

Nigeria



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Population:	189.7m (UN estimate – January 2017)
GDP per capita:	US\$5,900 (CIA Factbook – 2016)
Average GDP growth over previous [3] years:	Average 2.4% (CIA Factbook – 2014-2016)
Official languages:	English
Transparency International rating:	Ranked 136/176 (2016 Report)
Ease of doing business ranking:	Ranked 169/190 (2017 Report)

Type of legal system	Based on English common law system, African customary law and Islamic law
Signatory to NY Convention	Yes (17 March 1970)
Signatory to ICSID Convention	Yes (13 July 1965)
Member of COMESA, OHADA, SADAQ, EAC	No, but is a member of ECOWAS
Signed up to OECD Transfer Pricing Guidelines	Follows OECD Guidelines
Bilateral investment treaties	Nigeria is a party to several BITs with other states, including China, Finland, France, Germany, Italy, Republic of Korea, Netherlands, Romania, Serbia, South Africa, Spain, Sweden, Switzerland, Taiwan (Province of China) and the United Kingdom

Babatunde Ajibade, SAN and Kolawole Mayomi discuss the developing foreign investment market in Nigeria, as well as highlighting restrictions that investors may face

Real Estate

1. Are there restrictions on foreign entities holding interests in land, and if so, how are they expressed?

Section 1 of the Land Use Act vests all lands in Nigeria in the respective State Governors.

In principle, foreign entities, whether corporate or individual, can acquire land in Nigeria, as prescribed by state legislations. In Lagos State, for instance, the Lagos Acquisition of Lands by Aliens Law provides that:

- (a) The acquisition of land by aliens must be approved in writing by the Governor, save where the interest in land sought is for less than three years (including any option to renew).
- (b) Foreign entities seeking to alienate interest in land must offer to sell the land to the State government first, and if the government declines, to Nigerians (section 3).
- (c) Under the Law, unlawful occupation of land by foreigners is a criminal offence punishable with 12 months imprisonment or a N180,000 fine.
- (d) The Acquisition of Lands by Aliens Regulation provides a 25-year tenure (including the option to renew) of land.

Notwithstanding the above provisions, in appropriate circumstances, an application can be made to the State Governor for an exemption from the Law's provisions.

Employment

2. Are there any conditions placed on the hiring of a foreign worker (e.g. local minimum quotas which must first be met)?

The Nigerian Immigration Act and the Immigration Regulations, 2017 require any company that wishes to hire a foreign worker to obtain prior approval from the Minister of the Interior through an application for Expatriate Quota (EQ).

The EQ specifies positions to be filled and the number of slots granted for foreign workers. An EQ is granted for an initial period of three years and is renewable every two years, subject to a cap of 10 years.

A foreign worker must also apply to the Immigration Service for a temporary subject to

regularisation visa, before issuance of a Combined Expatriate Residence Permit and Aliens Card. Any foreigner who fails to comply with these entry requirements, if convicted, is liable to a fine of N1,000,000 or deportation, or both. Furthermore, any company convicted of such an offence will be liable to a fine of N5,000,000 or, in extreme cases, be wound-up.

The company must employ at least two Nigerians to understudy each position and render monthly returns to the Ministry and the Immigration Service, in the expectation that the competencies of foreign workers would be transferred by the end of the approved periods.

3. What are the restrictions on redundancies and any applicable compensation?

In a redundancy situation, section 20 (1) of the Labour Act, places certain restrictions on an employer, who must:

- inform the trade union or worker's representative of the reasons for and extent of the anticipated redundancy;
- observe the principle of "last in, first out", subject to giving consideration to factors such as relative merit, skill, ability, etc.; and
- use its best endeavours to negotiate redundancy payments to discharged workers who are not protected by regulations made further to the Labour Act.

Section 20 (2) of the Act provides that the Minister may make regulations for the compulsory payment of redundancy allowances on the termination of employment because of his redundancy. So far, no such regulation has been issued.

In practice, the redundancy/severance pay is usually computed using the employee's length of service and their last remuneration. Employees not covered by the Labour Act (non-workers) may in a redundancy only be entitled to the benefits set out in their contracts, or as are agreed with the employer, or between the employer and a trade union (where applicable) via a Collective Bargaining Agreement.

Investment and local content

4. Are there any general regulations on foreign investment, including any investment requirements for foreign companies to invest in conjunction with local entities or people, and if so, to what effect?

A foreign company seeking to merely invest in Nigeria does not require local incorporation, and may invest by itself or in conjunction with others in already established entities. However, if it plans to operate a business in Nigeria, it is required to incorporate a company locally. The Nigerian Investment and Promotions Commissions Act (NIPC Act) allows foreign investors to own and control 100% of the shares in any company in Nigeria, subject to a minimum of two shareholders and two directors. Foreigners are, however, prohibited from engaging in items on a negative list, set out in a schedule to the Act.

Additionally, an entity with foreign participation is required to obtain a business permit before commencing business in Nigeria.

The Nigerian Oil and Gas Content Development Act (NOGCDA) requires that first consideration be given to Nigerian companies in awarding contracts in the petroleum sector, even where Nigerian companies do not present the lowest bids. To be considered Nigerian and given preference, at least 51% of the shares of the company must be owned by Nigerians. The NOGCDA stipulates that local content levels in various projects must be in accordance with certain statutorily stated minimum levels.

5. Are there any specific legislative requirements, and if so, what are they?

Generally, there are no restrictions on local companies entering agreements with foreign companies, although the petroleum sector requires a holder of an oil prospecting/mining licence or lease to obtain prior consent from of the Minister of Petroleum Resources to assign (in whole or in part) any rights, power or interest in it to a third party. The 2014 guidelines outline the procedures for obtaining the Minister's consent, which involves giving notification to the government prior to the transaction; not advertising, publishing, or issuing a press release in respect of the assignment; and not proceeding with any process incidental to the transaction, until authorised. The transfer of shares in the entity holding the asset also requires ministerial consent.

Moreover, the National Office for Technology Acquisition & Promotion (NOTAP) Act requires all technical services agreements signed by Nigerian parties and foreign technical partners to be registered with NOTAP. An application for the registration or renewal of an agreement must be made to NOTAP within 30 days from the effective date of the agreement.

A wide range of agreements are classified under the Act, including agreements for:

- management services, consultancy services,

- technical know how;
- trademarks licence;
- franchising, technical services;
- software licensing; and
- research and development.

6. Are there any restrictions on the importation of goods or raw materials into the country, including requirements that local produce is utilised rather than products bought outside the country?

Yes, there are.

There is a ban on the importation of such items like ball point pens, toothpastes, sanitary products, cocoa butter, some medicaments, used vehicles older than 15 years, as defined by Nigerian customs, etc.

There is also an import substitution policy aimed at stimulating local production on more than 40 products. Moreover, exporters must pay an export supervision scheme administrative charge, which ranges from 0.5% to 0.15% of the free-on-board value.

In a bid to conserve the country's foreign exchange reserves, the CBN also placed 41 items on a list of items not eligible for foreign exchange. This means that the importers would have to source it from private bureau de change at a marked difference. These items include rice, tomato paste, meat and processed meat products, and plastic rubber, steel, iron and metal products, and other products also listed on the CBN's websites.

Exemptions are granted and currently include foreign tuition fees, business and personal travel allowances, medical fees abroad, life assurance premium payment and monthly mortgage payments.

Finance

7. Are there any restrictions on the purposes for which money may be lent?

Generally, loans may not be given for an illegal purpose, as the Nigerian courts would not uphold such transactions.

Section 159 of the Companies and Allied Matters Act (CAMA) prohibits companies from 'giving financial assistance' for the purchase of their own shares or to reduce or discharge any liability incurred by any person while acquiring the company's shares, except loans granted in the ordinary course of business to employees to participate in an employee share scheme, or to purchase shares independently.

Also, section 270 of CAMA prohibits a company

from giving loans to its directors or directors of its holding company. Only loans given to directors within the ordinary course of the company's business are permissible. Since the grant of loans and provision of guarantees is the ordinary business of a bank, it can provide credit (secured or unsecured) to its directors and entities in which they have over 5% interest, provided the prior approval of the Central Bank of Nigeria is sought and obtained.

The CBN's *Prudential Guidelines for Deposit Money Banks 2010* also prohibits the grant of loans for infrastructure projects which are still in the developmental phase, stating that funding for that phase should come from the project sponsors.

8. How does the law work in relation to security interests in this jurisdiction, and over which classes of assets may security be granted? Does your jurisdiction recognise the concept of a trust and the role of a Security Trustee?

Security may be granted over physical assets, shares, bank accounts, contracted rights, proceeds of authorisations and licences, and intangible assets like intellectual property.

The common forms of security over these assets are by way of mortgages, charges (fixed and floating), pledges, and liens. CAMA requires that charges created over assets of a Nigerian company shall be registered with the Corporate Affairs Commission (CAC) within 90 days. Failure to register will render the charge void against other creditors and liquidator of such company. However, the debt is not discharged as the debenture is only rendered unsecured.

For individuals, charges created over an asset must be registered with the Bills of Sale Registry under the Bills of Sale Law applicable in the various states.

The concept of a trust is recognised under Nigerian law, and is governed by the common law of trusts and the Trustee Investment Act. A validly appointed security trustee can hold security in trust for lender(s).

Generally, there are no restrictions on granting security to foreigners. However, statutory corporations may not grant security over their assets to foreigners. Similarly, banks require the prior written consent of the CBN before granting security over their assets.

Procurement/PPPs

9. What laws, regulation and guidance are in place to manage the procurement and management of infrastructure projects (including PPPs) and is this regime overseen by a special unit,

division or department (such as a PPP unit) within Government?

The Infrastructure Concession Regulatory Commission Act, (ICRCA) established the Infrastructure Concession Regulatory Commission (ICRC) to oversee private sector participation in the development, financing, construction, operation or maintenance of federal infrastructures.

In its work, the ICRC applies the following legislations and regulations: (a) the Public Private Partnership Manual 2012 ("PPP Manual"); (b) the National Policy on Public Private Partnerships 2008; (c) the Public Enterprises Privatisation and Commercialisation Act, which provides the framework for the privatisation and commercialisation of various public assets in Nigeria; (d) the Public Procurement Act, which applies to the procurement of goods and services for the Federal Government and any public body engaged in procurement, and (e) the National Planning Commission Act.

Leaning on the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, ICRC has formulated Unsolicited Proposals Guidelines, which provide that unsolicited proposals may be submitted to the ICRC for joint evaluation by ICRC and the relevant public authority.

Section 12 of the ICRCA mandates the relevant procuring entity to supervise the project in respect of which a concession has been granted, whilst section 20 empowers the ICRC to monitor compliance with the terms and conditions of any concession agreement.

Competition

10. Is there a merger control regime? If so, what are the thresholds for notification?

Yes, there is a merger control regime in Nigeria governed by the Investment and Securities Act (ISA) and Rules of the Securities and Exchange Commission (SEC).

There are three merger thresholds (small, intermediate and large) calculated based on the combined turnover or assets of the merging companies. A small merger is one below N1 billion; an intermediate merger is one between N1 billion and N5 billion; and a large merger is above N5 billion.

In a small merger, the entities are not required to notify the commission till the conclusion of the merger. However, in the case of both an intermediate and large merger, a pre-merger notification must be filed with the SEC which will conduct a review and approve or disapprove of the merger.

11. Is there a competition/anti-trust law that prohibits items such as abuse of a dominant position, cartel behaviour and exclusivity arrangements, and if so, how actively is it enforced?

There is, currently, no consolidated regime to regulate competition/antitrust problems in Nigeria. However, there are divergent provisions in sector-specific legislation. These include:

Under section 121 of the ISA, the SEC is empowered to determine whether any business combination is likely to substantially prevent or lessen competition. Also, the SEC may, in the public interest, order the break-up of the company into separate entities in such a way that its operations do not cause a substantial restraint of competition in its line of business or in the market. Since the Commission's competition review is limited to mergers, it is not effective in other instances of abuse.

An acquisition of a majority interest in a company is subject to the prior approval of the SEC; unless it is an acquisition in a private company or in an unlisted public company with assets or turnover below N500 million.

Furthermore, the Nigerian Communications Commission (NCC) has issued the Competition Practices Regulations 2007. Regulations 23–25 deal with abuse of dominant position and empower the NCC to issue directives and implement appropriate remedies, which are usually in the form of fines.

Intellectual Property

12. What protections does the local law provide for intellectual property rights?

Copyright and neighbouring rights, patents, industrial designs, trademarks and service marks are statutorily protected in Nigeria. The Copyright Act protects copyrights or neighbouring rights from unauthorised use. The Patent Act protects the registered owner of an invention or industrial design from the unauthorised use of his monopoly rights, while the Trademarks Act protects registered trademarks and service marks from unauthorised use of identical brands or marks that are so similar and likely to deceive or cause confusion among consumers. An action for infringement may be instituted at the Federal High Court at the division where the infringement occurred. The owner of the copyright, patent or trademark may claim relief by way of damages, injunction, and an account of profits or delivery up for destruction of the infringing items or

implements.

In addition, common law claims for passing off also protects unregistered trademark owners from misrepresentation based on prior established goodwill in the relevant marks. Although there is no specific local enactment that regulates trade secrets in Nigeria, the courts normally place reliance on the common law in resolving such matters. The Nigerian courts are effective in protecting intellectual property owners who can establish ownership of the intellectual property.

Tax and Foreign Exchange

13. What taxes are businesses subject to in this jurisdiction? Please include, for example, corporate tax, VAT, stamp duty, tax on share issues, etc. and the applicable rates. What transfer pricing rules apply, and are any withholding taxes in force in your jurisdiction?

Generally, a company will be liable to tax in Nigeria if profits accruing to the company for the relevant year of assessment are (a) accrued in or is derived from Nigeria (accrual basis), or (b) if the profit is brought into or received in Nigeria (remittance basis).

Businesses in Nigeria may be subject to varying tax regimes. However, most businesses are subject to the following regime:

Companies Income Tax: 30% (of taxable profits).

- Value Added Tax: 5%.
- Withholding Tax: 5% (individuals) 10% (company).
- Capital Gains Tax: 10% of the value of qualifying asset.
- Education Tax: 2% of chargeable profit.
- Personal Income Tax (PIT): a company is expected to deduct PIT from its employees' wages, and remit to the taxman. PIT is calculated on a marginal rate 19.2% increasing on a graduated rate.

With regard to withholding taxes, the rates are: dividends, 10%; interests, 10%; and royalties, 10%.

The Federal Inland Revenue Service (FIRS) released a new Income Tax (Transfer Pricing) Regulations No 1, 2012 in October 2012. The Transfer Pricing regulations give effect to the existing anti-avoidance provisions in the income tax laws and provide guidelines for the application of the arm's-length principle.

14. Are there any foreign exchange rules that control repatriation of funds out of this jurisdiction?

The Foreign Exchange (Monitoring and

Miscellaneous Provisions) Act regulates foreign exchange transactions in Nigeria. Section 15 requires foreign investors who wish to import capital into the country for their operations through official channels to obtain a Certificate of Capital Importation (CCI) from authorised dealers (licensed banks). A CCI is issued by a bank and certifies a foreign inflow for investment, either in cash or in kind (importation of machinery and equipment, etc.).

Aside being statutory evidence of capital inflow into the country, a CCI enables the unrestricted repatriation of funds, either as interest/loan repayments or dividends. However, where the foreigner wishes to repatriate funds being proceeds of management services or technical agreements, repatriation will only be possible if the underlying contract had been previously approved prior to that time by (NOTAP).

Due to the global drop in oil prices which resulted in a reduction of foreign currency reserves, the Central Bank of Nigeria has placed limits on goods for which importers can access the official window for payment. Also, it has prohibited Nigerian banks from lending in foreign currency or re-designating Naira loans as foreign currency loans.

Dispute Resolution

15. What is the courts' approach to enforcement of foreign judgments or arbitral awards?

There are two pieces of legislation governing the registration of foreign judgments in Nigeria: Reciprocal Enforcement of Judgments Ordinance (1922); and Foreign Judgments (Reciprocal Enforcement) Act (1961).

Under the 1922 Ordinance, a judgment creditor may apply to register a judgment obtained in the United Kingdom and its dominions in a High Court in Nigeria within 12 months of the date of judgment. Similarly, under the 1961 Act, a judgment creditor may apply to register a judgement obtained in any country of the world in a High Court in Nigeria within 12 months of the date of judgment.

A foreign judgment will not be registered if it is wholly spent or if it would not be enforceable in the country of the originating court. Moreover, registration can be set aside on grounds *inter alia* that: (a) the original court lacked jurisdiction, or (b) that the judgment was obtained by fraud, or is contrary to the public policy of Nigeria.

A foreign arbitral award can be enforced in Nigeria under the New York Convention at the Federal High Court or the High Court of a State.

The applicant shall file (a) a certified copy of the award, (b) the certified copy of the arbitration clause, and (c) a certified translation into English language where the award is rendered in another language.

16. Are the local courts generally supportive of arbitration proceedings (for example, in granting interim relief in support of such arbitrations)?

Nigerian courts have repeatedly held that once an arbitration clause is valid, and the dispute is within the contemplation of the clause, the courts will enforce the arbitration clause by staying any litigation commenced in breach thereof.

The court have also demonstrated support for the arbitration process by granting interim measures, pursuant to article 26(3) of the Arbitration Rules, made pursuant to the Arbitration and Conciliation Act, to preserve assets which are the subject of claims at arbitration proceedings, pending the resolution of such claims. Either the Federal High Court or a State High Court can exercise this jurisdiction.

In further demonstration of Nigeria's pro-arbitration stance, the Court of Appeal recently set aside two anti-arbitration injunctions issued by the lower courts to restrain arbitration proceedings. The Court of Appeal made it clear that the import of section 34 of the ACA which states that "a court shall not interfere in arbitral proceedings except where allowed by the Act" means that the court's intervention in arbitration proceedings shall only lie in specific areas (i.e. appointment of an arbitrator, grant of interim reliefs, setting aside or enforcement of an award, etc.) delineated in the ACA itself, and not at large.

General

17. In order for a foreign company to sign a document under local law are there any signing procedures that must be followed?

There are no special signing procedures required of a foreign company under Nigerian law.

The company may by an ordinary resolution authorise its director or other individual to execute contracts or registration documents on its behalf. Such documents would be presumed to have been duly executed. However, where a foreign company purports to sign a document authorising the registration of a wholly owned Nigerian subsidiary, or approved an investment in conjunction with others, the foreign company is required to affix its corporate seal on such resolutions/documents.

Where the foreign investor (or its representative)

is not present in the country to sign certain documents, a power of attorney can be utilised. The power of attorney must be granted in writing and it is recommended that an independent person with good repute attest it.

The land instrument registration laws of some states in Nigeria define an instrument to include a power of attorney under which an instrument may be executed, so a power of attorney is a registrable instrument. If it is not registered, it shall not be pleaded or given in evidence.

18. Are there any current legislative or policy developments that companies investing in this jurisdiction should be aware of?

Oil and gas: In 2016, a new Petroleum Industry Governance Bill (PIB) was introduced to the National Assembly and is currently under review by the relevant Senate committee. If passed in its current form, the PIB will harmonise petroleum regulatory functions and reposition the Nigerian National Petroleum Corporation as a commercial entity.

Taxation: The Federal Government recently (1 February 2017) approved the revised National Tax Policy (NTP) which aims to diversify government revenues whilst lowering tax rates and VAT for SMEs. It aims to solve the problem of multiple taxes and revenue agencies by putting in place one revenue agency per level of government, and sets out guidance on tax administration including registration, technology, and dispute resolution.

Foreign exchange regulation: To mitigate the negative impact of declining crude oil prices and consequential shortages of foreign currency, the CBN relaxed its foreign exchange control policies by introducing a single forex market in June 2016 (the *Revised FX Guidelines*). The effect of this was that CBN only participates in the interbank market through secondary market intervention mechanisms such as the sale of FX to authorised dealers on a wholesale basis or to end-users through authorised dealers on a retail basis. ■

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Dr. Ajibade is the managing partner of the firm. He is a noted capital market advisor, and also has expertise in all aspects of corporate and commercial dispute resolution in Nigeria with particular bias for matters involving the enforcement of foreign judgments, insolvency, and intra-company shareholder disputes.

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Kolawole is a partner in the firm, and has been involved in many high-stakes arbitration that have taken place in Nigeria over the past decade. He is noted for his expertise in resolving complex claims arising from construction and infrastructural projects, trade finance, intellectual property, and franchise rights.

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