

THE LENDING
AND SECURED
FINANCE REVIEW

SEVENTH EDITION

Editor
Azadeh Nassiri

THE LAWREVIEWS

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PREFACE

This seventh edition of *The Lending and Secured Finance Review* contains contributions from leading practitioners in 21 different countries, and I would like to thank each of the contributors for taking the time to share their expertise on the developments in the corporate lending and secured finance markets in their respective jurisdictions, and on the challenges and opportunities facing market participants. I would also like to thank our publishers without whom this review would not have been possible.

I hope that the commentary that follows will serve as a useful source for practitioners and other readers.

Azadeh Nassiri

Slaughter and May

London

June 2021

NIGERIA

Kofo Dosekun, Oludare Senbore, Ozioma Agu, Oluwatamilore Oluwalaiye and Oluwaseun Ayansola¹

I OVERVIEW

Over the past two years, as Nigeria grapples with the economic challenges arising from the global recession of 2018 and the covid-19 pandemic, Nigeria's fiscal and monetary regulators have sought to deploy a number of economic and regulatory tools or interventions with the objective of stabilising the economy, facilitating and improving access of the real sector of the Nigerian economy to credit and job creation. The Central Bank of Nigeria has been a major driver of this, reform and activities and some of the examples of the actions taken include interventions in the domestic gas and healthcare sectors.

In August 2020, the Central Bank of Nigeria (CBN), whose mandates includes the performance of major developmental functions that are focused on the key sectors of the Nigerian economy (i.e., financial, agricultural and industrial sectors) released the Framework for the Implementation of Intervention Facility for the National Gas Expansion Programme (the Programme). The total size of the Programme facility made available by the CBN is 250 billion naira, and facilities disbursed pursuant to the Programme are to be repaid by 31 December 2030.

The CBN also introduced a 100 billion naira credit support intervention for the healthcare industry to provide credit to Nigerian pharmaceutical companies and other healthcare value chain players that intend to build or expand their capacity.² The Federal Ministry of Finance has also provided 102.5 billion naira in resources for direct interventions in the country's healthcare sector in addition to waiving import duty and value added tax on critical medical equipment and supplies.

The CBN further introduced the 50 billion naira Targeted Credit Facility (TCF)³ as a stimulus package to support households and micro, small and medium enterprises (MSMEs) affected by the pandemic. Eligible activities under the scheme include agricultural value chain activities, hospitality (accommodation and food services), manufacturing/value addition among others. Furthermore, the CBN granted an extension of moratorium by one year on

1 Kofo Dosekun is the chair, Oludare Senbore is a partner and Ozioma Agu, Oluwatamilore Oluwalaiye and Oluwaseun Ayansola are associates at Aluko & Oyeboode.

2 CBN Guidelines for the Operations of the N100 Billion Credit Support for the Healthcare Sector, www.cbn.gov.ng/Out/2020/FPRD/healthcareintervention.pdf.

3 CBN Guidelines for the Implementation of the N50 Billion Targeted Credit Facility, www.cbn.gov.ng/Out/2020/FPRD/N50%20Billion%20Combined.pdf.

all principal repayments on all CBN intervention facilities effective on 1 March 2020.⁴ The CBN also directed that interest rates applicable on all CBN intervention facilities be reduced from 9 per cent to 5 per cent per annum for one year, effective on 1 March 2020.

The CBN continues to maintain the existing intervention facilities to facilitate quick economy recovery across the industries that drive the economy. Also, there is a steady increase in the number of companies leveraging the access to some of these developmental intervention facilities provided by the CBN. In particular, the differentiated cash reserves requirement facility (DCRR), which is a special facility regulated by the CBN and provided from the cash reserves held with the CBN on behalf of financial institutions, has been utilised by key players in the industrial space to finance at a single interest rate the development of a variety of projects. The DCRR was utilized for a gas-fired power plant to provide reliable and sustainable power to an industrial manufacturing company and for the development and construction of an iron ore mining project.

II LEGAL AND REGULATORY DEVELOPMENTS

i Recent reforms

The Companies and Allied Matters Act 2020

On 7 August 2020, the President of the Federal Republic of Nigeria signed into law the Companies and Allied Matters Act, 2020 (the CAMA 2020). The CAMA 2020 repeals the Companies and Allied Matters Act, 1990, which had been in force for the past 30 years. One of the major implications of the CAMA 2020 on secured lending transactions is the mode of execution of documents. A company seal is no longer a mandatory requirement under the CAMA. Where a company chooses to have a common seal or continues to use its existing company seal, the design and use of the seal shall be regulated by the company's articles, and the name of the company shall be engraved in the seal. Therefore, a company may validly execute a document as a deed, without affixing a common seal, if the document is executed by (1) a director and the company secretary; (2) at least two directors of the company; or (3) by a director of the company in the presence of at least one witness who shall attest the signature. Documents or proceedings (other than deeds) that require authentication by a company, may be signed by a director, secretary, or other authorised officer of the company. The CAMA 2020 also recognises the use of electronic signatures as due authentication of documents or proceedings by a company.

The CAMA 2020 also introduces provisions for netting arrangements, which confirms the enforceability of netting arrangements against an insolvent party, and, where applicable, a guarantor or other person providing security for a party. Provisions of a netting arrangement under qualified financial contracts shall not be affected by any applicable insolvency law limiting the right to set-off or net-out obligations, payment amounts, or values owed between an insolvent party and another party.

⁴ CBN Policy Measures in Response to COVID-19 Outbreak and Spillovers, www.cbn.gov.ng/Out/2020/FPRD/CBN%20POLICY%20MEASURES%20IN%20RESPONSE%20TO%20COVID-19%20OUTBREAK%20AND%20SPILLOVERS.pdf.

The CAMA 2020 has also introduced new insolvency proceedings such as administration and company voluntary arrangements, and thus both secured and unsecured lenders need to pay particular attention to the nature of their rights, powers and the new statutory protections that a company facing financial difficulties may seek to take advantage of.

The CAMA 2020 and the subsequent Companies Regulations 2021 have also significantly reduced transaction costs for secured lenders. Under the CAMA 1990, the cost of registration of charges was 1 per cent and 2 per cent of the secured amount for private and public companies respectively. The CAMA 2020 has significantly reduced the aforesaid cost of registration to 0.35 per cent of the secured amount. It is important to also note that particulars of any negative pledge must be noted at the companies' registry and will constitute constructive notice to any subsequent holder of a charge, which is a departure from the previous situation where registration did not constitute constructive notice.

ii The Banks and Other Financial Institutions Act 2020

The Banks and Other Financial Institutions Act 2020 (BOFIA 2020)⁵ was signed into law on Thursday, 12 November 2020. The BOFIA 2020 repeals the Banks and Other Financial Institutions Act (BOFIA 1991).⁶

The BOFIA 2020 has among other things expanded the definition of 'banking business' (which was previously limited to receiving deposits, paying or collecting cheques and provision of finance) to include the provision of finance consultancy and advisory services relating to corporate and investment matters, making or managing investments on behalf of any person whether businesses are conducted digitally, virtually or electronically only or other business as the governor of the CBN may, by an order published in the Gazette, designate as a banking business.

The BOFIA 2020 has also expanded the definition of other financial institutions to include credit bureaus, international money transfer services, mortgage refinance, mortgage guarantee, financial holding company or payment service providers and businesses whose principal objects include factoring (regardless of whether the businesses are conducted digitally, virtually or electronically).

The implication of these expanded definitions is to bring a wide variety of financial services companies, businesses and activities under the regulatory oversight of the CBN. This will subject all of these businesses and activities, such as payment service companies and financial holding companies, to additional regulatory compliance obligations that may be imposed by the CBN.

Another key feature of the reform brought under the BOFIA 2020 is its recognition and protection of netting agreements. It should be noted that in relation to banks and OFIs, the netting provisions in BOFIA 2020 will take precedence over the netting provisions in the Companies and Allied Matters Act 2020. The triggers for netting under BOFIA 2020 are where: (1) the license is revoked; (2) the bank is wound up; and (3) a liquidator is appointed.

Furthermore, the BOFIA 2020 has expanded the rescue tools for failing banks and has empowered the CBN so that it may employ any one of the following tools to rescue a failing bank:

5 No. 183, Federal Republic of Nigeria Official Gazette, No. 163, Vol 107, 2020.

6 Cap. B3, LFN 2004.

- a* suspend any payment or delivery obligations under any contract to which the bank in question is a party;⁷
- b* transfer part or the whole of the banking business to third party private purchasers or employ any other intervention tool that the CBN considers appropriate;⁸
- c* acquire the shares of any failing bank up to a level that guarantees its control of the bank. However, the CBN must dispose of the equity investment in the failing bank at the earliest suitable time;⁹
- d* issue a bail in certificate that operates to cancel, modify or suspend an eligible instrument (including judgement debts);
- e* transfer the assets of a bank, specialised bank or OFI to one or more private asset management vehicles; and
- f* transfer to a purchaser, shares or other instruments of ownership issued by the bank and assets of the bank.

We note finally that the changes introduced by the BOFIA 2020 were driven by the need to close the regulatory gaps in BOFIA 1991 and to ensure that the primary statute regulating banking and other related matters Nigeria is modern and aligns with international best practices.

iii The Finance Act 2020

Further to the changes introduced by the Finance Act 2019, on 31 December 2020, the Finance Act 2020 was signed into law. The Finance Act 2020 amends various provisions in 14 tax and fiscal statutes, geared towards preventing tax evasion, enlarging the tax base in Nigeria, clarifying ambiguous tax statutes and improving general tax administration. The effective date of the Finance Act 2020 is 1 January 2021.

The Finance Act 2020, among other things, limits the categories of agricultural companies that would enjoy tax exemption on interest income for loans to only companies engaged in ‘primary agricultural production’ as defined under the Finance Act 2020. In addition, the moratorium on these loans must not be less than 12 months.

The Finance Act 2020 also resolved the debate about the power of the Minister to determine the effective date of the new VAT rate introduced by the Finance Act 2019 by statutorily recognising the effective date for computation of VAT at the new rate of 7.5 per cent. The Finance Act 2020 expressly provides that the effective date for computing VAT at the rate of 7.5 per cent is 1 February 2020. The implication of this is that all invoices issued on 1 February 2020 or after are required to utilise the VAT rate of 7.5 per cent.

The Finance Act 2020 has also revised the definition of taxable supply of goods and services. Taxable goods have been redefined to include all forms of tangible property, movable or immovable, but excludes money, securities, land and building, while taxable services are redefined to include incorporeal rights, but this excludes interests in money, securities, land and building. The revised definitions were instructive to clarify that VAT is not payable on the sale of shares, securities or land, as this was not made clear under the Finance Act 2019.

Both the Nigerian Export Processing Zone Act and Oil and Gas Export Processing Free Zone Act were also amended to make their provisions subject to the provisions of the

7 Section 34(2)(b) of BOFIA 2020.

8 Section 34(2)(h) and (i) of BOFIA 2020.

9 Section 34(3) of BOFIA 2020.

Banks and Other Financial Institutions Act and to mandate companies in the zones to file companies income tax returns in compliance with Section 55 of the Companies Income Tax Act.¹⁰

Another significant provision introduced by the 2020 Finance Act is the significant economic presence rule. This is discussed in Section III.

iv The CBN Guidelines on Global Standing Instructions (GSI)

On 13 July 2020, the CBN issued the Guidelines on the Global Standing Instruction for Individuals (the GSI Guidelines). The Guidelines took effect from 1 August 2020. The CBN through the GSI Guidelines seeks facilitate an improved loan repayment culture, reduce non-performing loans, watch-list consistent loan defaulters and enhance loan recovery across the Nigerian banking industry.

The borrower must have executed a GSI mandate in favour of the participating financial institution (PFI) to come under the GSI Guidelines. Thus, execution of the GSI mandate is likely to be inserted in the standard offer letters of most PFIs and made a condition precedent to disbursement. Pursuant to the GSI Guidelines, in the event of default, the PFI may, as a last resort and without recourse to the borrower, recover past due obligations (principal and accrued interests only, excluding any penal charges) from a defaulting borrower through a direct set-off from deposits or investments held in the borrower's accounts with any other PFI.

To be eligible, a PFI must:

- a* be a financial institution duly licensed by the CBN;
- b* have adequate information technology infrastructure to meet all the connectivity and protocol requirements at Nigeria Inter-Bank Settlement System Plc (NIBSS) and CBN;
- c* provide access to customers' NUBAN accounts; and
- d* execute the GSI Master Agreement with NIBSS with a copy sent to CBN.

It should be noted that the GSI can only be triggered for the purpose of recovering loans (principal sums and interest only) granted to natural persons (individuals) and may be triggered in respect of savings accounts, current accounts, domiciliary accounts, investment or deposit accounts, and electronic wallets (whether held individually or jointly). The GSI Guidelines have been criticised on the basis that it cannot be validly levied against a joint account for an obligation owed by only one of the joint account holders. Unless the other joint account holder is a guarantor to the loan, the GSI cannot be validly levied against a joint account. This is, however, yet to be tested in court, and it is not certain the approach the Nigerian courts will take on this issue.

We note also that the biometric verification number (BVN) system shall be used to track linked accounts in other financial institutions. The GSI Guidelines, however, provide that where a borrower's BVN is not linked to any of the qualifying account types listed above, the account will be 'watch-listed'.

v The CBN Guidelines on Payment Service Banks

On 27 August 2020, the CBN issued the guidelines for the licensing and regulation of payment service banks (the Guidelines) in Nigeria. Pursuant to the Guidelines, payment service banks (PSBs), are required to have not less than 25 per cent of their financial service

¹⁰ Sections 58 and 59 of Finance Act 2020.

touch points located in the rural areas and unbanked locations targeting financially excluded persons. The permissible activities for PSBs include: (1) accepting deposits from individuals and small businesses, which shall be covered by the deposit insurance scheme; (2) carrying out payments and remittances (including inbound cross-border personal remittances) services through various channels within Nigeria; (3) selling foreign currencies realised from inbound cross-border personal remittances to authorised foreign exchange dealers; (4) issuing debit and pre-paid cards on its name; (5) operating electronic wallets; (6) rendering financial advisory services; (7) investing in FGN and CBN securities; and (8) carrying out such other activities as may be prescribed by the CBN from time to time. PSBs are prohibited from carrying out the following activities: (1) granting any form of loans, advances and guarantees (directly or indirectly); (2) accepting foreign currency deposits; (3) dealing in the foreign exchange market except as permitted by the Guidelines; and (4) undertaking any other transaction that is not prescribed by the Guidelines.

PSBs may be set up by banking agents, telecommunications companies, postal services providers and courier companies, mobile money operators and financial holding companies among others.

The Guidelines are a welcome development particularly in light of the CBN's objective to promote financial inclusion especially in the rural areas and unbanked locations in Nigeria.

vi Federal High Court decisions on value added tax

Pursuant to the Federal High Court decisions in *Vodacom Business Nigeria Limited v. Federal Inland Revenue Service*¹¹ and *Federal Inland Revenue Service v. Gazprom Oil & Gas Nigeria Limited*,¹² value added tax will now be payable by a borrower for fees payable to finance parties for transaction services (e.g., management, restructuring or agency fees) regardless of whether the service provider is a foreign entity that has not included value added tax in its invoices to the borrower. In this case, the borrower is required to compute the applicable value added tax and remit the same to the tax authority. In line with these decisions, the Finance Act 2019 has amended the Value Added Tax Act by inserting a new Section 2, which provides that value added tax is payable on the supply of all taxable goods and services in Nigeria other than those specifically exempted from tax under the act. Services are deemed to be supplied in Nigeria if the services are provided in Nigeria by a person physically present in Nigeria at the time that the service was provided or the services are provided to a person in Nigeria irrespective of where the services are rendered from.

III TAX CONSIDERATIONS

Loan transactions, as other commercial transactions in Nigeria, are subject to Nigerian taxes. These taxes include withholding tax on interest as well as stamp duty. A brief overview of each of these taxes is given below.

11 Appeal No. FHC/L/4A/2016.

12 Suit No. FHC/ABJ/TA/1/2015.

i Withholding tax

Interest on loans is generally subject to withholding tax payable at the rate of 10 per cent of the relevant interest sum. However, where lenders are domiciled in countries with which Nigeria has entered into double taxation agreements (DTAs), the applicable rate of tax will be 7.5 per cent of the interest amount, pursuant to the relevant DTA. Nigeria recently ratified the double taxation treaty that it entered into with Spain, thus bringing the total number of countries that Nigeria has a DTA arrangement with to 13.

With respect to loan documentation, market practice is that loan agreements are drafted to include gross-up provisions such that the borrower is obliged to pay an additional amount to the lender with interest, to ensure that the lender receives and retains the same amount that it would have received had no tax been withheld therefrom, or otherwise due as a result of the payment. The practical effect of grossing up is that the lender receives the agreed interest sum while still fulfilling its withholding tax obligation under Nigerian law.

ii Stamp duty

The Stamp Duties Act requires any instrument executed in Nigeria – or that relates, wheresoever executed, to any property situated or any matter or thing done or to be done in Nigeria – to be stamped and the appropriate stamp duty paid in respect of the instrument.

With respect to secured facilities, the practice is usually to stamp the security document at the relevant *ad valorem* rate, and the loan agreement would then be stamped at a nominal rate of 500 naira for the original and 50 naira for each counterpart copy.

The Finance Act 2019 defines ‘instruments’ to include electronic documents. The legal effect of which is that electronic documents (including copies of agreements) are accepted for the purpose of stamp duty payment by the various stamp duties offices. The 2019 Finance Act also puts to rest the argument as to whether a document is only received in Nigeria when the physical copy of the document is received in Nigeria. Such documents will now be deemed to have been received in Nigeria if an electronic copy of such document is transmitted into Nigeria and the obligation to stamp begins to count from the date of receipt into Nigeria.

Prior to December 2016, loan agreements with respect to unsecured facilities executed in Nigeria – or that relate to any property situated, or any matter or thing to be done, in Nigeria – would usually attract a nominal stamp duty of 500 naira for an original and 50 naira for each counterpart. Deriving its powers from the Stamp Duties Act, the Federal Inland Revenue Service issued a public notice in December 2016 stating that unsecured facility agreements are to be stamped at an *ad valorem* rate of 0.125 per cent of the loan amount. Where the tenor of the unsecured loan agreement does not exceed 12 months, it can be stamped at a nominal rate of 500 naira.

Under the 2020 Finance Act, the stamp duty provisions introduced an electronic money transfer levy of 50 naira on electronic transfer of money kept in any account in a bank or financial institution in substitution for stamp duties on bank transfers.¹³ The threshold will apply to e-transfers of 10,000 naira or more. This replaces stamp duties on electronic receipts or electronic transfer for money deposits.

13 Sections 47 and 48 Finance Act 2020.

iii Introduction of the significant economic presence rule under the Personal Income Tax Act (PITA) pursuant to the 2020 Finance Act

Where an individual, executor or trustee carries on the business of management, consultancy and professional services, the gains shall be deemed to be derived in Nigeria to the extent that this an individual has significant economic presence (SEP) in Nigeria. The Minister of Finance may issue an Order to define the activities that constitute a SEP of a non-resident person under the PITA. Our view is that this may result in double tax on non-residents who pay tax on their global income in their country of residence and also pay tax in Nigeria upon having been determined to have SEP in Nigeria,. It is expected that just as with the SEP regulations for companies, these provisions will be made subject to any applicable treaties between Nigeria and other countries.

Compliance with FATCA

Nigerian financial institutions comply with the Foreign Account Tax Compliance Act (FATCA) by creating FATCA compliance units to oversee and ensure that FATCA reporting requirements are met. From a transactional perspective, financial institutions may allocate FATCA risk by inserting certain clauses and representations to minimise downside risks that may occur.¹⁴ To assist with the above, the LMA template, which may be adopted by financial institutions, sets out information necessary to ensure compliance with FATCA.

IV CREDIT SUPPORT AND SUBORDINATION

i Security

Nigerian law recognises various types of security interests. These security interests may be created over movable assets (tangible and intangible) and immovable assets (real estate) located in Nigeria. These interests may be taken in the form of a mortgage, charge, pledge, lien or assignment, depending on the type of property.

Real estate or immovable property

Security over an immovable asset may be granted by way of a mortgage or a charge. A mortgage over land or other immovable assets may be created by way of a legal or equitable mortgage. A legal mortgage involves a transfer of the legal title in the immovable asset by the mortgagor to the mortgagee as a security for the payment of the mortgagor's debt. However, an equitable mortgage of an immovable asset is created by the mortgagor or borrower depositing the title deeds to the property with the lender, with or without a memorandum of deposit. An equitable mortgage creates a personal right against the mortgagor, which cannot be exercised without an order of the court.

A fixed or floating charge may also be created on an immovable property. A fixed charge is created over a specific immovable property of the chargor, thereby restricting the right of the chargor to deal with the asset without the consent of the chargee. However, a floating

¹⁴ Jide Bablola, 'Foreign Account Tax Compliance Act (FATCA) – A Nigerian Perspective', www.oudjinrinadefulu.com/content/foreign-account-tax-compliance-act-fatca-%E2%80%93-nigerian-perspective.

charge may be taken over a whole or specific immovable property owned by the chargee. A floating charge does not attach to a specific asset until there is a specific event that will cause the charge to crystallise.

To create an enforceable legal mortgage or a fixed charge over an immovable property, the security interest must be duly perfected as required under Nigerian law. The deed creating the legal mortgage or the fixed charge is required to be stamped (with *ad valorem* stamp duty being payable) and the consent of the governor of the state where the land is situated must be obtained. In addition to the requirement that the deed must be registered at the relevant land's registry, where the party providing the security is a company, the deed must be registered at the Corporate Affairs Commission (CAC). Registration of a charge at the CAC will constitute constructive notice of the matters specified in the particulars of the charge.

Pursuant to the Companies and Allied Matters Act, a company is required to maintain a register of charges at the registered office of the company. The register of charges maintained by the company should contain a description of the property charged, the amount of the charge and the name of the person entitled to the charge.¹⁵ Thus, where a company creates a charge over its assets, it is required to enter the details of the charge in the register maintained by the company.

Shares

Similarly, security may also be taken over shares of a company incorporated in Nigeria by way of a mortgage or a charge. To take a legal mortgage over shares, the mortgagor must transfer legal title to the shares to the lender, on the condition that the shares will be transferred back to the borrower on repayment of the loan. The lender must be registered in the company's register of members as the owner of the shares. An equitable mortgage of shares is created by depositing the share certificates with the lender or a security trustee appointed by the lender. Where an equitable mortgage is created, legal title to the shares is not transferred to the mortgagee (bank or security trustee).

Security can also be taken over shares by way of a fixed or a floating charge. Under Nigerian law, there is no requirement to register a share charge at the CAC where the nature of the security created is a fixed charge or a legal mortgage. A floating charge over shares, however, is required to be registered at the CAC. Though a fixed charge over shares is not a registrable instrument, certain practitioners have increasingly been filing a fixed charge as a miscellaneous document at the CAC, to notify third parties that conduct a search on the records of the company creating the charge of the existence of the charge. To facilitate enforcement of the security, lenders usually require the borrowers to execute a blank share transfer form. The Companies and Allied Matters Act also requires any person claiming to be interested in any shares, dividend or interest on them to serve on the company a notice of interest in order to protect his or her interest in these shares.¹⁶ Upon receipt of the notice of interest, the company is required to enter in its register of members the fact that notice has been served on the company. The effect of this notice is that the company will be precluded from transferring or making any payment contrary to the terms of the notice until the expiration of 42 days' notice to the claimant to the proposed transfer or payment.

Security may also be created over shares that are dematerialised and kept with a central depository. The company that operates Nigeria's central depository for listed shares is the

15 Section 216 of the Companies and Allied Matters Act 2020.

16 Section 180 of the Companies and Allied Matters Act 2020.

Central Securities Clearing System (CSCS). A memorandum executed by both parties requesting the CSCS to place a 'lien' on a specific quantity of shares, or all the shares of an account owner, is required to be forwarded to the CSCS. 'Lien' is used in this sense as a description for the security interest that is created over the shares or account.¹⁷ Legally, the nature of the security interest that is created is a floating charge over the shares and, as such, will require registration of the interest at the CAC if the party granting the security is a company.

Also, an undated letter signed by the party creating the security, authorising the lender to sell the shares in the event of default at the expiry of the loan due date, must be given to the lender, as the CSCS would require this document if the lender wishes to realise the security.

There is an erroneous practice in Nigeria of creating a pledge over shares. An asset can only be pledged if it is transferable by delivery of possession.¹⁸ Usually, the owner of the shares has a share certificate that evidences entitlement to the shares concerned. This is not, however, a document of title, as legal title only passes to the lender when he or she becomes the registered holder of the shares rather than mere possessor of the share certificate.¹⁹ Thus, where a party purports to create a pledge over shares, the legal effect of that is a floating charge, which could be held to be void for lack of registration.²⁰

Bank accounts

Under Nigerian law, a security interest may be created over the money in bank accounts by way of a fixed or floating charge. A fixed charge is created over deposits in bank accounts where the parties expressly state that they have created a fixed charge over the bank account, which must be adequately and sufficiently described in the security document; and the bank or security trustee must have control of how the funds deposited into that account are managed or dealt with.

Where the charge created on the security is a floating charge, the chargor controls the charged accounts until the charge crystallises into a fixed charge following certain events stipulated under the security document. A floating charge over cash deposits will require registration at the CAC. The registration must be preceded by the payment of stamp duty on the document creating the charge, usually at an *ad valorem* rate.

Other assets used as security

Security can be created over intellectual property, such as patents, trademarks, copyright and designs.²¹ Usually, parties execute a deed setting out the terms and conditions on which the security is granted. Security may also be created over a company's claims and receivables, which can be by way of an assignment, or a floating or fixed charge. Assignments must be in writing and must be preceded by the payment of stamp duty on the deed of assignment, at an *ad valorem* rate and registered with the CAC.

17 Richard Calnan, *Taking Security: Law and Practice* (2006).

18 *Cogg v. Bernard* (1703) 2 Ld Raym 909.

19 Richard Calnan, *Taking Security: Law and Practice* (2006).

20 Joanna Benjamin, *Interests in Securities: A Proprietary Law Analysis of the International Securities Markets* (2000).

21 Section 197(2)(i) of the Companies and Allied Matters Act, Laws of the Federation of Nigeria 2004.

Costs of perfection of security interests

Where the security is immovable property, the consent of the governor of the state where the property is situated must be obtained, and this usually attracts the payment of a fee that varies from state to state. Once the governor's consent has been granted, the security interest over the land must be registered at the relevant state's lands registry, which also attracts a fee that varies from state to state.

With respect to companies creating security over their assets, the Companies and Allied Matters Act 2020, which was signed into law on 7 August 2020, reduced the fees for registration of security from 1 per cent in respect of private companies and 2 per cent in respect of public companies to 0.35 per cent of the secured amount. The stamp duty payable on a debenture deed or deed of share charge is 0.375 per cent of the secured amount. In respect of security by way of assignment, the stamp duty payable on the deed of legal mortgage and assignment is at an *ad valorem* rate of 1.5 per cent.

Nigerian law recognises the rights of parties to commercially structure their transactions to allow the security documents to be stamped for an initial amount and then subsequently upstamped for additional sums.²² Consequently, on a large financing, parties may agree for the security documents to be stamped to cover a certain value, which may be less than the value of the amount that has been borrowed.

The Secured Transactions in Movable Assets Act (STMAA), which was signed into law in June 2017, creates a new registration regime for security interests in movable assets with an express exclusion of security over land, vessels and mortgages. Under the STMAA, charges over movable assets are to be registered at the National Collateral Registry (NCR). The NCR registration fee is a flat sum of 1,000 naira.

ii Guarantees and other forms of credit support

Guarantees are a common form of security used in finance transactions. A guarantee must be in writing (or evidenced in writing) and signed by the guarantor or a person authorised by the guarantor. Where no consideration has been furnished for issuing the guarantee, it must be granted by way of a deed. In accepting corporate guarantees, it is important to ensure that the issuance of the guarantee, as well as its value, is permitted under the articles of association of the guarantor.²³

Negative pledges

Negative pledges are designed to mitigate risk to lenders by prohibiting the borrower from creating security or quasi-security over its property, without first obtaining the prior consent of the lender or granting the lender commensurate or similar security as well.

The most common forms of quasi-securities used in Nigeria include hire purchase agreements, retention of title clauses in contracts, conditional sale agreements, negative pledges and letters of comfort.

22 Section 227 of the Companies and Allied Matters Act.

23 N Okafor, O Okafor, J Eimunjeze and D Adesina, 'Lending and Taking Security in Nigeria: overview', [https://uk.practicallaw.thomsonreuters.com/4-524-5665?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-524-5665?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

iii Priorities and subordination

Priorities

Security interests are typically ranked and given priority according to the date of their creation and their nature – whether legal or equitable. Generally, a legal interest will rank in priority over an equitable interest.

A fixed charge will usually have priority over a floating charge, unless the terms on which the floating charge was granted prohibited the company from granting any latter charge having priority over the floating charge and the person in whose favour the latter charge was granted had actual notice of that prohibition at the time when the charge was created.

Where more than one creditor has the same type of security interest – for instance, where there are two legal interests over the asset of the borrower – the security interest that was registered first will rank ahead of the subsequent secured party.

With respect to security created over the assets of a company incorporated under the laws of Nigeria, where the security is not registered within 90 days of the date of creation or another prescribed period, the security becomes void against the liquidator of the company and other third-party creditors, but not the company.

Subordination

Ordinarily, contractual subordination is recognised and enforceable under Nigerian law. Creditors may agree among themselves to contractually vary the order of priority or waive or subordinate their security interests to those of other creditors. Creditors may enter into a contractual subordination arrangement whereby junior creditors agree to subordinate their payment rights to the payment of debts due to senior creditors or agree to turn over monies collected from the debtor to the senior creditors.

However, there is significant risk that these subordination arrangements would not be enforceable in winding-up proceedings commenced against the debtor company. This is because the legal rights accruing to junior creditors in bankruptcy are not affected by such arrangements and a liquidator is not bound to adhere to the subordination arrangement.²⁴ Under Nigerian bankruptcy laws, all unsecured creditors are ranked *pari passu* and the liquidator is required to distribute the assets of the insolvent company among them equally. Different rules apply to secured creditors, as they are entitled to enforce their security in satisfaction of the debt, even if the borrower is in liquidation.²⁵

Intercreditor agreements are contracts between two or more creditors agreeing in advance on how their competing interests in their common borrower will be dealt with. It could contractually restrict junior creditors from commencing enforcement proceedings against the debtor company, provided that any of the obligations owed to senior creditors are outstanding.²⁶ In the event of a breach, the senior creditors may have a right to proceed against the junior creditors and claim any proceeds received by the junior creditors pursuant to the terms of the intercreditor arrangement.

CBN Circular No. BSD/DIR/GEN/LAB/10/009 on the Review of the Limit on Foreign Currency Borrowings by Banks (the Circular), dated 13 February 2017, stipulates

24 O Chukwu, O Nathaniel and U Okoli, 'Nigeria' in *Getting The Deal Through: Loans and Secured Financing* (2018).

25 *ibid.*

26 *ibid.*

that all foreign currency borrowings by a Nigerian bank must be subordinated debts with prepayments allowable only upon obtaining prior approval of the CBN. The Circular, however, does not stipulate the categories of foreign currency borrowings that are required to be subordinated and to what they should be subordinated. More clarity is therefore required from the CBN on the issue, especially as the Companies and Allied Matters Act, the Nigeria Deposit Insurance Corporation Act, the Banks and Other Financial Institutions Act and the Bankruptcy Act already set out the position under Nigerian law in relation to the priority of bank debts. Pursuant to these laws, the ranking of the debts of a Nigerian bank in the event of an insolvency is as set out below:

- a* liquidator expenses;
- b* depositor funds;
- c* preferential debts, including: all local rates and charges due from the company at the relevant date that became due and payable within 12 months next before that date;
- d* deductions made from the remuneration of employees and contributions of the company under the Pension Reform Act;
- e* deductions made from the remuneration of employees and contributions of the company under the Pension Reform Act;
- f* wages or salaries of any clerk or servant of the company;
- g* wages of workers or labourers;
- h* accrued holiday remuneration payable to clerks, servants, workers or labourers on termination of employment, or in the event of death;
- i* secured debts;
- j* unsecured debts; and
- k* shareholders debt.

V LEGAL RESERVATIONS AND OPINIONS PRACTICE

i Legal reservations

The financial assistance rules applicable in Nigeria were amended pursuant to the CAMA 2020. Certain types of financial assistance transactions, such as the provision of collateral, guarantee or security by a company in support of a financing of the acquisition of the company's its own shares or the shares of its holding company upon meeting certain conditions, are now permitted.

The term 'financial assistance' is broadly defined to include 'a gift, guarantee, any form of security or indemnity, loan, any form of credit and any financial assistance given by a company, the net assets of which are thereby reduced to 50 per cent, or which has no net assets'.

The consequences of failing to comply with the financial assistance rules are serious, as any transaction that represents unlawful financial assistance is void and unenforceable. Furthermore, the company and its officers will be guilty of an offence and liable on conviction to a fine.

ii Opinions practice

The typical types of opinions that are issued in a lending transaction are either: (1) a capacity and authority opinion, which confirms that the borrower has the capacity and the authority to enter into the opinion documents; or (2) a legal, valid, binding and enforceable (LVBE)

opinion, which confirms the foregoing, as well as the fact that the obligations undertaken in the opinion documents are legal, valid, binding and can be enforced against the person with respect to whom the opinion is being issued.

Typically, for finance transactions conducted in Nigeria, the counsel to the lender is responsible for most of the transaction documentation, including the preparation of an LVBE opinion on the transaction. However, this does not preclude the lenders requiring that the borrower's counsel should also give a capacity and authority opinion.

iii Choice of law and enforcement of foreign judgments

Nigerian law permits contracting parties to freely choose the law that will govern their contract, provided that the choice of law is real, genuine, bona fide, legal and reasonable, and was not made in bad faith or contrary to public policy.

The governing law of the contract would determine the construction, validity and performance of the agreement.

In the same way, foreign judgments may be duly enforced in Nigerian courts, provided they are not contrary to the public policy of Nigeria. There are two regimes for the enforcement of foreign judgments: the statutory and the common law regimes. Statutorily, the Reciprocal Enforcement of Judgments Ordinance 1958 provides for the registration and enforcement of foreign judgments in Nigeria, specifically judgment obtained from the high courts in England or Ireland, or from the Court of Session in Scotland. Thus, under the statutory regime, the courts of Nigeria will recognise and enforce (without re-examination or relitigation of the matter adjudicated upon) any judgment rendered by the high courts of England, in respect of any suit, action or proceeding arising out of or in connection with the transactions, as long as they satisfy the requirements of the Reciprocal Enforcement of Judgments Ordinance.

Under the common law regime, Nigerian law recognises a procedure whereby a judgment creditor seeking to give effect to a foreign judgment (which does not fall within the purview of the statutory regime) may institute an action for the enforcement of the judgment according to the rules of Nigerian courts. This principle of enforcement of foreign judgments through the common law route has been given judicial recognition in a number of Nigerian cases.

Foreign arbitral awards are also enforceable in Nigeria without the need for a relitigation of the facts on merits. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) has been given effect in Nigeria by the Arbitration and Conciliation Act, Cap A18 of the Laws of the Federation of Nigeria 2004. An arbitral award made in any country that is a party to the Convention will be enforced by the courts in Nigeria subject to the provisions of the Convention.

VI LOAN TRADING

Loan trading may occur with both individual and company debts. The practice of loan trading at this time is generally through novation or assignment, where the lender transfers its rights under the loan agreement to a new lender. This new lender then assumes the position of the old lender, inclusive of its rights and obligations. This is, however, subject to the provisions of the loan documents and the required consent under the agreements between the initial lender and the borrower.

A deed of assignment or a transfer certificate is usually executed between the initial lender and the new lender, which may contain an option for the assignor to assign to the assignee the benefit of any supporting security or guarantees related to the facility agreement. The provisions of the deed of assignment must not create new obligations but should only be limited to ongoing obligations on the part of the assignor. If the original lender still has obligations under the loan agreement (such as an obligation to make further advances to the borrower), it is advisable for a deed of novation to be executed.

Parties may also adopt a risk or funded participation arrangement, whereby the lender under a loan agreement subcontracts all or part of its risk to another financial institution or individual. In respect to a funded participation arrangement, the parties agree that the participant will fund the grantor, whereas for a risk participation, parties agree that the participant will reimburse the grantor on amounts unpaid by the borrower, following a payment default under the loan agreement.

VII OTHER ISSUES

There are currently no other issues of note.

VIII OUTLOOK AND CONCLUSIONS

The Nigerian government continues to make efforts through legislative and regulatory actions to promote economic growth, job creation and spur lending to the real sector of the economy. However, Nigeria continues to face significant headwinds, such as double-digit inflation, reduction in foreign currency earnings and liquidity, increasing oil subsidy payments and a significant funding requirement, to meet the country's infrastructure requirements.

It is anticipated that in the coming months, the federal government (through the CBN) will relax the foreign currency regulations such that the foreign exchange rate will become a more market-driven rate and also adopt policies that will attract more foreign currency inflows and investments into Nigeria whether in the form of portfolio investments, equity or international debt financings. In addition, the federal government is embarking on a number of infrastructure projects such as a public-private partnership model that will require private sector financing to get these projects bankable. Thus, it is important that financial institutions, especially international banks, have a good and deep understanding of new developments and reforms in Nigeria's banking and corporate law.

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