



ICLG

The International Comparative Legal Guide to:

Project Finance 2017

6th Edition

A practical cross-border insight into project finance

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Nigeria

Oyeyemi Oke



Mayowa Olugunwa



Templars

1 Overview

1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

There has been marked progress in the provision of partial risk guarantees by the Federal Government of Nigeria to support greenfield independent power producers. This includes credit enhancement for Nigerian bulk electricity trading and private debt mobilisation support.

1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

In recent years, there have been significant project financings in the power sector. A good example is the financing of the development of 500MW Azura Power Project in Edo State for the supply of power to the national grid. The project finance is in respect of a greenfield independent power plant in Edo State, Nigeria. This pioneering project has paved the way for other power projects in Nigeria which utilise credit enhancement products.

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Security may be granted on all types of assets under Nigerian law and this may be done via a general security document creating charges, liens, mortgages and/or security assignments on the relevant types of assets.

The formalities required to perfect a general or other security document is the payment of stamp duties on the relevant document(s) at the Federal Inland Revenue Service (“FIRS”) and registration of same at the central companies registry – the Corporate Affairs Commission (“CAC”) – within 30 (thirty) days and 90 (ninety) days of its creation, respectively.

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Security may be taken over real property, plant, machinery and equipment, subject to regulatory approvals in certain instances.

The applicable procedure for taking security over physical assets is dependent on the security subject. For example, security over land may be granted by a legal or equitable mortgage. Subject to the location of the land in the different states of Nigeria, a legal mortgage may be created by:

- a. a sub-demise;
- b. a charge by deed expressed by way of legal mortgage; or
- c. an assignment with a covenant for re-assignment, amongst others.

A legal mortgage over real property in any state in Nigeria may only be created with the prior written consent of the governor of the relevant state.

With regard to taking security over plant, machinery and equipment (“**Equipment**”), security is usually created by a fixed charge over the Equipment, and any agreement or document which relates to the Equipment or further to which a benefit from the Equipment accrued.

2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Security can be taken over receivables, with the chargor free to collect the receivables by way of a security assignment. If a notice of assignment is not provided, the assignment would take effect under Nigerian law as an equitable assignment and the consequence would be that (a) the debtors would earn a full discharge if it paid the receivables to the chargor, and (b) the chargee would have to join the chargor as co-claimant or co-defendant in any action to enforce the assignment.

2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Security can be taken over cash deposited in a bank account by a charge or lien over the account. Typically, a floating charge is created through an account security agreement or similar arrangement

where a charge will be created over all present and future rights, interests, benefits, etc. of the bank account. The chargor is usually restricted from withdrawing monies from the charged bank account, save in accordance with the account administration agreement or as otherwise agreed by the parties.

2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Security may be taken over shares in Nigerian companies. Also, shares are in certificated form in Nigeria. Security may be created over shares in a Nigerian company by way of a charge, a security assignment or an equitable mortgage. It is the usual practice for the creditor or security trustee to take physical possession of the share certificates, along with other necessary documents as may be applicable.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

Stamp duties are payable on all security documents and may be nominal or *ad valorem*.

CAC registration fees are also payable for security interests created against the assets of a company at a rate of 1% of the value of the secured assets for private companies and 2% in the case of a public company.

With respect to real estate, registration fees are payable at the relevant state land registries where the land is located.

Fees are not payable in respect of notarisation, as notarisation is not required to validate the security instruments.

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Subject to any bureaucratic delays, perfection formalities for security taken over different types of assets may be completed within 5 (five) to 15 (fifteen) days.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or over-ground), etc.?

Please see question 2.2 above. Also, regulatory consents are sometimes required for the creation of a security interest over physical assets in certain industries.

3 Security Trustee

3.1 Regardless of whether your jurisdiction recognises the concept of a “trust”, will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

The role of a security trustee or agent is recognised and they would be permitted to enforce the security on behalf of the secured parties.

3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

The concept of a security trust is recognised in Nigeria.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/ liquidator), or (b) (in respect of regulated assets) regulatory consents?

Generally, there are no significant restrictions which impact the timing and value of enforcement. It is important to note, however, that in certain enforcement scenarios (such as enforcement of security over oil and gas assets), regulatory consents may be required in order to complete any such enforcement.

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

There are no special restrictions imposed on foreign investors or creditors in the event of foreclosure on the project and related companies.

5 Bankruptcy and Restructuring Proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

Insolvency or insolvency proceedings would ordinarily constitute an event of default under the loan and security documentation. As such, the pendency of insolvency proceedings will not generally affect the right of a project lender to enforce its security. In the event that a winding-up order has been made or a provisional liquidator appointed by the court, the project lender will require the leave of the court to enforce its security.

5.2 Are there any preference periods, clawback rights or other preferential creditors’ rights (e.g. tax debts, employees’ claims) with respect to the security?

Nigerian law guarantees preferential payments in the event of the winding up of a company; these are:

- a. charges and taxes due and payable by the company;
- b. deductions made under the Nigerian Social Insurance Trust Fund Act;
- c. wages or salary of any clerk or servant for services to the company;

- d. wages of any workman or labourer for services to the company; and
- e. all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer on termination of employment before or by effect of the winding-up order.

It should also be noted that holders of perfected security interests are entitled to payment ahead of all other unsecured creditors.

5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

There are no private entities excluded from insolvency proceedings.

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

Subject to the nature of the security interest, a creditor with a perfected security interest may seize/take possession of the assets or sell such assets by a power of sale, without the need for court proceedings.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

A project company may engage in a scheme of arrangement, or a compromise with its creditors, to restructure its debts.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

Directors who continue to trade whilst a company is in financial difficulty may become personally liable for a refund of money or property received by the company and misapplied. Such director shall be required to refund any monies improperly paid away.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Generally, there are no restrictions, controls, fees and/or taxes on foreign ownership of a project company. However, in certain industries such as oil and gas, certain preferences are attributable to a company with at least 51% ownership by Nigerians.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

See question 6.1 above.

6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Under the Constitution of the Federal Republic of Nigeria 1999

(as amended) (“**Constitution**”), the Nigerian government may compulsorily take possession of an immovable property or compulsorily acquire interests in any such property, provided that compensation is promptly paid. This notwithstanding, the Nigerian Investment Promotion Commission Act (“**NIPC Act**”) guarantees that project companies or assets will not be expropriated by any government of the federation unless it is in the national interest, for a public purpose and carried out according to a law that makes provisions for fair compensation to be given and also allows the aggrieved previous owner access to the courts to determine his interests or the level of compensation to which he is entitled.

7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The relevant agencies are as follows:

- Electric power sector: Nigerian Electricity Regulatory Commission.
- Oil and gas: Department of Petroleum Resources.
- Telecommunications: Nigerian Communications Commission.
- Infrastructure: Federal Ministry of Works, Housing and Power.

7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

The instrument that creates a charge is required to be registered at the CAC within 90 days of creation. Stamp duties are also to be paid on all other financing and project documents, to be admissible as evidence in any legal action for the enforcement of rights.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Title to land is vested in the governor of the state in which the land is located and leasehold interests are granted to private individuals or corporate entities. Each individual state in Nigeria has an “acquisition of lands by aliens” law which prohibits non-Nigerians from acquiring land except with the approval of the governor of the relevant state.

The Constitution, Mineral and Mining Act 2007 and the Petroleum Act 1990 vest the entire property in, and control of, mineral resources and petroleum under or upon any land in Nigeria, its contiguous continental shelf, and rivers, streams and water courses throughout Nigeria in the federal government of Nigeria. Different licences are required to search for and exploit these resources or to operate pipelines for their distribution. The licences required for mining natural resources may only be granted to a company incorporated in Nigeria.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Taxes, duties or royalties payable in respect of extraction of minerals or other natural resources in Nigeria include the following:

- Petroleum Profits Tax.
- Company Income Tax.
- Royalties for the sale of mineral resources under an Exploration Licence, under the Minerals and Mining Act.
- Royalties payable under the Petroleum Act.

7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Generally, there are no restrictions on foreign exchange. That said, under the applicable exchange control laws and regulations in Nigeria, an inward remittance of foreign exchange for equity investments or in the form of a loan is required to be evidenced by a certificate of capital importation (“CCI”). The CCI serves as proof of the receipt of the relevant funds and their conversion to Naira. It allows access to the official foreign exchange market for the purpose of payment of dividends or capital repatriation (in the case of equity) or interests and principal (in the case of loans) intended to be remitted outside Nigeria by the investee company or the relevant investor.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

There are generally no restrictions on repatriation of funds, returns on investment or loan payments to other jurisdictions. Nigerian laws guarantee unconditional transferability of funds including dividends and loan repayments (net of all taxes). To repatriate funds through the proper channels, capital must have been imported into Nigeria through an authorised dealer and a CCI issued. Interest repayments and dividends are subject to withholding taxes at the rate of 10%. A lower rate of 7.5% is applicable to interest and dividend payments to countries with double taxation agreements with Nigeria.

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes, they can.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

See questions 7.5 and 7.6 above.

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 and the Environmental Impact Assessment Act 1992 (“EIA Act”) are material environmental laws that would impact upon a project financing. They are administered by the National Environmental Standards and Regulations Enforcement Agency. The EIA Act prohibits companies from undertaking projects without prior consideration of their environmental effects.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

There is no specific legal framework for procurement by private project companies. Where the project company is government-owned, the Public Procurement Act applies.

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

The Nigerian Insurance Act (“Insurance Act”) prohibits the transacting of insurance and reinsurance business with a foreign insurer or reinsurer in respect of the following:

- a. Fire insurance and reinsurance.
- b. Motor insurance and reinsurance.
- c. Liability insurance and reinsurance.
- d. Life insurance and reinsurance.
- e. Accident insurance and reinsurance.

However, where the National Insurance Commission is satisfied that a risk is of an exceptional nature, it may, in writing, permit insurance or reinsurance with a foreign insurer.

8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Insurance policies over project assets are payable to foreign (secured) creditors. However, there are regulatory restrictions in respect of Nigerian residents (including companies) assigning their insurance policies to non-residents.

9 Foreign Employee Restrictions

9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

Yes. Project companies seeking to employ foreign workers are required to apply to the Federal Ministry of Interior for expatriate quota positions for the number of foreign workers, technicians, engineers or executives they seek to employ.

In addition to the above, a Temporary Work Permit is required for short-term employees and a Combined Expatriate Residence Permit and Aliens Card (“CERPAC”) must be obtained from the Nigeria Immigration Service for permanent employees.

For the grant of an expatriate quota or CERPAC, the company must show that the foreign employee possesses a skill which is not readily available in Nigeria.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Contracts for the importation of equipment and any other form of

technology must be approved by the National Office of Technology Acquisition and Promotion. Import duties are also payable on importation of the equipment.

10.2 If so, what import duties are payable and are exceptions available?

Import duties are payable based on the Common External Tariff. An exception which is available on the import of equipment, is on goods which are imported for the purpose of export.

11 Force Majeure

11.1 Are force majeure exclusions available and enforceable?

Yes, they are.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

There are general non-project-specific rules which prohibit corrupt business practices under Nigerian law. Penalties are dependent on the offence and the legislation under which they are brought. An example is that under the Corrupt Practices and Other Related Offences Act, the penalty for the individuals who engage in the bribery or corrupt practice is imprisonment of between 5 (five) and 7 (seven) years.

13 Applicable Law

13.1 What law typically governs project agreements?

Project agreements may be governed by any law chosen by the parties. Typically, parties choose Nigerian or English law to govern project agreements.

13.2 What law typically governs financing agreements?

The governing law for financing agreements is dependent on whether the lenders are domestic or foreign. Foreign lenders are more comfortable with English law. Generally, Nigerian or English law governs project agreements.

13.3 What matters are typically governed by domestic law?

Project agreement and security documents over immovable property or rights over immovable property are usually governed by domestic law.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Yes, it is.

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes. The Arbitration and Conciliation Act provides for the recognition and enforcement in Nigeria of foreign arbitral awards irrespective of where they were made.

15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Yes. Nigeria has also ratified the International Centre for Settlement of Investment Dispute Convention.

15.3 Are any types of disputes not arbitrable under local law?

Tax disputes, election matters, criminal cases, divorce matters (dissolution of marriage, etc.) and disputes involving the interpretation of statutes are not arbitrable under Nigerian law.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

No types of disputes are subject to mandatory domestic arbitration proceedings.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

It is not unusual to have political risk protection such as direct agreements or political risk guarantees with the federal or state government through the relevant ministry, department or agency in a project involving a conferment of rights on the project company by the government or a project involving public interests. In the power sector, there has been a trend of "Put and Call Option Agreements" between the project sponsors and the Nigerian government, as well as "Partial Risk Guarantees", which seek to afford some level of protection with respect to political risks.

17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Yes, there is a requirement to withhold tax on interest payable on both domestic and foreign loans. There is no requirement to withhold tax on proceeds of a claim under a guarantee or the proceeds of enforcing security.

17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives or other incentives provided preferentially to foreign investors or creditors. However, a project company may apply for the grant of pioneer status, which confers a tax holiday for a period of up to five years subject to the fulfilment of certain conditions and depending on the applicable sector in which the project company intends to operate.

Save for payment of stamp duties and CAC registration fees as highlighted under question 2.6 above, there are no taxes that apply to foreign investments, loans or other security documents for the purposes of effectiveness or registration.

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

The Companies Income Tax Act provides for certain tax exemptions in respect of interest payable on foreign loans, depending on the tenor of the loan and the moratorium as follows:

Repayment Period including Moratorium	Grace Period	Exemption Allowed
Above 7 years	Not less than 2 years	100%
5–7 years	Not less than 18 months	70%
2–4 years	Not less than 12 months	40%
Less than 2 years	Nil	Nil

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

A company issuing bonds or other similar capital market instruments is required to be a public limited liability company and the capital market instruments are required to be registered with the Securities and Exchange Commission (“SEC”) before they can be issued. In addition, the SEC Rules require the capital market instruments to be rated by a ratings agency registered with the SEC or by an SEC-approved, internationally recognised rating agency. Bonds issued through a public offering must be rated at investment grade BBB or above.

19 Islamic Finance

19.1 Explain how *Istina’a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

Istina’a, *Ijarah*, *Wakala* and *Murabaha*, amongst others, are acceptable principles under the SEC Rules which may be applied in an Islamic Fund. The SEC requires that the fund manager offering *Shari’ah*-compliant portfolio management must ensure that its investment activities are limited to *Shari’ah*-compliant investments and that part of the fund’s assets are invested in unquoted securities. The fund manager is required to prepare or forward annually, a written disclosure, certificate of compliance and declaration to the board of directors of the fund manager and the trustees that the fund is carried out in accordance with *Shari’ah* principles.

19.2 In what circumstances may *Shari’ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari’ah* or the conflict of *Shari’ah* and local law relevant to the finance sector?

There have been a few transactions where Islamic finance has been used. Governing law clauses under such contracts are governed in accordance with English law to the extent that it does not contradict Islamic rules and principles of *Shari’ah*. In the event of a conflict, *Shari’ah* law prevails. Due to the fact that Islamic finance is an emerging mode of project finance, there is a dearth of cases on jurisdictional issues concerning the applicability of *Shari’ah*.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

Interest payment obligations are excluded in Islamic finance.

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TEMPLARS

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