# Effectiveness of Procedural Agreements in Securities Law

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**SUMMARY**

## Introduction

Securities have a long history. In ancient Greece, the pre-Socratic philosopher Thales of Miletus made a fortune from an olive harvest by predicting the weather. In one version of the story, he bought all the olive presses in Miletus after predicting the weather and a good harvest for a particular year. Another version has Aristotle explaining, in *Politics*, that the philosopher had reserved olive presses in advance, at a discount, and could rent them at a higher price, when demand peaked, following his prediction of a good harvest.[1] This first version of the story can be considered the first known creation and use of futures trading, and the second version would be the first creation and use of options trading.

This historical narrative highlights the early roots of risk assessment and investment based on predictive knowledge, which is a fundamental aspect of modern finance and securities.

In this context, investment funds hold important economic and social significance as a savings model that complements state pensions and pension savings plans. The current trend of retail investors gathering to the capital markets is not only attributed to evolved market dynamics; it is also driven by individuals who lack the knowledge and time to thoroughly evaluate all the legal implications of their investments.

Investment funds serve as an appealing traditional savings investment for numerous retail investors. Consequently, the total amount of assets invested in funds and the number of individuals participating in investment funds will continue to surge. As a result, the increased participation in investment funds also raises the chances of civil litigation between the involved parties. So, my objective is to evaluate this potential development and its management through procedural agreements by studying the effectiveness of procedural agreements in Securities Law, with an emphasis on the relationships within an investment fund.

For a better understanding, only the basic lines of the Securities Law regulation should be discussed and the terminology specific to the Portuguese Securities Code should be presented.

## 1. Securities Law, Retail Investors, and Institutional Investors

An investor is any person or other entity who commits capital with the expectation of receiving financial returns. Investors rely on different financial instruments to earn a rate of return and accomplish important financial objectives like

1 Aristotle (2017), pp. 73/74.

building retirement savings, funding a college education, or simply accumulating additional wealth over time.

Retail investors, also known as individual investors or private investors, are individuals or small groups of individuals who invest their personal funds in the financial markets. Institutional investors, on the other hand, are entities that invest large pools of money on behalf of others, such as pension funds, insurance companies, mutual funds, hedge funds, banks, and other financial institutions (Article 30.º of the Securities Code).

Retail investors are often subject to specific regulatory protections[2] and disclosure requirements aimed at ensuring transparency and safeguarding their interests. Regulatory authorities impose rules to protect retail investors from fraudulent practices and to ensure fair treatment. For example, a retail investor cannot invest in an Exchange Traded Fund if the issuer does not provide the Key Investor Information Documents in Portuguese or accompanied by a translation into Portuguese, according to Article 6.º, n.º 1, of the Securities Code. The Key Investor Information Document is required by law to assist the investor in understanding the risks, costs, and fundamental basis of the fund.

Also, in some jurisdictions, there may be restrictions on certain sophisticated financial products for retail investors, particularly those with higher levels of complexity and risk.[3] These restrictions aim to protect retail investors from investing in products that may not be suitable for their financial knowledge and risk tolerance.[4] On the other hand, institutional investors, or Accredited Investors, being sophisticated investors with larger resources and expertise, are subject to different regulatory frameworks that may have fewer protections as they are presumed to have the capacity to assess risks and make informed investment decisions.

Retail investors are afforded certain procedural rights and privileges that are not available to institutional investors. For example, they can initiate class actions (Article 31 of the Securities Code) or participate in mediation to solve conflicts (Article 33 of the Securities Code), while accredited investors are restricted from such actions. Also, retail investors may have equal treatment to consumers[5] (Article 321.º, n.º 1 of the Securities Code) and may have the option to exercise the right of retraction, enabling them to reconsider from specific investment

2 Cordeiro (2018), p. 94.

3 Which can include "futures", "options", "swaps", "credit derivatives", "contracts for differences", "forwards", "caps", "floors", "collars", See Antunes (2014), pp. 143-192; For "short selling", see Silva (2009), pp. 27-28. For "Over-the-Counter" derivatives, see Awrey (2011), pp. 267-275.

4 For a US perspective about whether the suitability rule rises to the level of law and whether an aggrieved investor may sue for a violation of the rule, see Booth (1999), pp. 1602-1605.

5 Cordeiro (2018), p. 111.

agreements or transactions under specific conditions (Article 322.º, n.º 2, of the Securities Code). Hence, the Portuguese Securities Code aligns the provisions applicable to retail investors with the regulations set forth in the Law of General Contractual Clauses (DL n.º 446/85, de 25 de outubro).

Institutional investors may as well qualify as financial intermediaries depending on the activities they perform. According to the Securities Code, financial intermediaries are, among other, those who provide investment services and activities in financial instruments (Article 289.º, n.º 1, *a*). The Securities Code also considers financial intermediaries the depositaries of securities. In this sense, the asset management selects the fund's assets, while the fund's assets are held and safeguarded by a depositary, to avoid confusion between the assets of the fund and the equity of the asset management company.[6]

## 2. Principles of Regulation. Investor Protection as the Main Purpose

The attractiveness of the basic economic idea and the associated importance of investment funds for the social market economy has called both Portuguese and European legislators on the scene. In Portugal, since 1999, the civil and regulatory provisions of investment law have been combined in the Securities Code, which also implements the European Union directives (recital 23 of the Securities Code).[7]

Today, investor protection is the primary goal of investment law regulation, along with ensuring that markets are fair, efficient, and transparent, and reducing systemic risks (Article 304.º, 1, of the Securities Code). Investment law regulation encompasses a set of legal principles, rules, and regulations designed to safeguard the rights and interests of investors.[8] These laws are typically enacted at both national and international levels, aiming to create a predictable and secure environment for investors. So, the primary objective of investment law regulation is to protect investors. This involves ensuring that investors, whether individual or institutional, have a reasonable expectation of the safety and security of their investments.

Investor protection extends to the promotion of fair markets, where all participants have equal access to information and opportunities (level playing field[9]),

6 Silva (2005), p. 167.

7 Câmara (2018), pp. 74-80.

8 Da Frada (2020), p. 1575.

9 Garten (2001), pp. 1-15.

and where market manipulation and fraud are deterred. Transparency is key to investor confidence. Regulations often mandate transparent disclosure requirements for companies, helping investors make informed decisions. In addition to individual investor protection, investment law regulation is also concerned with systemic risk reduction. Systemic risks can disrupt the entire financial system and harm investors, so regulations are designed to identify, mitigate, and prevent these risks. Measures may include prudential regulations for financial institutions and market oversight by regulatory authorities. Investment law regulation also seeks to enhance market efficiency. Efficient markets are more likely to attract investors and promote economic growth.

However, it is important to say that while market efficiency assumes that markets quickly incorporate all available information,[10] behavioural finance[11] recognizes that human emotions and biases can lead to market inefficiencies, so it combines principles of psychology[12] with economics and finance to understand how psychological and emotional factors influence financial decision-making.[13] Behavioural finance explores the various cognitive and emotional biases that can affect financial decision-making. Some well-known biases include overconfidence,[14] loss aversion,[15] confirmation bias,[16] and herd behaviour.[17] These two concepts – market efficiency and behavioural finance – offer different perspectives on how markets operate and how investors make decisions.

10 For a comprehensive analysis on how "security prices fully reflect all available information", see Fama (1970), pp. 383-417, and Fama (1991), pp. 1575-1617.

11 Cunningham (2002), pp. 772-783.

12 Charlie Munger counts preparation, patience, discipline, and objectivity among his most fundamental guiding principles. He will not deviate from these principles, regardless of group dynamics, emotional itches, or popular wisdom that "this time around it's different." Munger, Kaufman (2011) pp. 59-60.

13 In other words, there are discrepancies between the price and value of the security. On investing, Benjamin Grahan has included many different examples of overvaluation and undervaluation of a stock. Evidently the processes by which the securities market arrives at its appraisals are frequently illogical and erroneous. These processes are not automatic or mechanical but psychological, for they go on in the minds of people who buy or sell. The mistakes of the market are thus the mistakes of groups or masses of individuals. Most of them can be traced to one or more of three basic causes: exaggeration, oversimplification, or neglect (Graham (2009), p. 669).

14 Kahneman (2011), pp. 199-222. Overconfidence bias refers to the tendency for individuals to overestimate their own knowledge and abilities, leading to excessive trading, risk-taking, and suboptimal decision-making.

15 Kahneman (2011), pp. 282-286. This is a fundamental concept in behavioural finance, which suggests that people tend to strongly prefer avoiding losses over acquiring equivalent gains. As a result, investors may be more risk-averse when it comes to potential losses, even if it means missing out on potential gains.

16 Ibid., pp. 80-81. This bias involves seeking out information or opinions that confirm preexisting beliefs while ignoring or discounting information that contradicts those beliefs. This can lead to poor investment decisions and a lack of diversification.

17 Investors often exhibit herd behaviour, meaning they follow the crowd and make investment decisions based on what others are doing, rather than conducting independent research and analysis.

On this topic, the economist Robert Shiller concluded that people must distance themselves from the presumption that financial markets always work well and that price changes always reflect genuine information. He found evidence from behavioral finance that helped to understand, for example, that the worldwide stock market boom, and then crash after 2000, had its origins in human foibles and arbitrary feedback relations and must have generated a real and substantial misallocation of resources.[18]

Nowadays, it is no longer just the small investors who are understood as investors, but everyone, including institutional investors. So, investor protection in Securities Law not only protects individual investors but also has an institutional side. For example, Article 94.º, n.º 1, of the Securities Code, protects financial intermediaries from damages caused by central securities depository.

In addition to individual protection through claims, supervision, transparency, and so on, there is also the goal of strengthening investor confidence in the integrity of the Portuguese market for investment funds. However, the protection of retail investors is the main purpose of regulation in Securities Law, mainly because (i) investment funds are still used by many small investors who are particularly in need of protection as a savings model, and (ii) the harmonization of the European Union´s internal market for investment funds is itself also driven by investor protection.

## 3. The Concept of Investment Fund

The ever-changing nature of the global financial system required the adoption of flexible rules and procedures, designed to provide a degree of longevity to legislative text. The focus of the legislator was placed on the establishment of principles and general rules, often employing general clauses and vagueness. Therefore, these texts are expected to be further developed by jurisprudence, the practices of administrative authorities, and interpretation by scholars.

So, the units of participation in an investment fund are financial instruments that result from the capital raised by many investors. Together, these amounts establish a separate portfolio managed by an asset management company, which invests them in a variety of assets, including bonds, stocks, money market instruments, and even commodities such as natural gas or oil.

These financial instruments allow access to markets, assets, and opportunities that would otherwise not be accessible to most investors, ensuring investment diversification by allocating investments across different securities,

18 Shiller (2003), p. 102.

markets, and even currencies, thereby contributing to an overall risk reduction, investing for the medium to long run, with the possibility of benefiting from the high liquidity provided by most funds, and ensuring that asset management is carried out by experts dedicated to the individual performance of each fund.

There are several types of investment funds, each with its own characteristics and objectives. Mutual Funds are open-end investment funds that issue and redeem shares at the net asset value based at the end of each trading day. Mutual funds are popular among retail investors and offer a variety of investment objectives, including equity funds, bond funds, and balanced funds. Exchange-Traded Funds (ETFs) are like mutual funds but are traded on stock exchanges throughout the day, like individual stocks. They offer intraday liquidity and have lower expense ratios than mutual funds. Hedge Funds are typically open to qualified investors and have a more flexible investment strategy. Hedge funds aim to generate returns regardless of market conditions and may use leverage and short selling.

Private Equity Funds often invest in private companies rather than publicly traded securities. They often have a longer investment horizon and may be illiquid for several years. Real Estate Investment Trusts, also known as REITs, invest in real estate properties and are required to distribute a sizeable portion of their income to shareholders as dividends. They provide a way for investors to access real estate markets without owning physical properties.

The investment fund is structured as a so-called "investment triangle", and the three cornerstones of the investment triangle are the investor, the financial intermediaries, and the custodian bank.[19] The investor deposits capital into an account, the financial intermediaries invest this capital according to the specified investment conditions, and the custodian entity is responsible for holding and safeguarding the securities. Typically, these three parties do not enter into a multilateral agreement that binds them all, and neither do they have bilateral agreements among all these parties.

Instead, in investment funds, there are two contractual relationships: the investment contract between the investors and the asset management, and the custodian agreement between the asset management and the custodian bank.

19 Urhahn (2021), p. 89.

### 3.1 Investment Contract and Custodian Agreement. Obligations of the Investor and Obligations of the Asset Management

In an investment fund, investors and the asset management conclude the investment contract[20]. Its content is set by the investment conditions, as well as general Contract Law and the Securities Code.[21] In addition, as an exception, the provisions of the sales prospectus can become part of the investment contract if the agreement between the investor and the asset management company includes the sales prospectus.

So, in the case of a public investment fund, the investor's first contact with the potential contractual provisions usually takes place through the sales prospectus, which the asset management must create and make accessible to the public under Article 238 of the Securities Code.

Following the general principles of Securities Law, the prospectus itself does not represent an application, but merely pre-contractual information due to public offering.[22] The investor first submits the offer by communicating his intention to invest a certain amount in an investment fund, often through his bank or another sales company acting as a representative of the asset management. Then, the asset management accepts the offer by requesting the investor to pay the calculated issue price. There, for the sale of investment funds to private investors, it is stipulated that the potential investor is to be given a copy of the application for the conclusion of the contract.

Also, the investment contract obligates the investor to pay a certain amount of money to the investment fund. The amount of the payment is calculated from the net asset value of the unit that the investor is to receive plus a front-end load (commission) specified in the investment conditions. On the other hand, the asset management is obligated to provide several services, and among them, there are two main performance obligations.

The first main obligation is to grant the investor a share of the investment fund (so-called investment share), and, if applicable, the redemption of the shares. In other words, to conclude an issuance agreement on the investment share certificate with the investor under Securities Law.[23]

The second main obligation of the asset management is the portfolio management of the investment assets. This means two different sets of obligations, which can be called investment obligations and administrative obligations. The

20 Leitão (2015), pp. 112-121. In stock trading there is no contract between the parties, namely because there are no predetermined parties involved. See Ascensão (1999), p. 18.

21 Antunes (2009), pp. 281-287.

22 Almeida (2018), p. 155.

23 Cordeiro (2020), pp. 20-30.

asset management fulfils its investment obligation by developing an investment strategy, using this strategy to select which assets are to be acquired for the account of the investment fund, and finally implementing the investment decision, which is called asset allocation.[24]

In addition to the investment contract with the investors, the asset management concludes the so-called custodian agreement with the custodian entity. Because the conclusion of the custodian agreement is a condition for operating an investment business, the custodian agreement is concluded before the investment contract. The main duties of the custodian entity are the safekeeping of the assets of the special fund that can be held in custody, the control of the legality of the asset management actions, and the assertion of claims of the investors towards the asset management.[25]

### 3.2 Legal Relationship Between Investors

So, in the case of an investment fund, there is no contract in the relationship between the investors. As a rule, individual investors do not meet their fellow investors.[26] The investors therefore do not enter into a contractual agreement with one another. However, there is some correspondence in the legal relationships of the investors: all investors have the same rights under a similar investment contract with the asset management, known as analogous individual interests or collective interests.[27] It is important to understand that the investors do not know each other and do not want to contact each other.

### 3.3 Legal Relationship Between Investors and the Custodian Entity

The custodian agreement obliges the custodian to keep the assets safe and to monitor the asset management, which serves to protect investors. At the same time, investors often come into legal contact with the custodian themselves when the share certificates are issued. In addition, the Securities Market Commission independently prescribes the main rights and obligations of the

24 The roots of an investment portfolio and asset allocation can be traced back over a thousand years to what is known as the "Talmud Portfolio." The Talmud is a collection of Jewish texts falling under the category of the Oral *Torah*, comprising the source known as the *Mishnah* and its commentary, the *Gemara*. One version of the specific section of *Bava Metzia* 42 translates as "Rabbi Yitzchak advises a person to invest his money – one third in land and one third in business, and the remaining third, he should hold in cash."

25 Duarte (2000), p. 370.

26 Urhahn (2021), p. 85.

27 Jolowicz (2000), pp. 95-96.

depositary. Following this mixture of legal points of contact, different approaches to the qualification of the legal relationship between the investor and the custodian are conceivable.

Taking the picture of Urhahn's investment triangle further, one should first consider filling out the last remaining side of the triangle with a *contract*. This is certainly true if the investor, asset management, and custodian explicitly make a tripartite agreement, as is known from the area of special funds. A contract between the custodian and the investor is also to be assumed if, in addition to the provisions on the investment contract, the investment conditions contain the express declaration of the custodian's intention to be bound to the investors and the investors agree to these investment conditions.[28]

If the investor does not have an independent contract with the custodian, he could still claim against the latter by classifying the custodian agreement as a *contract in favour of the investors*. However, the author also rejects this view, claiming that a contract in favour of a third party requires the private, autonomous decision of the custodian.[29] However, if the intention of the asset management and the custodian in the legal transaction does not justify any primary claims by the investors against the custodian, the custodian agreement could still be classified as a *contract with a protective effect in favour of the investors*. Then the investors would at least be entitled to accessory claims against the custodian.[30]

If any link to the will of the parties to establish the legal relationship between the custodian and the investors fails, one could conclude that the custodian has no special legal relationship with the investors. Investors would then be required to claim damages under *tort law*, and it would be decisive which obligations of the depositary are to be classified as protective laws.[31]

So, in the absence of legally justifiable alternatives, only a special relationship remains in the form of a *legal obligation* under Securities Law. The result of the legal obligation established in this way will hardly differ from the acceptance of a contract in favour of third parties with legally prescribed content. However, a legal obligation is dogmatically more rigorous because, in contrast to any construction based on a contract in favour of third parties, it emphasizes that the custodian is obliged to perform its duties not because investors want it, but because it is legally required to do so.[32]

28 Urhahn (2021), pp. 73-76.

29 Ibid., pp. 76-77.

30 Ibid., pp. 77-78.

31 Ibid., pp. 78-80.

32 Ibid., pp. 80-84.

## 4. Procedural Agreements

The connection between substantive law and procedural law is a longstanding focus in modern legal science. In 1868, Oskar Bülow projected the idea of procedural relation. This was a concept inspired by the nineteenth century´s idea of legal relationship, and in a certain way parallel to it; but it was a relationship of an autonomous nature, radically different, because it had a public nature.[33] In this context, the problem of the various manifestations of private autonomy with respect to that new reality of public law immediately arose, mostly because the whole procedural law up until then was conceived by private conceptions. The procedural law then in force throughout Europe found its source of inspiration in the French *Code de Procédure Civile* of 1806. And it is known that this is the least innovative code of all those developed in the Napoleonic era. In fact, it could be said that it is only a renewed, reordered, and codified version of the *Ordonnance civile* formulated under Louis XIV.

By the end of the nineteenth century, the prevalent model of procedural law in Europe was the codified Roman-Canonical procedure, which was aligned with the liberal ideal of two parties with freedom and equality of arms to battle each other without state interference. The private will of the parties was the driving force behind the development of the procedure. However, the situation changed towards the end of the century.

In 1895, Franz Klein drafted the *Zivilprozessordnung* in the Austrian Empire, marking the beginning of the concept of the procedure as a means of enforcing public social interest, which is ultimately interpreted by the State and its judges. With the growing recognition of the public nature of the procedure, questions naturally arose about the nature, role, and even the legitimacy of private autonomy within the procedure.

The modern concept of procedural agreements, which unifies the various expressions of the parties' will to produce certain effects in a civil procedure, was formulated by Josef Kohler. He consolidated them into a single category.[34] In recent times, a renewed interest in procedural agreements can be observed. In Germany, Gerhard Wagner published the current reference work, *Prozessverträge*, with unprecedented ambition and exhaustiveness on this topic.[35] In France, the *contrats de procédure*, which are agreements that have been recently studied by Loïc Cadiet, are being experimented with extensively.[36]

33 Büllow (1969), p. 3.

34 Kohler (1894), p. 155.

35 Wagner (1998), p. 48.

36 Cadiet (2008), p. 34.

Procedural agreements are commonly understood as bilateral agreements that have their main effect on the procedure. The Portuguese legislation does not have any general regulation on the law of procedural agreements, focusing instead on specific types of procedural agreements, for example, Article 345.º of the Civil Code, regarding evidence, and Article 95.º of the Civil Procedural Code, regarding jurisdiction. The development of procedural contract law thus falls to scholars, who have dedicated significant effort to this task.[37]

The fundamental question of the legal nature of procedural agreements has not yet been clarified in a valid way. However, a basic set of recognized regulations has emerged, and for a better understanding of the considerations on procedural agreements in Securities Law, this basic set should be presented. Procedural agreements are often divided into disposal contracts (*Verfügungsverträge*) and obligational contracts (*Verpflichtungsverträge*) according to their procedural effect.[38] The disposal contracts are intended to tailor the civil procedure directly, while the obligational contracts are intended to obligate the parties to act or refrain from certain procedural actions.

However, the concept of *attribution*, as defined by Pedro Múrias, can provide a better understanding of the nature of the obligations or duties that arise from procedural agreements. According to Múrias, attribution refers to a valid norm that satisfies one party when an event that fits a particular description can be attributed to another, and dissatisfaction arises in its absence. Satisfaction of attributions serves as an indicator of legal value, while non-satisfaction indicates a lack of value. This concept is comparable to the performance of obligations, although with a wider scope since obligations are a subcategory of attributions.[39]

In the context of procedural agreements, the use of the terms "duty" or «obligation» may not be conducive from a legal standpoint, as there is no clear standard to determine when a party's behaviour during the execution of the agreement constitutes a duty to perform (or make a payment). Rather, in agreements that modify the burden of proof, the parties' actions are better characterized within the concept of attribution, as no duty to perform is owed. Specifically, the satisfactory event described in the agreement corresponds to what may be considered a duty to perform (or make a payment), while the satisfaction of the attribution aligns with performance. In fact, the party may not want its opponent to produce the evidence that it was required to provide in the agreement, even if this may seem counterintuitive.

37 Cabral (2023), p. 391; Silva (2020), p. 131.

38 Wagner (1998), pp. 35-38.

39 Múrias (2008), pp. 797-856.

### 4.1 Procedural Agreements and Investor Protection

In the context of an investment fund, conflicts of interest may arise and could involve various stakeholders such as fund managers, brokers, financial advisors, or other parties involved in the investment process. These conflicts can be related to compensation structures, fiduciary responsibilities, or any potential biases that might influence decision-making. Also, there are emerging issues and challenges associated with ETFs. This could include liquidity concerns, market impact, or unique risks introduced by specific types of ETFs. These issues might impact investor protection and market stability.

Financial intermediaries, such as brokers or financial advisors, may receive commissions or fees based on the financial products they recommend or sell. This creates a potential conflict of interest, as the advisor may be inclined to recommend products that generate higher fees for them, even if they are not in the best interest of the investor. Fund managers and investment professionals may receive bonuses or performance-based compensation. This can lead to a focus on short-term gains rather than long-term sustainable growth, potentially exposing investors to higher risks. Fiduciary responsibilities require financial professionals to act in the best interests of their clients. Conflicts arise when these professionals prioritize their personal interests over their clients' interests. Lack of transparency or insufficient disclosure about potential conflicts of interest can breach fiduciary duties.[40] Investors have a right to know about any relationships, affiliations, or financial incentives that may influence the financial professional's recommendations.

Although there may be existing standards and regulations for investor protection, especially in the context of retail investors or institutional investors (and these standards are designed to safeguard investor interests), there are gaps or areas where improvements could be made. The effectiveness of the current regulatory framework in ensuring investor protection and procedural agreements can be a powerful tool to protect retail investors.

Consequently, regarding the effectiveness of procedural agreements in Securities Law, it is fundamental to understand that Securities Law can use procedural contract law in attention to investor protection. The law governing investment assets contains provisions that directly or indirectly impact procedural agreements, with the purpose of protecting investors.[41] So, Investor protection is the underlying reason for limiting the effectiveness of procedural agreements.

40 For a comprehensive analysis of the nature and function of fiduciary duties, see Conaglen (2010).

41 Urhahn (2021), pp. 47-58.

The Securities Code includes civil procedural law provisions that set limits on procedural agreements. These provisions can address procedural agreements as well as those that relate to Civil Procedural Law. An example is Article 31 of the Securities Code, which enumerates the persons who have the right to file a class action[42] for protecting analogous individual interests or collective interests of retail investors in financial instruments.[43]

These norms are mandatory because they protect two public interests: the effectiveness of judicial protection for investors and investor protection, which involves investor confidence in a typified, consistent, and favourable legal structure for investment assets.

Accordingly, the Article 321.º, n.º 3, of the Securities Code, stipulates that the framework for standard contractual clauses applies to financial intermediation contracts and, for this purpose, retail investors are comparable to consumers. This is important because, with this comprehension, it becomes evident that clauses that reverse the burden of proof against the retail investor are invalid, in attention to Article 21.º, *g*, of the Standard Contractual Clauses Legal Regime. Also, Article 321.º, n.º 1, of the Securities Code, states that financial intermediation contracts shall be made in writing, under European Union legislation, and contracts entered with retail investors may only be claimed to be void by the latter if they are not in writing. So, contracts, including procedural agreements, that are not in written form are void and only the investor can invoke invalidity. On the other hand, contracts concluded with qualified investors can be oral contracts.

The Securities Code imposes requirements regarding the form of most contracts related to investment assets. The formal requirements of substantive law extend to procedural agreements concerning disputes arising from the investment contract, as stipulated in Article 4.º of the Securities Code. This form primarily serves the investors, who should be able to inform themselves about all agreements related to the investment.

The same Article 321.º, n.º 5, of the Securities Code, also stipulates that in intermediation contracts entered with retail investors residing in Portugal, to execute transactions in Portugal, the application of the competent law cannot result in depriving the investor of the protection granted under this chapter and Section III of Chapter I regarding information, conflict of interests and asset segregation. The purpose of this regulation is individual investor protection, ensuring that, among other things, retail investors do not have to litigate abroad. Also, Article 27 of the General Clauses Legal Regime aims to provide the highest possible protection for Portuguese investors against litigation abroad.

42 See Mulheron (2004); Sousa (2004), pp. 279-318.

43 Ascensão (2007), pp. 65-75.

In a preliminary conclusion, it can be stated that the criteria for the legally secure implementation of procedural agreements in investment law is a complex matter. From an evaluative perspective, the protection of retail investors proves to be the primary motivation for the specific requirements imposed by Securities Law on the effectiveness of procedural agreements. From a Securities Law perspective, the development of investor protection is a central regulatory objective that applies to all areas of the capital markets. From a Civil Procedural Law perspective, the impact of investor protection on the law of procedural agreements is possible because Civil Procedural Law, which governs procedural agreements, incorporates certain principles from substantive Civil Law.

Legal professionals need to recognize this interconnection and assess, on a case-by-case basis, which procedural agreement should be applied to each participant in an investment asset and how the respective investment asset is organized. Only by doing so the implementation of procedural agreements in Securities Law can be successful.

Procedural agreements are most likely to be established when the investment asset is created through individual agreements or when it involves a specialized investment asset. In contrast, the risk of procedural agreements being ineffective is high when it is intended for terms and conditions that qualify as general clauses applicable to retail investors.

### 4.2 Procedural Agreements Regulated by Law

Procedural agreements are a product of the contemporary movement to replace rigid procedures with more flexible ones, reflecting a cultural shift toward the discretion of the parties. Even though the term “procedural agreement” may appear to be an oxymoron, given that it combines two seemingly opposing concepts, namely, “procedure” and “agreement”, since there is a common understanding that civil procedure involves a disagreement between the parties. Keeping this in consideration, the research is devoted to the question of whether procedural agreements can be implemented within an investment fund and who is bound by them. This addresses the use and scope of procedural agreements in Securities Law.

Procedural agreements are subject to general principles of contracts as they are concluded according to Article 405 and interpreted according to Article 236 of the Civil Code. Interpretation is relevant to understand in which of the parties involved in an investment fund there is a contractual relationship. Procedural agreements can be concluded most easily regarding disputes arising from these legal relationships, since the parties here conclude a contract anyway.

The relationships between investors, asset management, and custodian are part of the complete description of the legal relationships under civil law that characterize an investment fund and in connection with which procedural agreements can be concluded. So, the following is not about presenting the rights and duties of all parties in detail. It is sufficient to show the existing relationships and to take a position on those controversies that are relevant regarding procedural agreements.

In addition to the conclusion and scope of the procedural agreements in Securities Law, which are intricately linked to the Law of Investment Funds, particularities have arisen concerning the effectiveness of procedural agreements in Securities Law. For example, the Securities Code contains several provisions that qualify as Civil Procedural Law and can therefore influence the admissibility of procedural agreements in Securities Law under Civil Procedural Law.

Quite a few provisions of Securities Law also protect the creation and/or the preservation of certain investment law claims. This evaluation is to be transferred to procedural contract law, so that procedural agreements are ineffective if they would undermine the protection of claims under Securities Law. In this way, procedural agreements that are ineffective may include the Securities Law revocation of rights, the liability of the custodian, the prospectus liability, and the liability of the asset management.

So, moving further, examples of procedural agreements in Securities Law regarding retail investors are mediation agreements, as stated in Articles 33.º and 34.º of the Securities Code. Mediation will be confidential, and the mediator shall be bound to secrecy in relation to all information obtained during mediation.

Also, the investor is entitled to resort to alternative dispute resolution mechanisms, such as arbitration, in addition to seeking remedies through ordinary legal proceedings and filing complaints with the Securities Market Commission. The financial intermediary ensures the availability of such extrajudicial means of complaint and alternative dispute resolution by adhering to entities duly authorized to conduct arbitrations, which will be disclosed by the asset management.

Recently, the Portuguese Securities Market Commission (CMVM) signed two protocols, one with 25 (twenty-five) financial intermediaries and another with the 7 (seven) Consumer Conflict Arbitration Centres that are part of the consumer arbitration network. The purpose of these protocols is to establish a solution to enhance the resolution of potential conflicts between financial intermediaries supervised by the CMVM and retail investors. With these protocols, the aim is to promote the use of alternative dispute resolution mechanisms that are

speedy and have very low or no costs for investors, as an alternative to resorting to judicial courts.[44]

In the protocol between the CMVM and financial intermediaries, the institutions commit to accepting requests for mediation and arbitration of disputes up to 15,000 euros, filed by retail investors, related to financial intermediation matters. In the agreement between the CMVM and Consumer Conflict Arbitration Centres, these centres agree to accept these disputes without the need for prior adherence by the financial intermediaries subscribing to the protocol with the CMVM. The CMVM also commits to providing the Arbitration Centres, whenever necessary, with training content in specific areas of financial intermediation activities. Both protocols stipulate that all involved parties commit to disseminating information about the existence of alternative dispute resolution mechanisms, especially on their websites.

### 4.3 Scope of Procedural Agreements within an Investment Fund

Therefore, two contractual relationships can be found in investment funds, namely the investment contract between each individual investor and the asset management and the custodian agreement between the asset management and the custodian bank. As a rule, the conclusion of procedural agreements is only possible regarding these two legal relationships. Furthermore, the investors do not know each other and do not contact each other. It is consequently unlikely that procedural agreements will be concluded between investors and in the relationship between investors and the custodian entity.

According to the basic legal concept, the scope of procedural agreements within an investment fund is also limited to contractual legal relationships, namely to relationships between the investors and the asset management and to relationships between the asset management and the custodian bank. For retail investors, the legal concept of the investment fund means that they are only bound by the procedural agreements that they can read and agree to in the investment conditions. The custodian agreement, which is not accessible to investors, cannot bring to them any surprises in terms of litigation.

44 For a comprehensive analysis on protocols, and the collective regulation of the procedure, from the perspective of French law and Italian law, see Canella (2010), pp. 570-580.

## Conclusion

The requirements that must be met by anyone who wants to implement a procedural agreement in the documents of an investment fund do not follow a simple checklist. Instead, they draw upon a complex framework that includes many sides of the legal landscape. These include principles of Civil Procedural Law, alongside elements from substantive law, and Securities Law.

Primarily, it became clear that the highest attention is required when entering a procedural agreement in Securities Law, mainly because at least three players are involved in an investment fund: the investors, the asset management, and the custodian entity. These actors are not linked to one another via a central contract; instead, there are several special relationships within the investment contract and the custodian agreement.

In addition, there is no legal regulation nor a case law for the relationship between the investor and the custodian. Therefore, anyone who wants to enter into procedural agreements for disputes arising from these contractual legal relationships must be prepared for their effectiveness to be tested.

## Bibliography

Almeida, Margarida Azevedo de (2018). *A responsabilidade civil por prospecto no direito dos valores mobiliários – o bem jurídico protegido*, Almedina, Coimbra.

Antunes, José Engrácia (2009). Os contratos de intermediação financeira, in *Separata de Boletim da Faculdade de Direito*, vol. 85, pp. 277-319.

Antunes, José Engrácia (2014). *Instrumentos financeiros*, 2.ª ed., Almedina, Coimbra.

Aristotle (2017). *Politics*, Benjamin Jowett (transl.), The Modern Library, New York.

Ascensão, José de Oliveira (1999). A celebração de negócios em bolsa, in *Ordem dos Advogados*, Lisboa.

Ascensão, José de Oliveira (2007). A acção popular e a protecção do investidor, *Caderno do Mercado de Valores Mobiliários*, n.º 11, 65-75.

Awrey, Dan (2012). "Complexity, innovation and the regulation of modern financial markets", *Harvard Business Law Review*, 235-294.

Booth, Richard A. (1999). The suitability rule, investor diversification, and using spread to measure risk, *The Business Lawyer*, vol. 54, n.º 4, 1599-627.

Büllow, Oskar (1969). *Die Lehre von den Prozesseinreden und die Prozessvoraussetzungen*, reprint, Scientia, Aalen.

Cabral, Antonio (2023). *Convenções processuais*, JusPodivm, Salvador.

Cadiet, Löic (2008). "Les conventions relatives au proces en droit français: sur la contractualisation du reglement des litiges", in *Accordi di parte e Processo, Supplemento della Rivista Trimestrale di Diritto e Procedura Civile,* Giuffré, Milano, pp. 7-35.

Câmara, Paulo (2018). *Manual de direito dos valores mobiliários*, Almedina, Coimbra.

Canella, Maria Giulia (2010). "Gli accordi processuali francesi volti alla «regolamentazione collettiva» del processo civile", *Rivista Trimestrale di Diritto e Procedura Civile*, vol. 64, no. 2, Milano, 549-580.

Conaglen Matthew (2010). *Fiduciary loyalty. protecting the due performance of non-fiduciary duties*, Hart Publishing, Oxford.

Cordeiro, A. Barreto Menezes (2018). *Manual de direito dos valores mobiliários*, Almedina, Coimbra.

Cordeiro, A. Barreto Menezes (2020). "O contrato de gestão de carteira", *Revista de Direito Financeiro e dos Mercados de Capitais*, vol. 2, n.º 6, 1-36.

Cunningham, Lawrence A. (2002). Behavioral finance and investor governance, *Washington & Lee Law Review*, Vol. 59, no. 3, 767-837.

Da Frada, Manuel A. Carneiro (2020). "A responsabilidade dos intermediários financeiros por informação deficitária ou falta de adequação dos instrumentos financeiros", in *Homenagem ao Professor Doutor Germano Marques da Silva*, vol. III, Universidade Católica Editora, 1571-1580.

Duarte, Rui Pinto (2000). "Contratos de intermediação no Código dos Valores Mobiliários", *Cadernos do Mercado de Valores Mobiliários*, n.º 7, 351-352.

Fama, Eugene F. (1970). "Efficient capital markets: a review of theory and empirical work", in *The Journal of Finance*, vol. 25, no. 2, 383-417.

Fama, Eugene F. (1991). Efficient capital markets: II, *The Journal of Finance*, vol. 46, no. 5, 1575-617.

Garten, Helen A. (2001). *US financial regulation and the level playing field*, Palgrave Macmillan, London.

Graham, Benjamin, Dodd, David L. (2009). *Security Analysis*, 6.th ed., McGraw Hill, New York.

Jolowicz, John Anthony (2000). Protection of diffuse, fragmented and collective interests, in *On Civil Procedure*, Cambridge University Press, Cambridge, 95-96.

Kahneman, Daniel (2011). *Thinking, fast and slow*, Farrar, Straus and Giroux, New York.

Kohler, Joseph (1894). *Ueber process rechtliche verträge und creationen, Gesammelte Beiträge zum Zivilprozess*, Carl Heymmanns, Berlin.

Leitão, Luiz Menezes (2015). "O contrato de gestão de carteiras", *Cadernos do Mercado de Valores Mobiliários*, n.º 51, 109-121.

Mulheron, Rachael (2004). *The class action in common law legal systems: a comparative perspective*, Bloomsbury Publishing, United Kingdom.

Munger, Charles T.; Kaufman, Peter d. (2005). *Poor Charlie's almanack: the wit and wisdom of Charles T. Munger*, 3.rd ed., Walsworth Publishing Company.

Múrias, Pedro (2008). Um conceito de atribuição para o direito do não cumprimento, *O Direito*, ano 140.º, n.º IV, Almedina, Coimbra, 797-856.

Silva, Paula Costa e (2005). *Direito dos valores mobiliários – relatório*, Coimbra Editora, Coimbra.

Silva, Paula Costa e (2009). *As operações de venda a descoberto de valores mobiliários*, Coimbra Editora, Coimbra.

Silva, Paula Costa e (2020). *Perturbações no cumprimento dos negócios processuais*, AAFDL, Lisboa.

Shiller, Robert J. (2003). "From efficient markets theory to behavioral finance", *The Journal of Economic Perspectives*, vol. 17, no. 1, 83-104.

Sousa, Miguel Teixeira de (2004). "A tutela jurisdicional dos interesses difusos no Direito Português", *Estudos do Direito do Consumidor*, *Faculdade de Direito da Universidade de Coimbra*, n.º 6, 279-318.

Urhahn, Alexander Matthias (2021). *Prozessverträge im Investmentrecht*, Nomos, Baden-Baden.

Wagner, Gerhard (1998). *Prozeßverträge. Privatautonomie im Verfahrensrecht*, Mohr Siebeck, Tübingen.