DOING BUSINESS IN NIGERIA

- an Overview of Key Aspects of Nigerian Law for Foreigners & Foreign Investors -

GBENGA BIOBAKU & CO

BARRISTERS & SOLICITORS

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1.1 Overview

The purpose of this guide is to give readers a brief overview of key aspects of Nigerian law on establishing and running a business. It is aimed at organizations and persons from other countries who are interested in doing business in Nigeria. This guide is not intended to be definitive on every aspect of Nigerian law. It only gives indications of applicable considerations from a commercial, tax and general regulatory point of view. The content of this guide is for information purposes only. It does not constitute legal advice, nor is it intended to do so. Should you require legal advice, please do not hesitate to contact us in respect of the details provided in this guide.

Nigeria's legal system is based on English Common Law with significant divergence which has been developed over the last decade.

The law is stated as at 31st of May 2018.

1.2 Key Facts About Gbenga Biobaku & Co

- Top ranking law firm based in Lagos, Nigeria

- Principal areas of practice – Energy, Projects, Foreign Investments, Banking, Capital Markets and General Corporate/ Commercial Law

- Recipient of the Corporate International Global distinction award for 'Business Formation & Legal Advisory'

- Global Clients include
    - Statoil
    - Nexans Norway
    - Baker Hughes
    - ExxonMobil
    - Oceaneering
    - Standard Chartered Bank
    - Rockwell Automation
    - African Capital Alliance
    - Parker Drilling
    - Nigerian Bottling Company (a Nigerian affiliate of the Coca-Cola Hellenic Bottling Company Group)

Foreign Investment In nigeria

Introduction

Nigeria's population is estimated at over 182 million and it is regarded as a continuously expanding consumer market. In addition to its ample manpower and market base, the diversity and economic potential of Nigeria's natural resources have over the years attracted substantial foreign investment. The establishment of democratic structures during the past 18 years and the efforts of the government towards entrenching the rule of law has significantly improved the country's political risk profile.

Africa's largest economy, with a GDP of about US$481 billion as at December 2016, Nigeria is a federation of 36 states and a federal capital territory, Abuja. Lagos State, one of the 36 states, the commercial capital (and former political capital), is by itself the fifth-largest economy in Africa.

Foreign Participation In The Nigerian Economy

In the period spanning the early 1970's to 1995, foreign investment in Nigeria operated largely under a climate of indigenization policies, designed to ensure Nigerian involvement (ownership, management and control) in certain industries and enterprises and effective technology transfer. The Nigerian Enterprises Promotion Decrees (NEPD) of 1972 and 1977 limited foreign equity in any enterprise to a maximum of 40% - 60% depending on the industry/enterprise. The NEPD of 1989 further excluded foreign participation in forty listed businesses (being exclusively reserved for Nigerians) except where the registered share capital of the company was not less than N20 million.

However, since the abrogation of the 1989 NEPD and promulgation of the Nigerian Investment Promotion Decree (NIPD) in 1995, the previous sectoral and equity limits have been abolished and foreign investors may now maintain 100% equity in locally incorporated subsidiaries.

A foreigner or foreign company may now carry on a legitimate business in Nigeria either alone (subject
to the requirements of sectoral regulations) or in partnership with Nigerians or other foreigners. A foreigner may either invest directly into the economy by establishing a company or indirectly through a portfolio investment by acquiring shares in an existing Nigerian company during a public offer or at the secondary market through a certified stock broker.
Under the Nigerian Investment Promotion Commission Act 2004 (NIPC Act) foreign ownership is permitted in all industries. However, restrictions apply to the following sectors:

Oil and Gas: For certain categories of activities, and particularly for activities in swamp regions, at least 51% of the shares of the company must be owned by Nigerians.

Shipping: The Coastal and Inland Shipping (Cabotage) Act restricts the use of foreign-owned or manned vessels for coastal trade in Nigeria. Ownership of a vessel is generally required to vest in Nigerian individuals or in a Nigerian company owned wholly owned by Nigerians.

Broadcasting: A company applying for a broadcasting licence must demonstrate that it is not representing any foreign interests and that it is substantially owned and operated by Nigerians.

Advertising: Only a national agency (that is, an agency in which Nigerians own not less than 74.9% of the equity) can advertise to the Nigerian market.

Private Security: A foreign investor cannot acquire an equity interest in, or sit on the board of, a Nigerian private security guard company.
Engineering: A company engaged in engineering services must be registered with the Council for the Regulation of Engineering in Nigeria (COREN). One requirement for registration is that the company must have Nigerian directors registered with the COREN holding at least 55% of the company's shares.

Aviation: To qualify for the grant of an aviation licence or permits, the Nigerian Civil Aviation Authority must be satisfied that an applicant is a company registered under Nigerian law. Also, an aircraft is eligible for registration if it is owned or leased by a Nigerian, a foreigner who is lawfully admitted for permanent residence in Nigeria, or an entity registered under Nigerian law.

Pharmacy: The Pharmacist Council of Nigeria Act 2004 provides for the registration of non-Nigerian citizens only:

- if the applicant's home country grants reciprocal registration to Nigerians; and
- where the applicant has been resident in Nigeria for at least 12 months prior to the application.

Negative list: Foreigners are generally prohibited from carrying on the business of the production of:

- arms and ammunition;
- narcotic drugs and psychotropic substances; or
- military and paramilitary wears and accoutrement (including those of the police and the customs, immigration and prison services).

It is significant to note, however, that a foreigner or a foreign company presently lacks the capacity to own landed property directly in Nigeria (See Huebner V. Aeronautical Industrial Engineering & Project Management Co. Ltd (2017) 14 NWLR (PT 1586) 396).

However, a foreign-owned Nigerian entity may own landed property in Nigeria as a corporate body, provided such acquisition is in furtherance of its legitimate business objects.

> A foreigner or foreign company may now carry on a legitimate business in Nigeria either alone (subject to the requirements of sectoral regulations) or in partnership with Nigerians or other foreigners.

Quoted from Paragraph 5, on page 6

Foreign Direct Investment (fdi) – Common Forms Of Business Organisation

Corporate:

Notwithstanding that a foreign investor may regard its proposed Nigerian operations as a branch or subsidiary; the Nigerian operations would have to be undertaken by a separate legal entity, registered under the Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria (LFN) 2004 (CAMA). This is because section 54 of the CAMA provides that in order to do business in Nigeria, a foreign investor must incorporate a separate entity in Nigeria, and until a foreign company is so incorporated it "shall not have a place of business or an address for service of documents or processes in Nigeria for any purposes other than the receipt of notices and other documents as matters preliminary to incorporation under [the CAMA]". Several factors such as the cost of registration and expenses, speed of processing and completion of registration, documentation and legal compliances, post registration compliances and regulatory supervision and the sphere/ extent of operation, may impact the choice of corporate business organization one may establish. The most common form of corporate business organization is the private limited liability company. This may not have more than 50 shareholders and must restrict the transfer of its shares. There is also the public limited liability company (plc), which can have any number of shareholders starting from two. This is the required form for companies listed on the stock market. The unlimited liability company is also an available form of company, but is rarely used.

Most enterprises can only be carried on using a corporate vehicle. For instance, banking, and oil exploration and production, can only be carried out by registered companies. The company itself (not its owners), is taxed on its profits.

Non-corporate:

Many small-scale businesses and petty traders in Nigeria carry on as unincorporated enterprises. Besides sole proprietorships, the most commonly used form of non-corporate business entity is the general partnership which usually operate under a Partnership deed. Except for the regulations affecting a Partnership based on its registration by CAC as a Business name, the operations of Partnership are not guided by CAMA. Partnerships are also not liable to tax – their profits are shared among the partners and taxed in the partners' hands.

Nigerian laws do not generally permit foreigners to carry on business in Nigeria as unincorporated entities.

Free Trade Zones:

The Nigerian government has approved the establishment of several Export Free Zones and Oil and Gas Zones as an incentive to encourage both foreign and domestic investment. The Nigerian Export Processing Zones Authority is the Agency responsible for promoting and facilitating local and international investment into licence free zones in Nigeria. Registered enterprises in the Zones are exempt from all Federal, State and Local Governments taxes rates and levies. Some of such zones include: the Calabar Free Trade zone, Tinapa Free Zone & Resort, Lekki Free Zone, Snake Island International Free Zone, Sebore Farms EFZ.

Registered enterprises in the Zones do not require local incorporation under the Companies and Allied Matters Act. Import of goods into the Zones for purpose of approved activity is exempt from custom duty. There is a simplified process for obtaining regulatory approvals for activities within the Zone as well as acquisition of land or premises for operations.

Investors are entitled to receive payment for export of goods to the customs territory in foreign currency. There is a complete waiver on all import and export licenses. There is also a more liberalised regime for the employment of expatriates.

Foreign Portfolio Investment (fpi)

Other than through direct establishment of a business entity in Nigeria, foreign portfolio investment is another mode of participating in the Nigeria economy. Most foreigners opt for this option because of the flexibility in investment and divestment. This includes purchasing shares from companies that are listed on the Nigerian Stock exchange through an accredited stock broker.

Foreign Investment Approvals

Where a company has foreign shareholders, the company will require certain foreign investment approvals. These are:

1.Business Registration: All companies with foreign participation in their capital structure are required to register with the Nigerian Investments Promotion Commission, through its One Stop Investment Centre, after they are incorporated, and obtain a Certificate of Registration of Company with Foreign Participation. This is a straightforward process and registration can be achieved within 3 – 7 working days.

2.Business Permit: Wholly foreign owned companies are also required to obtain a certificate called a "business permit" from the Federal Ministry of the Interior ("FMI") before they are permitted to carry on business in Nigeria. In order to obtain the business permit, the company will need to, amongst other things, provide evidence that it has invested in the Nigerian company either through cash and/or equipment. This evidence will usually be in the form of a Certificate of Capital Importation which is discussed on the next page.

3. Certificate of Capital Importation: Nigeria's foreign exchange regulations require that foreign investors must, if they wish to have access to the official foreign exchange markets for remitting their dividends, interest or capital, obtain what is called a Certificate of Capital Importation ("CCI") as evidence that their investment has been brought into Nigeria. CCIs are issued by Authorised Dealers (i.e. banks licensed and designated by the Central Bank of Nigeria to deal in foreign exchange) through which the funds are remitted into Nigeria and state, on their face, the purpose for which the moneys were brought in and the amount of the investment. The Capital importation could also be consideration other than cash e.g. importation of equipment or raw materials or through the Debt equity conversion programme.
Once obtained, a CCI permits the foreign investor to access the official foreign exchange market to purchase foreign exchange to remit its dividends, or to repatriate its capital in the event of the partial or complete sale of its investment. A CCI can be obtained within 24 – 48 hours after the investor has brought its foreign investment capital into Nigeria through an Authorised Dealer.

> Many small-scale businesses and petty traders in Nigeria carry on as unincorporated enterprises. Besides sole proprietorships, the most commonly used form of non-corporate business entity is the general partnership which usually operate under a Partnership deed.

Quoted from Paragraph 3, on page 8

Protection Of Foreign Investment

The Nigerian Investments Promotion Commission ("NIPC") Act expressly provides for guarantees against expropriation, nationalisation, and the requirement for any investor to surrender his capital, except if such action is done in the national interest or for public purpose and under a law which provides for the prompt payment of fair and adequate compensation.

The provisions of Section 44 of the Nigerian Constitutional safeguard against compulsory

acquisition of property, and adequate and prompt compensation if such property is acquired for overriding public interest.

Incentives Available To Investors

The NIPC in collaboration with FIRS in 2017 published the first edition of the compendium of investment incentives in Nigeria to encourage investments in line with the government's objective to drive economic recovery and growth. The Compendium is a list of approved tax tariffs, export and sector based incentives and cuts across industries such as the Agriculture/Agro-Allied sectors, Solid Minerals, Manufacturing, Tourism/Hospitality, Oil & Gas.

There are several investment incentives available to investors. These include the following:

1. The Pioneer Status scheme grants pioneer industries an income tax holiday for a period of three years, which can be extended for two additional years. The grant of pioneer status to an industry is aimed at enabling the industry concerned to make a reasonable level of profit within its formative years. The profit made is expected to be ploughed back into the business.

2. Interest earned by a foreign company on its deposits in domiciliary accounts in Nigeria is exempt from tax.

3. Nigerian companies with up to 25% imported foreign equity are exempt from paying minimum tax.

4. Purchasers of local plant and equipment are entitled to an investment allowance of 10%.

5. Capital gains tax (CGT) is not levied on gains from the sale of shares, stocks and treasury bills.

6. Machinery and equipment purchased for the use of gas in downstream operations are exempt from value-added tax (VAT).

7. Interest on securities issued by the Federal Government of Nigeria and on state, corporate and supranational bonds is exempt from tax until 1 January 2022.

8. In certain circumstances, interest on loans granted to Nigerian companies by foreign companies are entitled to tax exemption

> “ The Nigerian Investments Promotion Commission (“NIPC”) Act expressly provides for guarantees against expropriation, nationalisation, and the requirement for any investor to surrender his capital, except if such action is done in the national interest or for public purpose and under a law which provides for the prompt payment of fair and adequate compensation. ”
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> Quoted from Paragraph 3, on page 10

Exchange Control

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Introduction

The evolution of the foreign exchange market in Nigeria up to its present state has been influenced by factors such as the changing pattern of international trade, institutional changes in the economy and structural shifts in production. Before the establishment of the Central Bank of Nigeria (CBN) in 1958 and the enactment of the Exchange Control Act, 1990, foreign exchange was earned by the private sector and held in balances abroad by commercial banks which acted as agents for local exporters. However, with the establishment of the CBN and the subsequent centralization of foreign exchange authority in the Bank, the need to develop a local foreign exchange market became paramount.

In 1982 comprehensive exchange controls were applied because of the foreign exchange crisis that occurred in that year. The increasing demand for foreign exchange at a time when the supply was shrinking encouraged the development of a flourishing parallel market for foreign exchange.
The Foreign Exchange Market was liberalized in 1995 with the introduction of an Autonomous Foreign Exchange Market (AFEM) for the sale of foreign exchange to end-users by the CBN through selected authorised dealers at market determined exchange rate. The Foreign Exchange Market was further liberalized in October 1999 with the introduction of an Inter-bank Foreign Exchange Market (IFEM).

A parallel market for foreign exchange has been in existence since the exchange control era and continues to flourish till date. It has been established that scarcity in the official sector and bureaucratic procedures necessitated the growth and development of the parallel market. Today, while the exchange rate in the interbank has been stable, the rate in the parallel market has experienced unprecedented volatility.

Transactions In Foreign Currency

Section 20(1) of the CBN Act provides that the currency notes issued by the CBN shall be legal tender in Nigeria. Section 20(5) forbids anyone from refusing to accept the naira as a means of payment in Nigeria but empowers the CBN to prescribe the circumstances and conditions under which other currencies may be used as a medium of exchange. It is clear from these provisions that pricing in foreign currency is not prohibited but refusal to collect naira as payment.

Section 1(2) of the Foreign Exchange Act (FEA) empowers the CBN, with the approval of the finance minister, to issue guidelines from time to time, to regulate the procedures for transactions in foreign currency. Section 8 requires that such guidelines issued for supervision and monitoring must be consistent with the FEA. Based on section 10, an eligible transaction for the purchase of foreign exchange includes any transaction adequately supported by appropriate documentation except where the transaction is prohibited by law.

Convertibility And Transferability Of Funds

The NIPC Act and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act ("FEMMPA") guarantee unconditional transferability of funds through an authorised dealer, in freely convertible currency of dividends, profit (net of taxes) attributable to the investment. These laws also provide for repayment of a foreign loan and guarantee remittance of proceeds (net of taxes) and other obligations in the event of a sale or liquidation of the enterprise or any interest attributable to a foreign investment. The CBN recently introduced an FX window for investors and exporters which has significantly improved liquidity in the foreign exchange market. Also, in May 2018, Nigeria through the CBN signed a $2.5 billion bilateral currency swap Agreement to boost local currency liquidity in the Nigerian economy.

Nigerian laws regulate the convertibility of the local currency into foreign currency for foreign investments in Nigeria. In this regard, where an investor seeks to convert foreign currency for securities transaction through Government approved channels, it (through its Bank) would be required to comply with the provisions of the

Foreign Exchange (Monitoring and Miscellaneous Provisions) Act ("FEMMPA") concerning the procurement of foreign exchange for dealings in securities in Nigeria.

Further, for an investor to be able to repatriate such funds brought into Nigeria for investment purposes, it would be required under the NIPC Act to obtain a Certificate of Capital Importation ("CCI") from a Nigerian licensed bank through which the funds are to be imported into Nigeria. The NIPC Act assures convertibility of such funds brought into Nigeria under a CCI such that where any derivative cash from such imported funds are with the Bank, the same may be convertible into other currencies.

All cash that may be exported sometime in the future will need a CCI whenever it is imported. The CCI evidences the importation of capital (for the purpose stated therein) and facilitates the unconditional repatriation of such capital and any derivative earnings in foreign currency (net of applicable taxes).

Requirements For Obtaining A Cci

CCIs are Central Bank of Nigeria (CBN) certificates issued by banks for importation of cash (foreign currency Inflow) for investment as Equity or Loan, and for importation of machinery and equipment for investment as Equity or Loan.

As described above, they are aimed at providing investors with statutory evidence of capital inflow/investment into a Nigerian company. It legitimizes and facilitates the repatriation of dividends and capital to the foreign investor.

Documents required to issue CCI for Importation of cash as Equity Investment.

1. Board resolution authorizing the investment (from the Nigerian Company)
2. A copy of the Nigerian company's certificate of incorporation
3. Tested SWIFT telex copy stating amount and purpose of inflow
4. Name and address of foreign investor (to be provided by the Nigerian company).
5. Registration number and date of registration of investors
6. Nature of Business of Investor
7. Sector of Operation of the beneficiary.

Documents required to issue CCI for Importation of cash as Loan.

1. Board resolution authorizing the investment (from the Nigerian Company)
2. A copy of the Nigerian company's certificate of incorporation
3. Tested telex copy stating amount and purpose of inflow
4. Name and address of foreign investor to be provided by the Nigerian company.
5. Registration number and date of registration of investors
6. Nature of Business of Investor
7. Sector of Operation of the beneficiary
8. Offer letter by the Investor and acceptance by the beneficiary
9. Loan agreement stating the repayment schedule (tenor and interest rate)

Documents required to issue CCI for Importation of Machinery & equipment as Equity Investment.

·1. Board resolution authorizing the investment (from the Nigerian Company)
2. A copy of the Nigerian company's certificate of incorporation
3. Tested SWIFT telex copy stating amount and purpose of inflow
4. Name and address of foreign investor (to be provided by the Nigerian company).
5. Registration number and date of registration of investors
6. Nature of Business of Investor
7. Sector of Operation of the beneficiary.
8. Risk assessment report/combine certificate of origin and value for destination inspection
9. Certified copy of bill of lading (original to be sighted).
10. Certified copy of bill of entry/single goods declaration form (original to be sighted)
11. Original import duty payment receipt bearing single goods declaration (SGD) form number
12. Copy of Form M
13. Goods exit note.

Documents required to issue CCI for Importation of Machinery & equipment as Loan.

1. Letter from the customer requesting for CCI
2. Board resolution authorizing the investment (from the Nigerian Company)
3. A copy of the Nigerian company's certificate of incorporation
4. Tested telex copy stating amount and purpose of inflow
5. Name and address of foreign investor to be provided by the Nigerian company.
6. Registration number and date of registration of investors
7. Nature of Business of Investor
8. Sector of Operation of the beneficiary
9. Offer letter by the Investor and acceptance by the beneficiary
10. Loan agreement stating the repayment schedule (tenor and interest rate)
11. Risk assessment report/combine certificate of origin and value for destination inspection
12. Certified copy of bill of lading (original to be sighted).
13. Certified copy of bill of entry/single goods declaration form (original to be sighted)
14. Original import duty payment receipt bearing single goods declaration (SGD) form number
15. Copy of Form M.
16. Goods exit note (evidencing clearance of goods not earlier than six months).

Generally, the CBN mandates that foreign currency inflows for which customers require CCI's must be converted to Naira by selling funds to the Bank within 24 hours of receipt. It is advised that applicants for CCI provide all required documents and information before funds are received.

CCI for importation of Raw materials/equipment must be issued within 24 hours of receipt of Customers' request and clearance of goods from the port subject to complete documentation.

Exchange Control Regulations For Imports

1. All import of goods into the country must be covered with duly approved Form M regardless of whether the transaction is exempted from destination inspection and/or payment is involved.

2. Import duty must be paid through the bank that processed the Form M except where such a bank is a non- collecting bank.

3. All goods under the import prohibition list as announced from time to time by the Federal Ministry of Finance are not allowed into the country

4. All imports are subject to destination inspection except those items granted exemption by the Federal Ministry of Finance

5. All importers must submit Exchange Control Documents (ECD) to the local bank that processed their Form M after taking delivery of the goods from the port

6. All sale of foreign exchange by authorized dealer banks and the Central Bank of Nigeria for imports must be supported by documents as prescribed from time to time by the Central Bank

Exchange Control Regulations For Exports

1. All exports must be supported by approved Form NXP
2. All exports are subject to pre-shipment inspection
3. Exports can be invoiced Cost and Freight (CFR) or Free on Board (FOB)
4. Exports proceeds must be repatriated to an export domiciliary account in Nigeria within 90days from date of departure to destination

Other Provisions Of The Exchange Controls

1. No person shall be required to declare at the port of entry into Nigeria any foreign currency unless its value is more than USD5,000 or its equivalent.
2. The importation and exportation of the Naira shall remain prohibited
3. No person shall, in Nigeria make or accept cash payment, whether denominated in foreign currency or not for the purchase or acquisition of
the following:
- Landed Properties
- Securities, including stocks, shares, debentures and all forms of negotiable instruments
- Motor Cars, including other vehicles of any description whatsoever.
- Payments for these items specified above shall be made by means of bank transfers or cheques drawn on banks in Nigeria only.
- Transactions of operators in the Free Trade Zone shall not qualify for remittance with funds from Nigeria Foreign Exchange Market
- Transactions with shipping documents predating the approval date of Form M and Documentary Credit shall not qualify for payment in the foreign exchange market.

> "A parallel market for foreign exchange has been in existence since the exchange control era and continues to flourish till date. It has been established that scarcity in the official sector and bureaucratic procedures necessitated the growth and development of the parallel market."
>
> Quoted from Paragraph 3, on page 13

Banking and Finance

Overview Of Applicable Regulatory Regime

There are several laws and regulations governing different aspects of the banking and finance institution in Nigeria. The purpose of the strict regulation of the sector is to ensure financial stability in the country. The Banks and Other Financial Institutions Act ("BOFIA") and the Central Bank of Nigeria ("CBN") (Establishment) Act ("CBN Act") are the primary legislations that empower the CBN to regulate and supervise financial institutions in Nigeria. While the CBN Act concerns itself with the powers and responsibilities of the CBN, the BOFIA concerns itself with the regulation of banking business per se. The BOFIA provides that only a company registered in Nigeria and has a valid banking license can carry on the business of banking in Nigeria.[1]

The Nigerian Deposit Insurance Corporation ("NDIC") Act establishes the NDIC which is the agency responsible for insuring all deposit liabilities of licensed banks.
The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act established the Autonomous Foreign Exchange Market and regulates foreign exchange transactions in Nigeria.

The principal regulator of the banking and finance industry in Nigeria is the CBN, established by the CBN Act. The CBN is responsible for granting banking licenses to carry on the business of banking and performs regulatory and supervisory functions such as ensuring monetary stability, promoting sound financial systems, keeping accounts for commercial banks and other financial institutions and issuing of guidelines and circulars. In addition to these functions, the CBN also serves as the banker and adviser to the federal government with respect to financial matters.[2]
The Monetary Policy Committee (MPC) is a regulatory agency established by the CBN Act[3] responsible for formulating monetary and credit policy for the Nigerian financial system. The MPC facilitates price stability and supports the economic policy of the Federal Government. The Financial Reporting Council of Nigeria (FRCN)[4] also regulates the banking and finance industry in Nigeria. It has the responsibility of enforcing compliance with accounting, auditing, corporate governance and financial reporting standards. The FRCN also develops and publishes accounting and financial reporting standards for the preparation of financial statements of public interest entities, which includes banks and other financial institutions.

Banking Licenses And Authorizations In Nigeria

An application for the Banking license is usually made in two stages. At the end of the first stage, an approval-in-principle will be granted; and a final license is granted at the end of the second stage. Application for the Approval-in-Principle is required to be addressed to the Director of Banking Supervision Department at the Central Bank of Nigeria (CBN) and submitted with the following:

(a) A non-refundable application fee of N500,000 (Five Hundred Thousand Naira)

(b) Deposit of minimum capital of N 25 billion with Central Bank of Nigeria on application with evidence of deposit by each shareholder. The source of capital contribution by each shareholder/ subscriber would subsequently be verified by the CBN.
(c) A feasibility report/ business plan of the proposed bank reflecting the minimum paid-up share capital, the ownership structure (proposed investors), objectives of the bank, services to be rendered and all other plans necessary for the sustenance of the proposed bank.
(d) A draft of the Memorandum and Articles of Association of the proposed bank.

1. Sec 2(1) of BOFIA
2. Sec 2 of CBN Act
3. Sec 12 of CBN Act
4. FRCN was established by the Financial Reporting Council of Nigeria Act

(e) A list of shareholders, directors and principal officers of the proposed bank and their particulars.
(f) Any other documents/information as may be required.

An application for final banking license is also required to be made not later than 6 (Six) months after the approval-in-principle is granted and submitted with the following;

(a) Non-refundable licensing fee of N5,000,000 (Five Million Naira)
(b) Certified true copy (CTC) of incorporation documents (Certificate of Incorporation, Memorandum and Articles of Association, Allotment of shares and Particulars of directors)
(c) Evidence of location of Head Office/Branch Building (rented or owned) for the take-off of banking business.
(d) Changes (if any) in the Board, Management and Shareholding should be clearly stated.
(e) Evidence of Banking Hall and Vault Facilities.
(f) Bullion vehicles with standard security gadgets.
(g) Evidence of installation I.T. facilities/ computer ization.
(h) Copies of letters of offer and acceptance of employment in respect of the Management Team.

> “The Banks and Other Financial Institutions Act (“BOFIA”) and the Central Bank of Nigeria (“CBN”) (Establishment) Act (“CBN Act”) are the primary legislations that empower the CBN to regulate and supervise financial institutions in Nigeria. While the CBN Act concerns itself with the powers and responsibilities of the CBN, the BOFIA concerns itself with the regulation of banking business per se.”
>
> Quoted from Paragraph 1, on page 18

Competition, Mergers And Acquisitions

GBENGA BIOBAKU & CO
Barristers & Solicitors

Introduction

Nigeria does not currently have a single law that deals exclusively with competition law issues. However, there is a draft Nigerian Federal Competition and Consumer Protection Bill (FCCP Bill) that seeks to establish the Federal Competition and Consumer Protection Commission. The FCCP Bill is yet to be passed into law. Under the FCCP Bill, the Securities and Exchange Commission (SEC) is empowered to determine whether any merger, acquisition or business combination is likely to substantially prevent or lessen competition. The relevant legislation, rules and regulations are available on the SEC's website (www.sec.gov.ng).

There are also sector-specific guidelines on competition-related issues. For example, the Nigerian Communications Commission (NCC) regulates competition in relation to the telecommunications sector and has issued the Competition Practices Regulations 2007 (CPR 2007), which is available on its website (www.ncc.gov.ng). Some of the Nigerian laws that contain comprehensive competition provisions include the SEC Regulations 2013, CBN Act , the Consumer Protection Council Act, the Electric Power Sector Reform Act , the Nigerian Communications Act, NIPC Act etc

When companies merge or acquire other companies, they usually do so to improve their position in the market. Therefore, where two firms come together and increase their share in a particular sector of the market, competition laws seek to ensure that their joint share in the market is not such that gives them unfair edge or advantage over their competitors. As part of its merger control roles, SEC can order for the breakup of companies whose business practices are capable of restraining competition and creating a monopoly (for example, companies or business undertakings entering into agreements which have as their object or effect: the prevention, restriction or distortion of competition in any part of the Nigerian market). The SEC may also impose civil penalties for breaches of its rules.

The CPR 2007 empowers the NCC to review agreements and practices which attempt to lessen competition such as:
- Price-fixing agreements.
- Market allocation agreements.
- Exclusive dealing agreements.
- Bid-rigging.
- Resale price maintenance.

Contravention can lead to some fine or other civil sanctions.

The existing competition rules apply to Nigerian entities. Therefore, foreign entities are only subject to these rules in relation to the activities of their Nigerian subsidiaries.

Mergers & Acquisitions

A merger is defined by the Investment and Securities Act of 2007 as any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies. On the other hand, a "Takeover" is defined by the ISA as "the acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company."

The ISA provides that a merger can be achieved through the purchase or lease of the shares, interest or assets of the other company in question or an amalgamation or other combination with the other company in question.

Alternatively, a merger or acquisition could be achieved using a scheme of arrangement.

Legal Regime Governing M&As

The main laws and regulations governing business combinations in Nigeria are:

1. The Investments and Securities Act 2007 (the ISA);
2. The Companies and Allied Matters Act Cap C20
   Laws of the Federation of Nigeria (LFN) 2004 (the CAMA);

3. The Securities and Exchange Commission (the SEC) Rules 2013 (as amended), which are made by the SEC pursuant to the ISA (the SEC Rules); and
4. The Nigerian Stock Exchange Rule Book 2015 (applicable to public companies listed on the Nigerian Stock Exchange (NSE)).
5. There are also sector-specific pieces of legislation that apply to business combinations.

These include:
- The Banks and other Financial Institutions Act Cap B3 LFN 2004 and the Procedures Manual for Applications for Bank Mergers/Take-overs 2004 issued by the Central Bank of Nigeria (applicable to the banking sector);
- The Insurance Act, Cap I18 LFN 2004 (applicable to the insurance sector);
- The Nigerian Communications Commission Act Cap N97 LFN 2004 and the NCC Competition Practices Regulations 2007 (applicable to the telecommunications sector);
- The Electric Power Sector Reform Act 2005 (applicable to the power sector);
- The National Broadcasting Commission Act Cap N11 LFN 2004 (applicable to the broadcasting sector); and
- The Department of Petroleum Resources Guidelines for obtaining Ministerial Consent (2014) (applicable to the oil and gas sector).

That said, the principal law regulating mergers and acquisitions in Nigeria is the ISA, the Securities and Exchange Rules and Regulations ("SECRR") made pursuant to the ISA and the CAMA. The ISA and the SECRR apply to all companies notwithstanding the sectors they operate in and by Reg. 424, the scope of SECRR in respect of mergers, takeovers and acquisitions apply to public and private companies.

In addition to the ISA, the SECRR and CAMA, there are other laws applicable to mergers and acquisitions which are sector or industry specific. For instance, the Central Bank Act and the Banks and Other Financial Institutions Act regulate mergers and acquisitions in the banking sector, the Insurance Act applies to mergers and acquisitions in the insurance sector, the Nigerian Communications Act includes provisions that regulate mergers and acquisitions in the telecommunications sector while the Electricity Power Sector Reform Act applies to mergers and acquisitions in the power sector.

Thresholds And Categories Of Mergers

By virtue of the section 120 of the ISA, the Securities and Exchange Commission ("SEC") has the power to prescribe a lower and an upper threshold of combined annual turnover or assets or a combination of both in Nigeria, in general or in relation to specific industries, for the purposes of determining categories of mergers.

The categories are small, intermediate and large mergers. By Reg. 427 of SECRR , SEC prescribes that the threshold for a small merger shall be below N1,000,000,000.00 of either the combined assets or turnover of the merging companies, the intermediate threshold shall be between N1,000,000,000.00 and N5,000,000,000.00 whilst the upper threshold shall be above N5, 000,000,000.00

Considerations Of Mergers

The SEC's approval must be obtained before any merger, acquisition or business combination between or among companies can be effected, except those specifically exempted by SEC such as:

(a) Holding companies acquiring shares solely for investment and not for the purpose of using the shares by voting or to cause substantial restraint of competition or tend to create monopoly in any line of business enterprise;
(b) In a small merger, the merging entities shall not be required to seek prior approval of the SEC but shall be required to inform SEC after the merger.
(c) An acquisition in a private/unquoted public company with assets or turnover below N500,000,000.00 shall not be subject to the prior review and approval of SEC.

Section 121 of ISA sets out the factors the SEC takes into consideration when deciding whether to approve a merger application or not. Initially, the SEC will determine if the merger is likely to substantially prevent or lessen competition. If it does appear that it will, the SEC would then determine if the merger is likely to result in any technological efficiency gain greater than, and off-setting, the effects of any prevention or lessening of competition that may result from the merger which may not be obtained if the merger is prevented.

In making its decision, the SEC will also look at the strength of the competition in the relevant market and the probability that the company after the merger, will behave competitively or co-operatively, considering any factor that is relevant to competition in that market.

Additionally, the SEC would also decide whether the merger can or cannot be justified on substantial public interest grounds by considering the effect the merger will have on (a) an industrial sector or region (b) employment (c) the ability of small businesses to become competitive and (d) the ability of national industries to compete in international markets.

The SEC would also assess whether all the shareholders are fairly, equitably and similarly treated and given sufficient information regarding the merger.

The SEC may grant an approval in principle after making an initial determination and direct the merging companies to make an application to the court to order shareholders' meetings of the respective companies to get their concurrence to the proposed merger.

If at least three quarters in value of the shares of members being present and voting either in person or by proxy at each at the separate meetings agree to the scheme, the scheme shall be referred to SEC for approval.

Procedure For Small Mergers

Section 122 provides that a party to a small merger is not required to notify the SEC of a merger unless the SEC requires it to do so and the party implements the merger without approval unless the SEC requires that it should be notified. Such party may nevertheless voluntarily notify the SEC at the time of the merger.

However, the SEC may require parties to a small merger to notify it within six (6) months after the merger has commenced if, in the opinion of the SEC, the merger may substantially prevent or lessen competition or if it cannot be justified on public grounds. No further steps can be taken by the parties until the merger has been approved.

After considering the merger, the SEC may either approve the merger, prohibit the merger if it has not been implemented or, if already implemented, can make a declaration that the merger is prohibited.

If the merger is approved by the SEC, the parties must apply to the courts for the merger to be sanctioned. When sanctioned, the merger will become binding on the parties.

The parties must deliver a copy of the order to the SEC for registration within seven (7) days after it is made and should publish the order in the gazette and in at least one national newspaper.

Procedure For Intermediate And Large Mergers

With respect to intermediate and large mergers, under section 123 of ISA parties are required to notify the SEC of the proposed merger. The acquiring company and the target company must also provide a copy of the notice to its employees or any registered trade union that represents its employees.

Notices of proposed mergers, acquisitions or other forms of combinations, referred to as pre-merger notices in the SECRR, must be filed with the SEC for evaluation.

After the parties to a merger have fulfilled all notification requirements, within twenty (20) working days for intermediate mergers and forty (40) working days for larger mergers, the SEC may approve the merger subject to any conditions or prohibit the implementation of the merger.

The merger must not be implemented without the approval of the SEC. Where the approval was gained by incorrect information given by a party or deceit by a party, the SEC has the power to revoke its decision approving any merger.

Furthermore, where the SEC believes that the business practice of a company substantially prevents or lessens competition, section 128 empowers the SEC to order the break-up of the company into separate entities in such a way that it does not substantially restrain competition in its line of business or in the market.

Acquisitions And Takeovers

Where a person acquires shares carrying 30% or more of the voting rights of a company, or where together with persons acting in concert with him, he holds not less than 30% but not more than 50%, such person is required to make a takeover offer to the shareholders of the class of shares he holds in the manner described below.

Procedure For Takeovers

Authority to proceed with bids must first be obtained from the SEC before a party can proceed with the bid. In deciding whether to grant the authority to proceed or not, the SEC would have regard only to the likely effect of a successful takeover bid on the Nigerian economy and on any manpower and development policy of the Nigerian Government. It is also important to note that under Nigerian law, a take-over bid shall not be made in any case where the shares to be acquired under a bid are shares in a private company.

The bid proposal must also be circulated by the offeror to the directors of the target company and its shareholders and must register the proposal with the SEC.

An authority to proceed with a takeover will remain in force for three (3) months and may be extended if an application to do so is submitted to the SEC before the end of the initial three-month period.

Once a notification of approval in principle has been granted in response to a pre-merger notice, the parties are required to file a draft scheme of arrangement with SEC for clearance and file an application in the court seeking to convene a court ordered meeting. After the shareholders resolution has been passed at the court ordered meeting, the parties must file a formal application of approval of the merger. The parties would also have to comply with post-approval requirements.

> “The CPR 2007 empowers the NCC to review agreements and practices which attempt to lessen competition”
>
> Quoted from Paragraph 4, on page 21

Employment Law

GBENGA BIOBAKU & CO
Barristers & Solicitors

Applicable Legal Framework

In Nigeria, employment law is draws largely from the common law principles of freedom of contract within the broad limits of legality and public policy. However, existing employment legislation has intervened, to some extent, to prescribe certain minimum standards of contractual responsibilities between employers of labor and workers.

When dealing with employment law in Nigeria, the most relevant and applicable legislation includes the:

(a) The Labour Act (Labour Act) 2004
(b) Trade Unions Act 2004
(c) The Employees Compensation Act 2010/
(d) The Factories Act 2004
(e) The Pensions Act 2004
(f) The Trade Disputes Act 2004
(g) The Minimum Wage (Amendment) Act 2011

Although the Labour Act is the principal labor legislation, it is not applicable to all classes of employees in Nigeria. It only applies to "Workers" who are described in the Act as any person who has entered into or works under a contract with an employer to carry out manual or clerical work but does not include persons exercising administrative, executive, technical or professional functions. Therefore, the relationship between an employer and any one employed to perform administrative, executive, technical or professional functions is governed by contracts entered into by the parties.

From the foregoing, there are two classes of employees, those covered by the Labour Act and those covered by individual contracts. For employees covered by the Labour Act, there is a requirement for a written contract of employment within three months of employment. This written contract is expected to state clearly all the terms governing the employment. For employees not covered by the Labour Act, there is no express provision as to whether there has to be a written contract governing their relationship with their employers. It is however advisable that their contracts be written for clarity as to the terms governing the contract of employment. In addition to the written contract of employment, most organizations in Nigeria have staff handbooks which also govern the relationship between employers and employees.

There is a third class of employment wherein employee and employer relations are governed by statutory provisions, such as those employed in government institutions and parastatals.

Also noteworthy is the existence of certain directives issued by Regulatory Agencies such as the Department of Petroleum Resources which relate to employment contracts in the oil and gas industry, for example, the Guidelines for the Release of Staff in the Oil and Gas Industry issued by the DPR in 2015. Although the applicability of this directive can be contested based on the decision of the Nigerian Supreme Court in the case of Shell Petroleum Company v Nwawka (2003) 1 SC Pt II 127, where the apex court held that a directive from a stranger or third party to a contract may not be construed to derogate from contractual obligations of the parties.

The major regulatory agency in charge of employment relations is the Ministry of Labour and Productivity. However, there are other government agencies that oversee some aspects of employment relations such as the National Pension Commission which regulates pension related matters and the Ministry of Interior which regulates employment of foreign workers.

It is expected that employer-employee relations will run smoothly, however, where disputes arise during employment or following termination of employment, the National Industrial Court ("NIC") would have the jurisdiction as arbiter.

Work Permits And Visas

Expatriate Quota Positions

Where a Nigerian company (the "NigCo") wishes to employ expatriates, it will be required to obtain an expatriate quota approval for the required number of expatriate personnel. Usually, the expatriate quota is granted in respect of managerial and technical positions. The employment of expatriate staff in Nigeria under the expatriate quota system is used as a tool to ensure technology transfer therefore, quota applications are generally required to be supported by detailed training programmes for Nigerian staff, and a management succession schedule. In this regard, two Nigerians are required to understudy each expatriate employed by the NigCo.

Further, except for the position of the managing director, the NigCo's application would usually be considered where there are no qualified personnel in Nigeria to hold the positions for which expatriate quota approvals are sought or, where such personnel exist but are not available in sufficient number at the time required.

Temporary Work Permit ("TWP")/Cable Visa – Application/Extension

Whereas Expatriate quota is granted in favour of a company, work permit is in favour of the individual staff to enable him work in the relevant company. A temporary work permit is usually granted for 90 (ninety) days on the basis of the applicant's invitation to Nigeria by an individual or company for a specific business purpose. TWPs may be utilized until the expatriate quota approval has been granted.

Subject to Regularisation ("STR") Visa

This visa is obtained by an applicant who has been offered employment on the basis of a valid Expatriate Quota held by a Nigerian registered company. This visa is conditional upon the applicant regularising his status in Nigeria after his entry into Nigeria i.e. by applying for and obtaining a Combined Expatriate Residence Permit and Alien's Card.

Combined Expatriate Residence Permit and Alien's Card

This permit is necessary for expatriates who are employed in Nigeria on the basis of a valid expatriate quota and completes the regularisation of STR Visas. The permit enables the holder to apply for and obtain all necessary permits on behalf of their spouses and children as dependents of the employee.

> "Although the Labour Act is the principal labor legislation, it is not applicable to all classes of employees in Nigeria. It only applies to "Workers" who are described in the Act as any person who has entered into or works under a contract..."
>
> Quoted from Paragraph 3, on page 26

The Oil and Gas Industry

The Oil And Gas Industry[5]

In Nigeria, employment law is draws largely from The oil and gas industry in Nigeria has grown from the first discovery of oil in Oloibiri, Port Harcourt, to become the major contributor to the Nigerian economy.

Nigeria has about 34 pieces of legislation, excluding regulations and directives, regulating various aspects of the petroleum industry. The exploration and production of petroleum and the grant and revocation of petroleum licences and leases in Nigeria are regulated and governed by federal legislation. Accordingly, the Constitution and the Petroleum Act ("the Act") vests the entire ownership and control of all petroleum resources in, under or upon any lands, (including under water) in Nigeria in the Federal Government of Nigeria ("the Government"). The Department of Petroleum Resources (DPR), an arm of the Petroleum Ministry, monitors, supervises and administers the activities and operations of all companies operating in the petroleum industry.

Historically, licenses and leases for the exploration and production of petroleum have been granted through direct negotiation and discretionarily by the Government. However, to promote sector transparency, a system of competitive tenders has often been used by the government. The DPR is responsible for organising oil bid rounds.

A licence/lease will usually be granted with accompanying obligations on the licensee/lessee to comply with requirements regarding rent and royalty payments, reporting discoveries of hydrocarbons and other economic minerals, adherence to planning laws, safety and environmental protection and promotion of local content.

The typical contractual arrangements through which the exploration and production activities are carried out in Nigeria include the Joint Venture (JV) models, Production Sharing Contracts (PSCs), Service Contracts (SC) and Marginal Field farm-in arrangements. Sole risk operations are also a standard feature of oil field development models in Nigeria.

The JV model is currently becoming less popular with the government due to the difficulty of the State-owned Nigerian National Petroleum Corporation (NNPC) to meet its financial obligations under the JV.

Under the PSC model, the NNPC which is granted the concession engages the Multinational Oil Company (MOC) or indigenous oil company to conduct petroleum operations on behalf of itself and the NNPC. The MOC or indigenous company will usually bear the financing risk and upon success in its operations is reimbursed with either cash or oil or both, according to the agreement between the parties.

Tax obligations for both upstream and downstream operators are regulated by Federal legislation. Taxes which players in the petroleum industry will pay usually include petroleum profits tax (for upstream companies), companies' income tax, value added tax, tertiary education tax (excluding companies not registered in Nigeria), withholding tax, capital gains and tax paid by vessels engaged in coastal trade.

The proposed Petroleum Industry Reform Bills pending before the national assembly, are aimed at harmonising all the legislation and significantly restructuring the industry, particularly the functions of the various regulatory agencies, with a view to eliminating overlaps. These bills are referenced further below.

The upstream sector, the most active sector of the Nigerian industry, is largely export-focused and until recently was dominated by international oil companies (IOCs). The Nigerian government's Marginal Fields Licensing regime and its local content development drive have given rise to significant levels of indigenous participation within the sector.

5. Our updated and more detailed article on Investing in the Nigerian oil and gas Industry will be published by mid-August, 2018

The government places a high premium on local content development in the petroleum industry. There is therefore federal legislation which makes it mandatory for operators in the petroleum industry to develop and maintain Nigerian content in their operations, and a supervisory agency whose main function is to implement the provisions of the Act with respect to supervising, coordinating, administering, monitoring and managing the development of Nigerian Content in the petroleum industry.

The midstream and downstream sectors are dominated by indigenous players. Both sectors, except in respect of arrangements relating to liquefied natural gas (LNG), are significantly underdeveloped as Nigeria's four refineries are currently producing just above 10 million litres of petroleum products per day in comparison with Nigeria's daily consumption of about 35 million litres per day. As a result, there is heavy reliance on imports in the midstream, and some form of government subsidization to provide petroleum products at affordable prices in the downstream sector. There have been several attempts by the government to remove the subsidy regime and deregulate the downstream sector of the industry, as the regime has been both ineffective and subject to abuse or misapplication of government funding.

Health, safety and environmental protection from the negative effects of petroleum exploration and production activities are regulated by various legislation and agencies in Nigeria. The Associated Gas Re-Injection Act (AGRA) aims to reduce the incidence of flaring associated gas found in the production of oil and penalises operators who do not comply with its directives in this regard. In the same vein, the Environmental Guidelines and Standards or the Petroleum Industry (EGASPIN) is a set of guidelines initiated by the Department of Petroleum Resources (DPR) to govern health, safety and environmental activities in the petroleum industry.

Certain laws are currently being proposed which are aimed at reforms in the petroleum industry, and which represent fractionalized segments of a Petroleum Industry Bill (PIB) introduced to the Nigerian parliament over 16 years.

The PIB aimed among other goals, to provide governance and institutional framework for the Nigerian Petroleum industry and clearly separate policy, regulatory and commercial functions.

These proposed laws are the Petroleum Industry and Governance Bill (PIGB), Petroleum Industry Administration Bill 2018, Petroleum Industry Fiscal Bill 2018 and the Petroleum Host and Impacted Communities Bill 2018.

The PIGB has been passed by the Nigerian Parliament and presently awaits the assent of the president to effectively become law.

> The typical contractual arrangements through which the exploration and production activities are carried out in Nigeria include the Joint Venture (JV) models, Production Sharing Contracts (PSCs), Service Contracts (SC) and Marginal Field farm-in arrangements. Sole risk operations are also a standard feature of oil field development models in Nigeria.
>
> Quoted from Paragraph 5, on page 29

Taxes In Nigeria

GBENGA BIOBAKU & CO
BARRISTERS & SOLICITORS

Introduction

Nigeria runs a federal system of government which shares power between the central government known as the federal government, the regional government known as the state governments, and the sub-regional governments known as the local governments. The major institutions responsible for the collection of taxes are the Federal Inland Revenue Service for the federal government and the State Inland Revenue Service for the state government. Local governments are empowered to collect certain rates and levies assessed and collected through their respective local council authorities.

Corporate Tax

Companies registered in Nigeria are taxed at the rate of 30% of all profits on their worldwide income. Under the Companies Income Tax Act (CITA), a company is deemed to be a Nigerian company or resident in Nigeria if it is incorporated in Nigeria. The profits of a local subsidiary accruing in, derived from, brought into or received in Nigeria are taxable.

A foreign or non-resident company may be deemed to have a taxable presence in Nigeria and be subject to deemed income tax if:

(a) It has a fixed base in Nigeria and the profit is attributable to that fixed base;
(b) Where it habitually carries on business in Nigeria through an agent;
(c) Where it executes a turnkey contract; or
(d) Where the trade or business is between the foreign entity and an affiliated company.

In other words, foreign or non- resident companies doing business in Nigeria are liable to tax to the extent of any accrued income derived from their operations which falls under (a) –(d) in Nigeria

Therefore, physical or transactional presence are important for determining the tax liability of a foreign company – there has to be some connecting factor between the trade or profit of the company in question and the physical territory of Nigeria.

One area of controversy in determining the extent to which the income of a foreign company is liable to tax in Nigeria is in the question of whether the company has a fixed base in Nigeria. It has been decided in a number of cases that, as long as a foreign company has a location in Nigeria from which it carries on business, such location will be regarded as a fixed base for that company in Nigeria and the company will be liable to pay tax in Nigeria. This is regardless of whether the company in fact owns the property in question, or whether it rents such property[6].

Foreign or non-resident companies are assessed for tax on a deemed profit basis. In this case, the turnover is used to determine assessable profit by applying a deemed profit or "best of judgment" rate (currently 20%) on the company's turnover. By this structure, the effective tax rate would amount to 6% of turnover.

6. Shell International Petroleum BV v FBIR (2004) 2 NWLR (pt. 861) *Nigeria Weekly Law Report (NWLR)

Petroleum Profit Tax

A company involved in petroleum operation is not subject to Companies' Income Tax but is liable to Petroleum Profit Tax (PPT). Liability to pay this tax is not because a company is in the oil and gas industry. To be liable, a company must engage in petroleum operations. This tax is charged upon the profits of the exploration and production company for each accounting period.
Accounting period in this instance means a period of one year commencing on 1 January and ending on 31 December of the same year; or any shorter period commencing on the day the company first makes a sale or bulk disposal of chargeable oil under a programme of continuous production and sales, domestic, export or both, and ending on 31 December of the same year; or any period of less than a year being a period commencing on 1 January of any year and ending on the date in the same year when the company ceases to be engaged in petroleum operations.

Petroleum operations conducted onshore and in the shallow water areas are subject to the tax rate stipulated in the PPT Act ("PPTA") at the rate of 65.75% of chargeable profits for the first 5 (five) years following first oil after which the rate is 85% of chargeable profits after necessary deductions have been made; It is initially charged at the reduced rate of 65.75% to assist in amortising pre-production capitalised expenditure.

On the other hand, companies which operate concessions in the deep offshore terrain are taxed at a reduced flat rate of 50% under the provisions of the Deep Offshore and Inland Basin Production Sharing Contracts Act (DIPSA). Companies operating in water depth of beyond 200 metres are considered to be in the deep offshore.

Where production is from a field designated a marginal field, it is important to point out that in recognition of the size of marginal field operations, the Federal Government ("the Government") approved a reduced tax rate to be applied to marginal field operations. The approval of the Government was conveyed by an executive letter dated 12th July 2006 from the Department of
Petroleum Resources ("the DPR") to marginal field operators, and aimed at ensuring a reasonable fiscal regime commensurate to the size of the operations. Thus, on the strength of that letter, marginal field operations are to be taxed at the rate of 55%. Please note however that this tax regime though approved by the Government (and stated to be effective from September 2005) is yet to be formalized into legislation and remains untested in its application.

Personal Income Tax

Personal income tax is charged on the income of an individual on the basis of residency. This tax is paid to the State Inland Revenue Service of the state of residency of the taxpayer. The determination of residency for the relevant year of assessment is a period of 183 days or more in any twelve-month period commencing in the calendar year and ending either in the same year or the following year. The rate for personal income tax ranges from 7% to 24% depending on the income. It is paid on a Pay–as-you-earn basis.

Accordingly, N200,000 is subject to a minimum of 1 % of gross income and any balance is taxed in accordance with the following tax table:-

Income	Rate
1st N300,000.00	7%
Next N300,000.00	11%
Next N500,000.00	15%
Next 500,000.00	19%
Next N1,600,000.00	21%
Above N3,200,000.00	24%

A company is deemed an agent of the tax authority for tax collection purposes and is accordingly required to deduct tax at source from salaries, wages and pensions (or other remuneration due to the employee) and remit the same to the State Internal Revenue Service. In the event of default of full or accurate remittance, the payment shortfall is recoverable from the employer.

It is important to point out that in certain cases, expatriates are assessed on a deemed salary basis (which may often have no relevance to the declared salary) calculated on a Naira salary that an expatriate can reasonably be expected to earn while working in Nigeria.

Value Added Tax (vat)

This is the tax paid on consumption of goods and services. It is calculated at 5% of the cost of the goods or services. It is payable to FIRS. It requires that a taxable person registers with the Federal Inland Revenue Service to charge and collect VAT at a flat rate of 5% of all invoiced amounts of taxable goods and services. VAT is calculated on an aggregate value of cost, insurance and freight, customs duties and all other charges on an imported machinery or equipment.

Education Tax

It is a tax of 2% on the assessable profits of all companies incorporated in Nigeria. It is a way of ensuring that companies contribute to the development of educational facilities in the country.

Capital Gains Tax

This tax is based on capital gain accruing on the disposal of assets. The rate for computing this tax is 10%.

Witholding Tax (wht)

This is not a tax in itself but an advance payment of income tax. The Tax payer is expected by law to withhold a certain percentage of the transaction as tax to be remitted. The tax is normally to be deducted at source when a payment is to be made to the beneficiary. WHT covers rent, dividends, and directors' fees, all aspects of building, construction and related services. It also covers all types of contract and agency arrangement, other than outright sale and purchase of goods and property in the ordinary course of business, consultancy, technical and professional services, management services, commissions, interest and royalty. The table below shows the WHT applicable to different items:

Item	WHT for individuals (%)	WHT for companies (%)
Dividends, interest, and rents	10	10
Directors fees	10	Not Applicable
Royalties	5	10
Hire of equipment	10	10
Commission, consultancy, technical, service fees	5	10
Management fees	5	10
Construction/building (excluding survey, design, and deliveries)	5	5
Contracts other than sales in the ordinary course of business	5	5

WHT is remitted through nominated banks within 21 days of the following month of deduction.

Nigerian Content Development (NCD) Levy

A 1% Nigerian Content Development (NCD) levy applies to companies in the oil and gas industry. The NCD levy is charged to every contract awarded to any operator, contractor, subcontractor, alliance partner or any other entity involved in any project, operation, activity or transaction in the upstream sector of the Nigeria oil and gas industry. This is deducted at source and paid into the Nigerian Content Development Fund.

Improved Double Tax Arrangements in Nigeria

Nigeria currently has double taxation treaties (DTTs) with the following countries namely: The United Kingdom, The Netherlands, Canada, South Africa, China, Philippines, Pakistan, Romania, Belgium, French Republic, Mauritius, South- Korea and Italy. The DTTs with South Korea, Spain, and Sweden are still being ratified and the DTTs with Kenya, Mauritius, and Poland are yet to be ratified by the Nigerian National Assembly. Recently, in 2017, the Federal Government of Nigeria, through the Federal Executive Council, signed a DTT with the Government of Singapore.

The DTTs are aimed at eliminating or providing relief for double taxation on income of companies and individuals that are resident in either country.

The DTTs have been designed around the OECD model.

> “Personal income tax is charged on the income of an individual on the basis of residency. This tax is paid to the State Inland Revenue Service of the state of residency of the taxpayer. The determination of residency for the relevant year of assessment is a period of 183 days or more in any twelve-month period commencing in the calendar year and ending either in the same year or the following year.”
>
> Quoted from Paragraph 6, on page 34

Intellectual Property

There are three (3) main types of intellectual property rights in Nigeria; Copyright, Trademark and Patents & Industrial Design. Nigeria is a member of the World Intellectual Property Organization and has entered into many international agreements relating specifically or incidentally to intellectual property regulation or administration, however, there are laws that govern the different intellectual property rights in Nigeria.

Copyright

Copyright is an intellectual property right that confers upon a creator of a work a bundle of exclusive rights such as right to display, perform, transmit and copy their own work, to exclude others from certain uses of their work and right to prepare works based on the original work.

In Nigeria, copyright law is governed by the Copyright Act Cap C28, 2004. Materials covered by this law include the following; Literary works, Musical works, Artistic works, Cinematograph films, Sound recordings and Broadcast. For these materials to be eligible for copyright, it must be shown that sufficient effort has been expended on making the work to give it an original character and that the work has been produced/fixed in any definite form now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device. Essentially, Copyright law is concerned with the negative right of preventing the copying of physical material. It is not concerned with the reproduction of ideas but with the reproduction of the form in which the ideas are expressed and for any eligible work to obtain protection under the Act, it must have the requirements of:

(1.) Originality (the expression of the idea must originate from the author;
(2.) Fixation (the idea must be expressed in a fixed (physical form); and
(3.) Ownership (the person seeking copyright protection must be the owner of the work.

The administrative agency for copyright matters in Nigeria is the Nigerian Copyright Commission (NCC). Section 34 of the Act establishes the NCC to perform enforcement and regulatory functions.

The Act expressly provides for the functions of the NCC in Sec 34(3) which states as follows:

"The Commission shall-
(a) be responsible for all matters affecting copyright in Nigeria as provided for in this Act;
(b) monitor and supervise Nigeria's position in relation to international conventions and advise Government thereon;
(c) advise and regulate conditions for the conclusion of bilateral and multilateral agreements between Nigeria and any other country;
(d) enlighten and inform the public on matters relating to copyright;
(e) maintain an effective data bank on authors and their works;
be responsible for such other matters as relate to copyright in Nigeria as the Minister may, from time to time, direct."

From the above provision, the NCC has the primary duty of protecting copyright against infringement in Nigeria. It is important to note that the Act does not mandate the registration of copyright in Nigeria. Section 14 of the Act however requires that publishers, printers, producers and manufacturers of works should keep records of all works produced by them showing the name of the author, title, year of publication and the quantity of the works produced.

There are categories of criminal acts in relation to copyright infringement recognised under the Copyright Act. The first category relates to the production or importation of the infringing copies of the author's work, the second category relates to the distribution of such infringing works and the third category deals with unlicensed distribution of the protected work itself.

Copyright in Literary, Musical and Artistic works shall be valid for seventy years after the end of the year in which the author dies. In case of cinematograph films, sound recording, broadcasts, photographs and performers right, the copyright shall be valid for fifty years after first publication. With respect to Broadcast works, fifty years after the end of the year in which the broadcast first took place and with respect to performance right, fifty years after the end of the year in which performance first took place.

Trademark

Trademark in Nigeria is regulated by the Nigerian Trademark Act Cap T13 LFN 2004 (“Act”). The Act defines Trademark as a mark used or proposed to be used in relation to goods for the purpose of indication or so as to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of the person. The mark can be a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof.

The Trademarks, Patents & Designs Registry is the administrative agency in charge of trademarks and is responsible for registration of trademarks and it is under the supervision of the Federal Ministry of Industry, Trade and Investment.

The Act provides that for a trademark to be registerable, it must contain or consist of at least one of the following;

(a) The name of a company, individual, or firm, represented in a special or particular manner;
(b) The signature of the applicant for registration or some predecessor in his business;
(c) An invented word or invented words;
(d) A word or words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or a surname;
(e) Any other distinctive mark:

Non-registrable marks under the Trademarks Act include marks which are deceptive or have scandalous matter; names of chemical substances; identical or resembling trademarks which create confusion in the mind of users; Nigerian Coat of Arms. However, by section 7 of the Trademarks Act, a user of an unregistered mark who has used such mark for many years will not be prevented from continuing the use of such mark by a subsequent person who seeks to register a similar mark and the prior user of the mark will be allowed to register the mark, regardless of an already existing registration by the subsequent user of the mark. This exception is based on priority of use. Section 4 of the Act mandates the registration of trademark in respect of goods or classes of goods which can be done under Part A or Part B of the Act. While Part A registration is based on distinctiveness, marks registered under Part B are meant to distinguish the goods from other goods. Where trademark is not registered no person shall be entitled to institute any proceeding to prevent or to recover damages for the infringement of the unregistered trade mark; but this does not affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.

The registration of a trademark shall be valid for a period of seven years from the date of first registration and can be renewed from time to time subject to the provisions of the Act.

Patent And Industrial Design

Patent

Patent is an exclusive right granted to a person (known as the inventor) who discovers a new invention, to develop and use the right for a period of time. This right prevents others from making, using, importing and selling the invention without the permission or consent of the inventor. The Patent Act 1970 (now designated Cap P2, LFN 2004) governs the registration and practice of patent and industrial design while the Trademarks, Patents & Designs Registry is the administrative agency in Nigeria. An invention is patentable if it is new, results from inventive activity and is capable of industrial application or if it constitutes an improvement upon a patented invention and is new, results from inventive activity and is capable of industrial application. It is very important to state that in order for an invention to be regarded as new, it must not be published or made available to the public already.

The only exception to this is if the inventor, within six months preceding the filing of the patent application, exhibited it in an official or unofficially recognized exhibition.

A person may become vested with the right to a patent by being the inventor, an employer of the inventor or through transfer. The statutory inventor and the true inventor are not necessarily the same person. This is because the right to a patent in respect of an invention is vested in the first to file such patent application whether or not he is the true inventor, it is therefore important to register a patent upon invention.

Where an invention is made during employment or in the execution of a contract for the performance of specified work, the right to a patent in the invention is vested in the employer. The employee may however be entitled to fair remuneration if his contract does not require him to make such invention or if the invention is of exceptional importance.

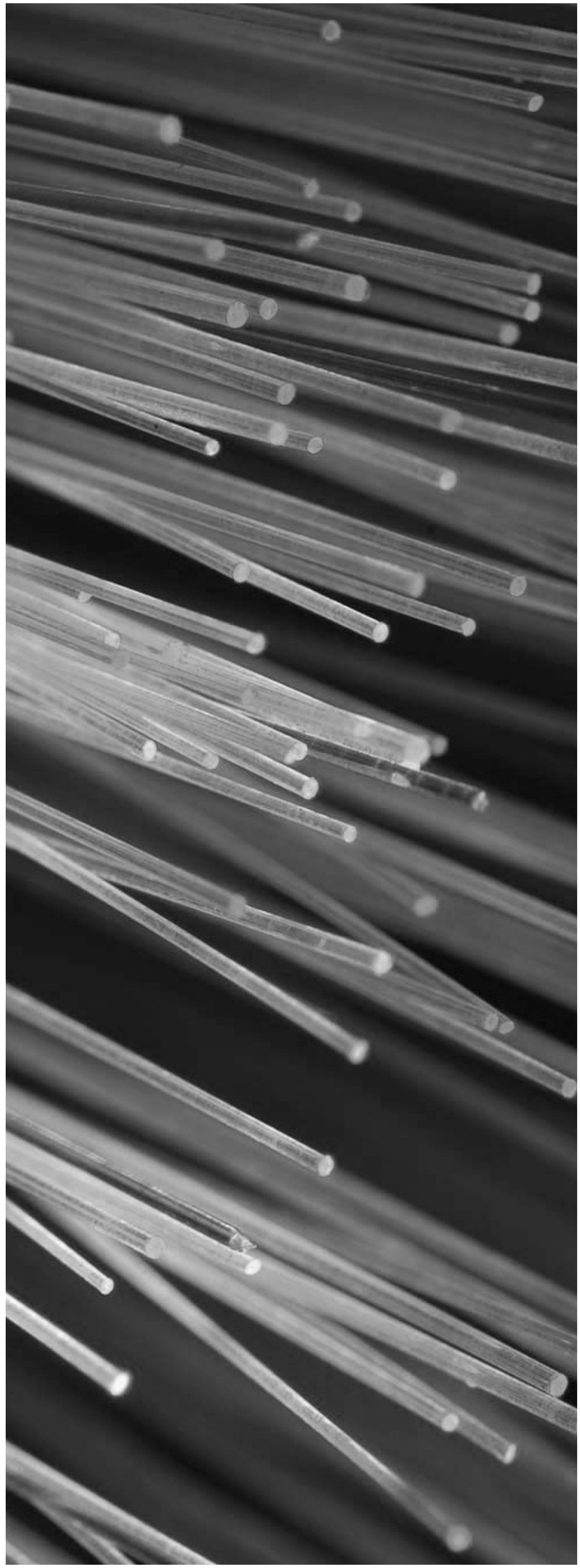
Right in a patent subsist for a period of 20 years from the date of the filing of the relevant patent application (not from the time of grant) and is not renewable. A patent may lapse before the expiration of the 20 years if the prescribed annual fee is not duly paid. A patent owner may also revoke or surrender his patent by a written declaration addressed to the registrar in which case the patented process or product become available for absolute or limited free use, depending on the nature of the surrender. An expiration, lapse or surrender of a patent is expected to be registered.

> "The Act defines Trademark as a mark used or proposed to be used in relation to goods for the purpose of indication or so as to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of the person."
>
> Quoted from Paragraph 1, on page 39

Industrial Design

Industrial design is any combination of lines or colours or both and any 3-dimensional form, whether or not associated with colours which is intended by the creator to be used as a model or pattern to be multiplied by industrial process and is not intended solely to obtain a technical result. An industrial design is registerable if is new and it is not contrary to public order or morality. It is also important to note that an industrial design is not new if, before the date of application for registration, it has been made available to the public anywhere and at any time by means of description, use or in any other way, unless it is shown to the satisfaction of the registrar that the creator of the design could not have known that it had been made so available.

Industrial design shall be effective in the first instance for five years from the date of the application for registration and may be renewed for two further consecutive periods of five years. The registered owner of an industrial design may renounce the registration by a written declaration to the registrar of Patent and Design.



Dispute Resolution And The Courts

GBENGA BIOBAKU & CO
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Introduction

The Nigerian Legal System is modelled after the English legal system by virtue of colonization and the reception of English law through the process of legal transplant. English Common law and legal tradition influenced the development of the Nigerian legal system and consequently the resolution of disputes.

The predominant dispute resolution method in Nigeria is through the court system. The Nigerian Courts uphold the principles of rule of law and equality before the law. Equal opportunities are available to litigants for the presentation of their cases. Nigeria practices an adversarial system, where two advocates present the litigants' case or position before an impartial judge or judges, based on applicable laws, the rules of evidence and court procedural laws. The judges determine the truth by placing the evidence on imaginary scales.

Nigerian laws ensure free and easy access to courts. A person is empowered by law to approach the courts for the determination of his civil rights and obligations, including any question or determination by or against any government or authority. Such persons are entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and Impartiality.

A party who elects to approach the court must observe all the rules of commencement of legal proceedings. The law in Nigeria frowns at the practice of springing surprises or over reaching an opponent. Consequently, a party initiating an action in court is expected to comply with the applicable frontloading system whereby copies of documents sought to be relied upon are filed and served in advance. Essentially, the party is to file alongside the writ of summons: the Statement of Claim, which sets out the facts of the case; statements on oath of proposed witnesses; documents to be relied on at trial and other processes related to the matter. The adverse party is to be served, and the rules for such service must be strictly complied with.

In Lagos, Nigeria's commercial capital, an average of over 4, 000 new cases are filed every year with cases taking on an average 3 – 5 years from commencement to judgement. An important factor to consider in deciding whether to commence an action or not is to know which court has jurisdiction to hear what type of matter.

High Court

Section 270 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) creates the High Court of each state of the federation. The jurisdictional scope of the State High Court is set out in section 272. Under this section, each High Court has the jurisdiction to determine all manner of disputes except those within the jurisdictional ambit of both the Federal High Court and the National Industrial Court. The High Court of a state has wide jurisdictional powers to determine disputes with regards to the interpretation of any contract so as to ascertain the rights, duties and obligations of the parties under the contract. The court also has the powers to, among other things, determine disputes relating to the title, ownership and possession of land. The High Court is a court of record and hears appeals from courts like the Magistrate Court and the Customary Courts. Being a court of record, the court is bound by the rules of evidence as it relates to the admission of evidence and documents in court and the testimony of witnesses. Appeals from the High Court lie directly to the Court of Appeal either directly or by leave of the High Court or the Court of Appeal.

Federal High Court

The Federal High Court is created under section 249 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and its jurisdiction can be found in section 251 of the Constitution. The Federal High Court, formerly known as the Revenue Court, has the jurisdiction to deal with matters relating to taxation of companies or the revenue of the Federal Government of Nigeria where an agency of the Federal Government or the Federal Government itself is a party. Among other things, it also has the jurisdiction to deal with disputes relating to customs and excise, mines and minerals, banking matters (except as relating to the relationship between a bank and its customer) and disputes relating to admiralty matters including shipping and navigation, the River Niger and River Benue and their affluents and on such other inland waterway as may be designated by any enactment to be an international waterway, matters involving all Federal Ports, (including constitution and powers of port authorities for Federal Ports) and carriage by sea, disputes arising from the operation of the Companies and Allied Matters Act or any other enactment replacing that Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act, disputes involving diplomatic, consular and trade representation, citizenship, naturalization and aliens, deportation of persons who are not citizens of Nigeria, extradition, immigration into and emigration from Nigeria, passports and visas just to mention a few. With regards to its criminal jurisdiction, it has the power to deal with issues relating to treason, treasonable felony and allied offences. Like the High Court, the Federal High Court is a court of record and appeals lie directly from the Federal High Court to the Court of Appeal.

National Industrial Court

The National Industrial Court (NIC) has the exclusive jurisdiction to deal with all disputes relating to a person's employment or connected to it such as whether a person has been validly employed or his employment terminated or the interpretation of provisions in the contract of employment or whether a contract of employment exists. The National Industrial Court is a court of record and appeals lie directly from the NICto the Court of Appeal.

Appeals

Appeals from high court (federal or state) decisions lie with a federal court of appeal, and from there to the Federal Supreme Court, which is the final appellate court.

> “Nigerian laws ensure free and easy access to courts. A person is empowered by law to approach the courts for the determination of his civil rights and obligations, including any question or determination by or against any government or authority.”
>
> Quoted from Paragraph 3, on page 43

Alternatives To Litigation

Arbitration

Arbitration in Nigeria is primarily governed by the Arbitration and Conciliation Act which is a federal statute. However, in 2009, the Lagos State House of Assembly enacted an Arbitration Law, in force in Lagos State, providing a different statutory framework for the conduct of arbitration in Lagos State. The constitutional basis upon which the Lagos State House of Assembly enacted the legislation is that the subject of the legislation – commercial contracts – is a residual matter not being contained in the legislative lists in the second schedule to the Constitution.

The major local arbitral institutions are the Lagos Court of Arbitration, the Nigerian Branch of the Chartered Institute of Arbitrators and the Lagos Regional Centre for International Commercial Arbitration. The Lagos Court of Arbitration was created by the Lagos State legislature in 2009 to promote arbitration and ADR within Lagos State, and to make rules for arbitration conducted under the Lagos State Arbitration Law. The main international institutions involved in Nigeria-related disputes include the Permanent Court of Arbitration, the International Centre for Settlement of Investment Disputes, the Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, and the WIPO Arbitration and Mediation Centre.

Arbitration is increasingly accepted by both the legal and business communities in Nigeria as an alternative to litigation. Furthermore, it has become common for investors to always insist on inserting arbitration clauses into commercial agreements; this is to avoid resorting to litigation in the event of a dispute and is considered expedient as it is flexible and faster; parties can choose their venue and the applicable laws and appoint their arbitrators and privacy and confidentiality is also guaranteed.

There is no right of appeal available to a party under either the Arbitration and Conciliation Act or the Lagos State Arbitration Law. An award may only be set aside for reasons of misconduct or other procedural irregularity by the courts.

The options viable for the enforcement of foreign awards are laid down in Section 51 of the Arbitration and Conciliation Act.

The application for the enforcement of a foreign award is made ex-parte supported by an affidavit with, inter alia, a duly authenticated original award or duly certified copy thereof, an original arbitration agreement or duly certified copy thereof and, where the award is not made in English, a duly certified translation.

The New York Convention applies to arbitration in Nigeria. The Arbitration and Conciliation Act incorporates the New York Convention of 1958, which is particularly set out as the Second Schedule to the Act.

Mediation

In Nigeria, mediation is generally governed by the agreement of the parties to a contract. The rules governing mediation may be established by the parties involved in a dispute or by incorporating rules of some mediation and conciliation organisation, such as the Optional Conciliation Rules of the International Chamber of Commerce or the Conciliation Rules of the American Arbitration Association.

The statutory provisions governing mediation include the Arbitration and Conciliation Act, the Lagos State Multi-Door Courthouse Laws of Lagos State, 2007.

In Lagos State, the Practice Direction of the Lagos Multi-Door Court House (the ADR Centre), states that, on referral to any of the ADR methods, the ADR sessions are administered in accordance with the Negotiation and Conflict Management Group (NCMG) Mediation Procedure Rules 2002 or the NCMG Arbitration Procedure Rules 2002.

Other forms of ADR are provided for by the Multi-Door Court House. The Multi-Door Court House is an ADR centre annexed to the court that offers a variety of ADR processes. It was established to supplement available resources for easy access to justice. The options available at the Multi-Door Court House include, but are not limited to, the following: early neutral evaluation, conciliation and negotiation.

Disclaimer & Contact

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DOING BUSINESS IN NIGERIA

An Overview of Key Aspects of Nigerian Law for Foreigners & Foreign Investors -

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