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Taking Security in Nigeria

A Comparative Guide for Investors

ABOUT THIS GUIDE

In light of Africa's sustained economic growth over the last decade, the continent has become an increasingly attractive destination for investment.

However, to a foreign investor, assessing legal risk requires an understanding of the laws and the legal system particular to the jurisdictions in which the investment is being made.

Taking Security in Nigeria - A Comparative Guide for Investors provides an overview of the types of assets over which security can be taken in Nigeria, the different types of security, as well as the related procedures for the perfection and enforcement of such security.

This Nigeria guide forms part of a wider series focusing on the most active jurisdictions in Africa, and was prepared with the help of Nigerian firm Templars, Aluko Oyeboade and G. Elias & Co.



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NIGERIA

TYPES OF SECURITY INTERESTS

What categories of assets are typically provided as security to lenders in Nigerian financings?

Shares

Security can be taken in the shares of a company incorporated in Nigeria by way of a mortgage or a charge. In Nigeria, shares in companies are issued in registered form and not bearer form. Therefore, a pledge of shares by mere delivery of the share certificates to the secured party would not be an effective means of creating security as a share certificate is merely evidence of title and not an instrument conferring title.

Bank Accounts

The most common security interest taken over bank accounts is a charge, which can be either a fixed or a floating charge. For a fixed charge, the secured party/chargee has control over the charged accounts and the chargor is prevented from dealing with the charged accounts without the chargee's consent. With a floating charge, the chargor retains control of the charged accounts until the charge crystallises into a fixed charge following certain events, which usually are specified in the security document.

Land

Security over land is granted by way of a legal or an equitable mortgage.

Contractual Rights

Rights arising under a contract or an agreement are usually assigned by way of security to a secured party, with a provision for re-assignment to the assignor after the secured obligations have been discharged. Depending on the terms of the contract or agreement, an assignment might be subject to the prior approval of the counterparty.

Insurance Proceeds

Insurance proceeds are usually assigned by way of security to a secured party, with a provision for re-assignment to the assignor after the secured obligations have been discharged.

The Central Bank of Nigeria prohibits a Nigerian resident (whether a corporate or a natural person) from assigning Nigerian residents' annuities and insurance policies to non-residents. If a non-resident lender proposes to take security over residents' insurance policies, that lender would either: (i) appoint a local security agent to which the insurance proceeds are assigned on the lender's behalf, or (ii) require the borrower to establish an insurance proceeds account into which all insurance proceeds are paid, and then take security over that account.

The insurance regulator in Nigeria recently outlawed the assignment of reinsurance policies.

Authorisations and Licences

Rights arising under authorisations and licences can be assigned by way of security to a secured party. However, since authorisations and licences are considered personal to the beneficiary or licence holder, an assignment or transfer of the beneficiary's or licence holder's rights to a third-party as security requires the issuing authority's consent. Accordingly, the terms of most authorisations and licences (including oil mining licences, mining permits and licences issued in the electricity sector) usually would prohibit its holder(s) from mortgaging, charging or otherwise encumbering its interest under the authorisation or licence without the issuing authority's prior consent.

Intellectual Property

Security over patents, trademarks, copyright and designs is typically granted by way of a fixed charge or an assignment by way of security. Security can also be taken over intellectual property by way of a mortgage or a floating charge.

Personal Property and Tangible Assets

Security over tangible assets such as plant and machinery and other moveable assets can be granted by way of a mortgage, charge or a pledge. A pledge of the assets involves the deposit of the tangible moveable asset with the secured party/lender as security for the secured obligations, and on the condition that the assets will be returned to the pledgor after the secured obligation has been discharged.

Can security be taken over future assets?

Security can be granted over future assets either by way of a floating charge over a specified category of assets or by way of a fixed charge (where the future assets in question are clearly identifiable). For the fixed charge, the security interest attaches to future assets as soon as the assets are acquired, but the security interest is deemed created on the security instrument's execution date.

Are there any restrictions on who can legally grant and/or hold a security interest?

Under Nigerian law, generally, the following are restricted or prohibited from granting security:

- **Statutory corporations:** The capacity of a statutory corporation to grant security over its assets will depend on the establishing statute of that statutory corporation. Where the establishing statute does not include an express right to grant security, the relevant statutory corporation would be prohibited from doing so.
- **Incorporated companies:** The ability of an incorporated company to grant security over its assets may be limited by the articles and memorandum of association of that company. Where a company's articles and memorandum of association are silent on the ability of that company to grant security, any such grant of will be ineffective unless ratified by a resolution of its shareholders and its board of directors.
- **Banks:** A bank cannot grant security over its assets without the prior written approval of the Central Bank of Nigeria.
- **Trustees:** Generally, a trustee has power to grant security over any trust property, except where if such power is expressly restricted by law or in the instrument of trust.
- **Adjudged bankrupts:** Under the Nigerian Bankruptcy Act 2004 (the Bankruptcy Act), a person's assignment (including an assignment by way of security) of his or her future or existing book debts will be void against the bankruptcy trustee as regards any book debts that have not been paid at the bankruptcy's commencement, unless that assignment has been registered with the Chief Registrar of the Federal High Court in a register that person keeps for that purpose. Other circumstances under which a security interest could be set aside (including on an insolvency or a bankruptcy) are discussed further below.

Are security trustees or security agencies recognised under Nigerian law? If so, do any steps need to be taken to ensure the enforceability of a security trustee's or a security agent's right in the secured property?

Both security trustees and security agents are recognised under Nigerian law. A security trustee or agent can be appointed to hold security in trust on behalf of lenders and other secured parties. If a security trustee or agent is validly appointed, no additional steps are required for the trustee or agent to be recognised under Nigerian law and, provided that any security interests granted in favour of that trustee or agent have been properly perfected, the trustee's or agent's rights over the security interests are enforceable.

What about third-party security?

Under Nigerian law, a company incorporated in Nigeria can grant third-party security if its constitutional documents permitted the company to do so, and if its directors, acting in good faith and in the best interests of the company, approve the arrangement. If the arrangement's commercial benefit is unclear, shareholder approval of the transaction should also be obtained to avoid claims against the directors for breach of their fiduciary duties to the company.

PERFECTING SECURITY INTERESTS AND PRIORITY

Are there any asset-specific perfection requirements?

Shares

To perfect an equitable mortgage or charge over shares, the mortgagor must deposit the share certificates with the secured party/mortgagee with or without a memorandum of deposit. The mortgagor must also provide the mortgagee with an undated share transfer form in respect of the shares executed in blank. These documents will also be accompanied by a signed and undated resolution of the mortgagor's board of directors approving the transfer of the shares in the event of an enforcement. Note that this resolution may no longer be deemed valid upon enforcement if the board of directors has been reconstituted since the grant of security.

To perfect a legal mortgage over shares, the mortgagee must be registered as a shareholder in the register of company members, with an undertaking for re-transfer of the shares to the mortgagor following discharge of the secured obligations.

There is no requirement to register a charge over shares with the Corporate Affairs Commission (the CAC), but if the mortgaged/charged shares are transferred on enforcement, the transferee must be registered as a shareholder in the register of company members.

Additional steps are required to be taken to perfect charged shares that are in dematerialised form and deposited with Nigeria's Central Securities Clearing System (the CSCS), which include the secured parties submitting to the CSCS a memorandum the chargor and chargee have jointly signed, requesting the CSCS to place a lien on a specified number of the shares.

Bank Accounts

A floating charge a company creates over its cash deposits or bank accounts is not registrable at the CAC. In practice, an account bank will usually require notification of a security interest over accounts the bank holds. Notifying the account bank of a charge over an account is recommended in any event.

Land

Governor's and other consents: Under the Land Use Act 2004 (the Land Use Act), an assignment, mortgage, transfer, sublease or other disposal of an interest in land requires the consent of the Governor of the State in which the land is situated in order to be valid and enforceable. Accordingly, this consent is required for a legal mortgage to be valid and enforceable at the time of its creation. However, in the case of an equitable mortgage that does not constitute a transfer of title in land to the mortgagee, the Governor's consent is not required at the time of the mortgage's creation, but will be required at the point of enforcement.

Taking security over land held by the Federal Government of Nigeria or any of its agencies also requires the consent of the Minister of Lands, Housing and Urban Development, or, if the land is situated in Abuja, the Minister of the Federal Capital Territory.

Registrations: An instrument creating a mortgage over land must be filed at the relevant lands registry. This filing can only be made once any applicable stamp duty has been paid in respect of the instrument, and the Governor's consent has been endorsed the instrument.

To create an equitable mortgage, the mortgagor deposits the title deeds to the property with the mortgagee together with a memorandum of title deposit that sets out the terms of the mortgage or obligates the mortgagor to execute a legal mortgage when required to do so. An equitable mortgage can also arise under an agreement to create a legal mortgage if there has been no conveyance or the relevant statutory forms have not been completed.

If the mortgagor for a legal or an equitable mortgage is a company, the stamped and endorsed mortgage instrument also must be registered at the CAC.

Contractual Rights and Insurance Proceeds

Under Nigerian law, in order to perfect an assignment of contractual rights, notice of the security interest must be given to the counterparty of the underlying contract, subject to prior compliance with any approval rights of the counterparty thereunder. For an assignment of insurance proceeds, this means giving notice to the insurer under the policy. An acknowledgment of the notice of assignment is not required as a matter of law. However, secured parties usually require the assignor to procure an acknowledgment of the notice of assignment in an agreed form and a confirmation from the contract counterparty or insurer that the contract counterparty or insurer has received no notification of any prior assignment or security interest regarding the underlying contract.

If the assignor is a company, an assignment of contractual rights and insurance proceeds is required to be registered at the CAC.

Authorisations and Licences

If the issuing authority has consented to the beneficiary or licence holder assigning by way of security the beneficiary's or license holder's rights under an authorisation or licence, the assignment can be perfected in the same manner described above for assignments of contractual rights.

Intellectual Property

An instrument creating a security interest over a trademark or patent must be registered at the Trade Marks and Patent Registry. Assignments or other security interests for patents and designs also must be registered at the Patents and Design Registry in order to be effective against third parties. Additionally, to perfect a security interest that is a mortgage or a fixed or floating charge granted by a company, the security interest must be registered at the CAC.

Aircrafts, Ships and Vessels

Consents: The Federal Ministry of Transport's written consent must be obtained prior to creating a mortgage over a ship or vessel that is registered in Nigeria by submitting an application to the Director General of the Nigerian Maritime Administration and Safety Agency. The application must be accompanied with a mortgagor board resolution authorising the creation of the mortgage, payment of a nominal consent fee of ₦20 (US\$0.12), and a duly stamped deed of mortgage.

Registrations: A mortgage or charge over an aircraft, ship or vessel must be registered with the CAC and the Nigerian Maritime Administration and Safety Agency (for a mortgage over a ship or vessel) or the Nigerian Civil Aviation Authority (for a mortgage over an aircraft). Mortgages over ships and vessels must also be registered at the ship's or vessel's port of registry.

What are the fees, costs and expenses associated with creating and perfecting security in Nigeria?

Stamp duty: Under the Stamp Duties Act 2004 (the Stamp Duties Act), and subject to limited exceptions, any document that transfers or creates a proprietary interest in assets, such as a security document, is subject to the payment of *ad valorem* stamp duty and must be stamped: (a) if executed within Nigeria, within 40 days of such execution; or (b) if executed outside of Nigeria, within 30 days of that document being received in Nigeria.

The stamp duty payable on a legal mortgage or a debenture deed is 0.375% of the secured amount. In practice, a security document is usually submitted to the Stamp Duties Commissioner for an assessment of the applicable stamp duty prior to paying the duty and stamping the document.

Accordingly, on a large financing, the stamp duty payable for a security document can be very high (and in certain cases, prohibitively so). For lenders to a financing to agree that the borrower can pay stamp duty on only a portion of the secured amount rather than the whole secured amount is not uncommon, with the borrower's further assurance that the full stamp duty will be paid on a future date or upon certain events. This practice is known as "upstamping." Until the security document is upstamped, any such lender is only protected up to the amount expressed to be secured, and a lender may lose priority to any subsequent security granted on the charged assets during the period between the initial stamping and the full upstamping of the security document.

By statute, transactions involving the governments of certain countries or certain multilateral financial institutions such as the International Finance Corporation, the African Export-Import Bank and the Africa Finance Corporation are exempt from stamp duties.

Generally, a failure to stamp a security document does not render the security document or the security interest created thereunder void or invalid. However, the Stamp Duties Act provides that no instrument executed in Nigeria, or wheresoever executed relating to any property situated or any manner or thing done or to be done in Nigeria, will be admissible in evidence or available for any purpose whatsoever, unless duly stamped in accordance with Nigerian law in force at the time when the instrument was first executed. Legal practitioners in Nigeria have interpreted this to mean that a security document is inadmissible in evidence unless it is stamped. A corollary of this is that any security document that is required to be registered with the CAC or any other government body must be stamped prior to its submission for registration. Thus, in relation to registrable security documents, if the documents are not stamped, they will not be accepted for registration and non-registration would render the security void. On the other hand, if the security documents are not registrable, a failure to stamp will simply render them inadmissible in evidence or unavailable for any other purpose in Nigeria until they are stamped.

CAC registration: Under the Companies and Allied Matters Act 2004 (CAMA), any security document or instrument under which a company creates a mortgage or charge (whether fixed or floating) must be registered at the CAC within 90 days of that mortgage's or charge's creation. A failure to register a registrable security document with the CAC will render the mortgage or charge thereunder void against a liquidator or any creditor of that company.

A CAC registration fee of 1% of the secured amount is payable by private companies, or 2% of the secured amount for public companies, on registration of a mortgage or charge with the CAC.

Consent and registration fees on mortgages over land: Under the Land Use Act, an assignment, mortgage, transfer, sublease or other disposal of an interest in land requires the consent of the Governor of the State in which the land is situated, as described above. The fee payable on the application for consent varies from State to State.

The registration of a mortgage over land at the lands registry also attracts a fee, which varies from State to State.

Can security over the same asset be granted to two creditors? If so, how will priority be determined?

A person can grant security over the same asset to two or more creditors. In this case, under Nigerian law, priority among the security interests will depend on the type of security interest and/or the date of the security's creation.

Generally, any earlier created security interest ranks ahead of a later one. However, if a security interest is required to be registered with the CAC, a registered security interest has priority over an unregistered security interest. If two security interests granted to two separate creditors are both required to be registered with the CAC, and are registered as prescribed, the security's date of creation rather than its registration determines priority between the security interests.

A fixed charge on an asset has priority over a floating charge over the same asset, unless (i) the floating charge was created first and on terms prohibiting the chargor from granting any subsequent security having priority to the floating charge; and (ii) the person in whose favour the subsequent security was granted had actual notice of the prohibition at the time the subsequent charge was granted.

A legal mortgage or other security interest has priority over an equitable mortgage or security interest.

Creditors may agree among themselves to contractually vary the order of priority or waive or subordinate their security interests to those of other creditors. This is done under an intercreditor, subordination or priority agreement that would cover issues such as priority of claims and subordination.

ENFORCEMENT OF SECURITY

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take in order to enforce its security interest?

Outside of bankruptcy or insolvency proceedings, a secured party is only able to enforce its security interest in accordance with the enforcement provisions and other terms of the finance and security documents, and as provided by applicable law.

Security documents governed by Nigerian law typically specify the events that allow the security interest to be enforced. Once the holder of a security interest is entitled to enforce the security in accordance with its terms, the security documents typically provide for enforcement through either the: (i) creditor's or security trustee/agent's exercise of a power of sale to dispose of the secured assets; or (ii) appointment of a receiver or a receiver/manager in respect of the secured assets. If the power of sale has arisen and is exercised, the sale of the secured assets can be by public auction or, if expressly provided in the security document, by private sale.

The appointment of a receiver or a receiver/manager needs to be registered at the CAC.

A mortgagee under a legal mortgage relating to land can also: (i) apply for a court order to extinguish the mortgagor's equity of redemption and vest the mortgagor's entire interest in the mortgagee; or (ii) enter into and take possession of the mortgaged property.

The holder of a security interest is not obligated to maximise the proceeds from enforcement of the security, but must act in good faith in realising such proceeds. The holder of a security interest becomes a trustee of the grantor for any proceeds from the sale of the secured assets and has a duty to deliver to the grantor the balance of the proceeds of enforcement after deducting amounts required to discharge the secured obligations.

Are any governmental or other consents required in connection with an out-of-court enforcement of security?

Out-of-court enforcement of any asset generally is permitted under Nigerian law.

Any disposal by a security trustee/agent of land subject to an equitable mortgage requires the prior consent of the Governor of the State in which the mortgaged land is situated if the consent was not obtained before the mortgage's creation. In certain States, foreign purchasers are prohibited from acquiring an interest or right in or over land unless the Governor of the State approves the transaction. In such States, the Governor's consent is required to enforce the security against the mortgaged land if that enforcement will result in the sale of the land to a foreign purchaser. A "foreign purchaser" refers to: (a) an individual that is not a Nigerian national; (b) a company that is not incorporated in Nigeria; or (c) a company that is incorporated in Nigeria but that is majority owned by foreigners.

The sale of a vessel that is subject to a legal mortgage requires the Minister of Transport's prior consent. A disposal of any rights under an authorisation or a licence that is subject to an assignment by way of security requires the issuing authority's prior approval.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of, Nigeria?

Generally, there are no restrictions on who can enforce a security interest over assets in Nigeria, provided the person seeking the enforcement is the secured party, its trustee, agent, assignee, successor or transferee. From a practical perspective, a secured party that is a foreign entity may require a local receiver to act on its behalf.

INSOLVENCY/BANKRUPTCY PROCEEDINGS

Overview

Primary legislation for bankruptcy and insolvency in Nigeria is contained in: (a) the Bankruptcy Act and the Bankruptcy (Proceedings) Rules 1990, which apply if the debtor is an individual or a firm; and (b) the CAMA and the Companies Winding-Up Rules 2001 (the Companies Winding-Up Rules), which apply if the debtor is a limited liability company. This section deals with bankruptcy and insolvency as it applies to incorporated companies only.

The CAMA and the Companies Winding-Up Rules apply only to limited liability companies incorporated in Nigeria and do not apply to statutory corporations or State-owned entities, which instead are governed by their enabling legislation. Usually, if the enabling legislation provides for the insolvency or dissolution of a statutory body, the legislation will also provide for a new entity that will assume that statutory body's assets and liabilities.

Winding up or insolvency registers

Insolvency proceedings against a company must be commenced in the Federal High Court, which is the court with jurisdiction to wind up a company, in the jurisdiction in which the company's registered office or head office is located. A manual search of the Federal High Court's records can be conducted (as the records are not computerised) to determine whether bankruptcy or insolvency proceedings are pending, or a bankruptcy or winding up order has been made against a company.

Are "company rescue" or reorganisation procedures available?

Outside of insolvency and receivership proceedings, Nigerian law allows for a company to enter into a scheme of arrangement with its creditors or undertake corporate restructuring. A scheme of arrangement must be approved by not less than 75% of the company's shareholders and creditors, present and voting at their respective meetings. The scheme must also be referred to the Securities and Exchange Commission for approval and, if approved, sanctioned by the Federal High Court.

Will the commencement of insolvency proceedings against a grantor of security affect the ability of a secured party/creditor to enforce the security interests granted to it by that company?

Provided that the security interest is validly created and has been duly perfected, the insolvency or bankruptcy of the grantor of the security interest will not affect a secured party's ability to enforce the security or a secured party's rights in the secured assets.

Are there any preference periods, claw-back rights or preferential creditors' rights that creditors should be aware of?

Fraudulent preference: The Bankruptcy Act and the CAMA both address situations in which a debtor may fraudulently rank a creditor above other creditors in view of a forthcoming insolvency or bankruptcy proceedings.

The CAMA provides that any conveyance, mortgage or other transaction relating to property, which if done by an individual would be deemed in his bankruptcy a fraudulent preference, will if done by a company be deemed, in the event of the company being wound up, a fraudulent preference of its creditors and invalid.

Under the Bankruptcy Act, any conveyance, mortgage or other transaction relating to property in favour of a creditor made by a company that is unable to pay its debts from the company's own money, will be deemed a fraudulent preference of that creditor and invalid if the company is wound up upon a winding up petition being presented within three months of that transaction, unless one can show that the transaction was done in good faith and for valuable consideration.

Floating charges: Any floating charge on the undertaking or property of a company created within three months of the commencement of winding up proceedings against that company will be invalid (except with respect to the amount of any cash paid to the company in consideration for the floating charge with interest at the current bank rate), unless one can prove that the company immediately after the charge was created was solvent or new money was advanced contemporaneously with or subsequent to the creation of the charge.

Disclaimer of onerous property: With the court's approval, a company's liquidator can disclaim any onerous property in writing signed by the liquidator within 12 months of the commencement of the winding up or such extended period as the court may allow. Onerous property includes unprofitable contracts, any company property considered unsellable or not readily sellable, or any property that may give rise to a liability to pay money or perform other onerous acts. The disclaimer will not affect any proprietary rights and interests that any third-party may have acquired prior to the date of the disclaimer.

Preferential creditors' rights: The ranking or priority of a secured party in whose favour a floating charge is created may be restricted or set aside with respect to preferential creditors. Statutorily preferred debts include local rates, charges, taxes and pay-as-you-earn deductions; deductions under the Nigerian Social Insurance Trust Fund (formerly known as the National Provident Fund)¹; wages and salaries; accrued holiday remuneration; and compensation due to workers. These amounts would rank equally among themselves or rateably if company's assets are insufficient. If a company is not being wound up, payments accruing to the company's preferential creditors have priority over any claim for principal or interest due on debts secured by a floating charge. On a winding up of the company, amounts due to preferential creditors must be paid in priority to all other debts.

Other than payments to preferential creditors, secured assets fall outside of the debtor's assets that are available to the general pool of creditors, and these secured assets are used to satisfy the claims of the relevant secured parties.

Can debt a company owes a creditor be contractually subordinated to debt that company owes another creditor? Are contractual subordination provisions that are agreed among creditors legally recognised on the company's insolvency or bankruptcy?

A debt a company owes a creditor can be contractually subordinated to a debt that company owes other creditors, and contractual subordination ordinarily is recognised and enforceable under Nigerian law.

However, whether contractual subordination provisions are legally valid on the debtor's insolvency are unclear, in which case a liquidator or other insolvency officer of the courts tends to recognise only the order of payments the statute stipulates. The *pari passu* principle (which provides that distributions in a winding up must be made to creditors in each category on a *pari passu* basis) is applicable in the distribution of an insolvent company's assets among its creditors. There is case law in Nigeria that suggests that Nigerian courts can uphold the provisions of an intercreditor or a subordination agreement on the basis that the provisions do not undermine the *pari passu* principle.

How is priority among secured parties determined on the insolvency of the debtor?

Creditors will rank in the following order of priority:

- Creditors secured by way of a fixed charge
- Preferential creditors
- Creditors secured by way of a floating charge
- Secured but contractually subordinated creditors
- Unsecured creditors

¹ The Nigerian Social Insurance Trust Fund is the government agency whose statutory mandate is the provision of social security and social protection for the poor, the aged, the disabled and the disadvantaged members of the population. The Nigerian Social Insurance Trust Fund requires employers to make monthly pension and social security contributions on behalf of their employees.

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