patent application.

## 6 Border Control Measures

**6.1 Is there any mechanism for seizing or preventing the importation of infringing products, and if so, how quickly are such measures resolved?**

Typically, the patentee would liaise with the Patent Office and the Nigerian Customs Service (being the body which has the authority to seize and detain improperly imported goods), in anticipation of the importation of goods. The patentee is expected to be responsible for the cost of carrying out the seizure.

There is, however, no timeframe within which such measures are resolved.

## 7 Antitrust Law and Inequitable Conduct

**7.1 Can antitrust law be deployed to prevent relief for patent infringement being granted?**

Nigeria’s antitrust laws in relation to patent litigation have not been largely developed. Although a plaintiff may bring forward a claim of the defendant’s breach of antitrust, this is generally a question that the courts would deem as academic; and in the case where infringement of a patent is proven, the courts will most likely award the plaintiff other remedies, but will not give a remedy based on antitrust or inequitable conduct.

**7.2 What limitations are put on patent licensing due to antitrust law?**

Please see the response to question 7.1 above.

## 8 Current Developments

**8.1 What have been the significant developments in relation to patents in the last year?**

There is currently a Patent and Designs (Amendment) Bill at the National Assembly before the Senate, which underwent its second reading on 14<sup>th</sup> March 2018, and has been referred to the Committee on Trade and Investment. The Bill seeks to repeal the Patents and Designs Act Cap P2 LFN 2004 and enact the Patents Act 2016 to provide for the protection of inventions and other related matters.

There is also the Industrial Property Commission Bill, which seeks to establish the Industrial Property Commission repeal of the Patents and Designs Act Cap 344, LFN 1990 to provide for the protection of inventions and other related matters.

**8.2 Are there any significant developments expected in the next year?**

Yes, the eventual passage and enactment of the Industrial Property Commission Bill will usher in improved protection for inventions, and the proposed harmonisation of all intellectual property legislation and intellectual property administering agencies. Although there is no guarantee that the Bill will be passed next year, we are generally optimistic of its eventual implementation. A public hearing on the Bill took place on 28<sup>th</sup> March 2018.

**8.3 Are there any general practice or enforcement trends that have become apparent in your jurisdiction over the last year or so?**

Yes, the Trademarks, Patents and Designs Registry introduced e-filing of patent and trademarks applications in July 2014. In 2016, 40% of trademarks and 35% of patent applications were filed using e-filing, which shows the technical advancement which is taking place in the sector.

### Acknowledgment

The authors would like to acknowledge Obi Meghoma for her assistance in preparing this chapter. Obi is a key Associate at Templars, with experience in corporate law, labour law and intellectual property law (Email: [obi.meghoma@templars-law.com](mailto:obi.meghoma@templars-law.com)).

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Osayi also advises clients on issues relating to the setting up of businesses in Nigeria, labour and industrial relations, as well as Nigerian law and policy affecting the operation of businesses, the establishment of foreign businesses and foreign investments in Nigeria. She also provides corporate governance and compliance advice to clients in connection with local and international transactions.

# TEMPLARS

Templars is one of Nigeria's foremost integrated full-service commercial law firms. With offices in key commercial centres, the firm is strategically placed to offer quality legal services to clients across the length and breadth of the country. At Templars, our strengths lie in our coverage of diverse legal fields, as well as our familiarity with the major sectors of the Nigerian economy. Not only are we well acquainted with domestic and international business transactions, typically involving strategic alliances and complex business arrangements; our lawyers work daily with all kinds and sizes of businesses, to structure, negotiate and document their transactions.

We have built a reputation for understanding each client's peculiar business needs, and applying legal principles to craft workable solutions to meet those business objectives. We analyse the risks involved in our clients' transactions, and devise appropriate risk management formulae to assist in the mitigation and hedging of those risks.

At Templars we are always consistent with our commercial approach in the service of our clients, and we constantly employ cost-effective procedures in the pursuit of each mandate.



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