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## **INSOLVENCY OF AN OIL AND GAS ASSET HOLDER IN THE NIGERIAN PETROLEUM INDUSTRY: MATTERS ARISING. [PART 1]**

### **1. Introduction**

It is well known that transactions and projects in the oil and gas industry are capital intensive. Thus, stakeholders usually pool resources together to execute projects in the industry. Licensees or lessees, joint venture operators, service providers, financiers etc work together to deliver on projects. Project finance arrangements are one of the ways by which the licensees or lessees fund development of projects/assets in the industry. By the very nature of the high risk and cyclical business in which the oil and gas companies are engaged and by deploying the project finance model in some of the projects, the licensees or lessees are prime candidates for insolvency proceedings. This paper, written in a series of six in total, looks at the issues and problems that arise where a licensee or lessee of an oil and gas asset, issued pursuant to the Petroleum Act, becomes insolvent and the creditor, usually the financier, initiates insolvency proceedings and seeks to take over the 'mortgaged' assets.

### **2. Focus, Scope and structure of the Paper**

The article focuses on a wide range of issues including examination of the effects and problems of insolvency proceedings on the holder of an oil and gas asset; the problems caused by such insolvency proceedings for the Minister of Petroleum Resources, the Department of Petroleum Resources ("DPR"), the creditor and the Oil and Gas industry in Nigeria at large. Efforts will be made to highlight the following connected question(s): Does mortgaging an oil and gas asset to a creditor not

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constitute divestment of the asset? What are the implications of assignment or divestment of an oil and gas asset via insolvency proceedings? Does the fact of such assignment or divestment alone constitute a ground for the Minister to revoke a licence or lease, or does this power only arise where such assignment or divestment constitutes a breach of the terms of the lease or licence or otherwise renders the operation of the asset impossible? Can the Minister of Petroleum Resources revoke a licence or lease as a result of insolvency proceedings simpliciter?

Other probed questions in the light of current state of laws and regulations in the industry are: Can the Minister of Petroleum Resources revoke the licence or lease for lack of the underlying Ministerial consent to the creation of an interest in the asset? What is the effect of revocation of such licence or lease? Unlike a conventional receiver/receiver manager in sectors other than oil and gas, where consent of the regulator may not be required, can a receiver/receiver manager appointed by a creditor take over and operate oil and gas assets and exercise powers and rights prior to or without the Minister's consent?

The article is divided into six parts with related headings and covers elucidation into the subject of insolvency in the Nigeria Oil and Gas industry; providing answers to most of the queries stated above.

### **3. What does Part One cover?**

In this first part and to situate the issues in proper perspective, I set out the pertinent but foundational statutory and regulatory provisions affecting the issues that are thrown up when an oil and gas asset holder becomes insolvent and makes or refuses efforts to divest the underlying asset to the creditor.

A company is only insolvent (i.e. unable to pay its debts) if it either does not have enough assets to cover its debts (i.e. value of assets is less than amount of liabilities), or if it is unable to pay its debts as they fall due. This simply implies that a company has borrowed money, is unable to pay back the loan and the creditor has taken steps to take over the collateral that the company mortgaged for the loan. For reasons of space constraint, part one will basically state or quote the relevant provisions of the laws, regulations and guidelines as these would be referred to in subsequent parts of the paper.

### **4. Current law/regulation on ownership and divestment of assets in the oil and gas industry in Nigeria.**

It is elementary to restate that the Federal Government of Nigeria is the owner of the entire property in and control of all minerals, mineral oils and natural gas in under or

upon any land or territory of Nigeria. The **1999 constitution** is clear on this.<sup>2</sup> **Section 1 of the Petroleum Act, Cap P10 Laws of the Federation of Nigeria (LFN), 2004** also vests ownership of oil and gas in the Federal Government of Nigeria. The Federal Government, through the Honourable Minister of Petroleum Resources (“the Minister”), only grants licences or leases for exploration and production of the oil and gas resources to the licensees or lessees. Consequently, the law and regulations and guidelines further provide that the licence or lease issued to a company can only be assigned or transferred to, or acquired by, another company with the prior written consent of the Minister.

#### **5. Current law/regulation on Consent to mortgage / divest assets in the oil and gas**

The current law, regulation and guidelines make it clear that without obtaining the Minister’s consent, no assignment or acquisition of oil and gas assets in Nigeria can be validly done.<sup>3</sup> **Section 17(5)(d) of the Oil Pipelines Act 2004** with respect to oil pipeline licence provides thus:

**“(5)** In the absence of express provision to the contrary, a licence shall be deemed to include the following conditions to be performed and observed by the holder –

*(d) not to assign, sublet, mortgage or otherwise part with the licence or any right or Interest thereunder without the previous consent in writing of the Minister.”*

Also, **Paragraph 14 of the First Schedule to the Petroleum Act 2004** provides thus:

*“Without the prior consent of the Minister, the holder of an Oil Prospecting Licence or an Oil Mining Lease shall not assign his licence or lease, or any right, power or interest therein or thereunder.”*

#### **6. Current law/regulation procedure of revocation of an oil and gas licence**

Significantly also, **Paragraphs 24, 25, 26, 27, 28, 29, and 30 of the First Schedule to the Petroleum Act 2004** provide thus:

**“24.(1)** *The Minister may revoke any oil prospecting licence or oil mining lease if the licensee or lessee becomes controlled directly or*

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<sup>2</sup> Section 44(3) of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>3</sup> *Moni Pulo Limited v. Brass Exploration* (2012) 6 CLRN pg. 153-235. See also First Schedule, Paragraph 14, Petroleum Act and Regulation 4 of the Petroleum (Drilling and Production) Regulations (the Regulations).

*indirectly by a citizen of, or subject of, or a company incorporated in, any country which is-*

- (a)** *a country other than the licensee's or lessee's country of origin; and*
- (b)** *a country the laws of which do not permit citizens of Nigeria or Nigerian companies to acquire, hold and operate petroleum concessions on conditions which in the opinion of the Minister are reasonably comparable with the conditions upon which such concessions are granted to subjects of that country.*
- (2)** *In this paragraph 'Nigerian company' means a company incorporated in Nigeria or a company controlled directly or indirectly by citizens of Nigeria.*

**25.(1)** *The Minister may revoke any oil prospecting licence or oil mining lease if in his opinion the licensee or lessee-*

- (a)** *is not conducting operations-*
  - (i) continuously;*
  - (ii) in a vigorous and businesslike manner in accordance with the basic work programme approved for the licensee or lessee; and*
  - (iii) in accordance with good oil field practice; or*
- (b)** *has failed to comply with any provision of this Act or any regulation or direction given thereunder or is not fulfilling his obligations under the special conditions of his licence or lease; or*
- (c)** *fails to pay his due rent or royalties, whether or not they have been demanded by the Minister, within the period specified by or in pursuance of this Act; or*
- (d)** *has failed to furnish such reports on his operations as the Minister may lawfully require.*
- (2)** *Paragraphs 26 to 30 of this Schedule shall apply where there is revocation under this paragraph.*

**26.** *The Minister shall inform the licensee or lessee of the grounds on which the revocation is contemplated and shall invite the licensee or lessee to make any explanation if he so desires.*

27. *If the Minister is satisfied with the explanation, he may invite the licensee or lessee to rectify the matter complained of within a specified period.*
28. *If-*
  - (a) *the licensee or lessee makes no or no sufficient explanation; or*
  - (b) *does not rectify the matter complained of within the specified period, the Minister may revoke the licence or lease.*
29. *A notice sent to the last-known address of the licensee or lessee or his legal representatives in Nigeria and published in the Federal Gazette shall, for all purposes, be sufficient notice to him of the revocation of the licence or lease.*
30. *The revocation shall be without prejudice to any liabilities which the licensee or lessee may have incurred, or to any claim against him which may have accrued to the Federal Government.”*

**7. Relevant portions of the guidelines on assignment, transfer or acquisition of rights and interests in oil and gas assets in Nigeria.**

The current Guidelines and Procedure for obtaining Minister’s consent to the assignment of interests in oil and gas assets in Nigeria was issued on **11<sup>th</sup> August 2014**, pursuant to the provisions of **paragraphs 14-16 of the First schedule to the Petroleum Act, Cap P10 LFN, 2004** and **section 17 (5) (d) of the Oil Pipelines Act, Cap. O7 LFN 2004**. Conditions/grounds and procedure for revocation of the licence or lease (or interests in them) are also contained in **paragraphs 24 to 30 of the First schedule to the Petroleum Act, Cap P10 LFN, 2004**. The guidelines and procedures outline the ways and means of doing this. Some relevant parts of the guidelines as follows:

**Paragraph 3.1** which defines assignment provides as follows:

- “3.1 Assignment as used herein involves the transfer of a licence, lease or marginal field **or an interest, power or right therein** by any company with equity, participating, contractual or working interest in the said OPL, OML or marginal field in Nigeria, through merger, acquisition, take-over, divestment **or any such transaction that may alter the ownership, equity, rights or interest of the assigning company** in question, not minding the nature of upstream arrangement that the assigning company may be involved in, including but not limited to Joint Venture (JV), Production Sharing Contract (PSC), Service

Contract, Sole Risk (RS), or Marginal Fields Operation. Instances of an assignment shall include but not limited to the following:

- i. Assignment by way of exchange or transfer of shares: This shall entail the acquisition of part or all of the shares of a company which holds an OPL, OGPL, OML, or Marginal Field in Nigeria.
- ii. Assignment by way of the private or public listing of a part or of the whole of the shares of a company which holds an OPL, OGPL, OML, or Marginal Field in a Stock Exchange anywhere in the world.
- iii. Assignment by way of merger, wherein a company which holds an OPL, OGPL, OML or marginal field combines with one or more companies to form another company by way of payment, exchange of shares or by any other means whatsoever.
- iv. Assignment by way of acquisition, wherein the acquiring company directly or indirectly takes over or acquires the whole rights or interest in a license or lease or marginal field and associated assets of the assigning company, including acquisition of interest by an entity in a parent company whose affiliate has interest in a licence, lease or marginal field or associated assets in Nigeria.
- v. Assignment to a company in a group of which the assignor is a member and is to be made for the purpose of re-organisation in order to achieve greater efficiency and to acquire resources for more effective petroleum operations.
- vi. Assignment brought about by reason of devolution of ownership of shares or interest in ownership of shares by way of operation of law and testamentary device. Operation of law shall refer to a judgment of a competent court of law or an award from an Arbitration Panel. Testamentary device shall refer to the transfer of shares through a will or letters of Administration, or Deed of Gift.”

**Paragraph 4 of the guidelines** makes provisions for the procedure to follow and **paragraph 4.1 (c)** provides that it shall be the responsibility of the assignor to secure the consent of the Minister with respect to any assignment of interest in an asset.

**Paragraphs 4.2 - 4.17** on the other hand stipulate several other conditions/procedures that the assignor must follow to obtain the consent and ultimately the divestment or assignment of the asset. By **paragraph 4.16**, where the parent company of a company holding interest in an asset in Nigeria is taken over by or merged with another company overseas, the veil of incorporation shall be lifted in such circumstance to determine if such transaction constitutes an assignment under the Petroleum Act. In **paragraph 5**, the Guidelines make provision for submission of a written application for the Minister's consent to the Department of Petroleum Resources ("DPR") attaching various prescribed documents and agreements, etc.

The entirety of **Paragraph 6 of the Guidelines** provides the criteria and procedures for the application and grant of the Minister's consent in this regard and **paragraph 6.1** gives the Minister the discretion to grant consent where he is satisfied that:

- "(i) The proposed assignee itself, or the group of companies within which it is a member or under which it is owned is of **good reputation**;
- (ii) The proposed assignee is **acceptable to the Federal Government** in all other aspects; and
- (iii) It is likely that the proposed assignee has sufficient technical knowledge, experience **and finance** to properly execute the project for which the licence, lease or marginal field has been assigned."

Furthermore, **Paragraph 6.2 of the Guidelines** includes the conduct of **due diligence** on the proposed assignee, or the parent company of the assignee (as the case may be). This due diligence is a crucial part of the process of considering the application for consent. It would be conducted by a technical team duly nominated from the DPR and should, *inter alia*, reveal the technical competence and the financial capability of the assignee entity. The due diligence is mandated to be carried out on the assignee **within 3 months** of the nomination of the technical team as afore-stated. Notably, the cost of this due diligence would be borne by the assignor.<sup>4</sup>

In concluding this part one, where I have merely set out the relevant laws and regulations, the reader will note that the Federal Government of Nigeria remains the owner of the underlying asset (under the ground) of an oil and gas licence. Obtaining Ministerial Consent is central to any divestment or acquisition of assets in the

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<sup>4</sup> See <https://www.dpr.gov.ng/wp-content/uploads/2018/08/Giudeline-on-Asset-divestment-16-10-14.pdf> accessed on 10th October 2019, for the guidelines.

Nigerian oil and gas industry; and any such divestment or acquisition, howsoever described that is not backed up with Ministerial Consent shall be void and of no effect whatsoever. The law and regulation set out what is considered interests, rights and assets of an oil and gas licence that can be divested or assigned and the procedure to follow in obtaining the requisite consent to do that are also well laid out. Notwithstanding these provisions of the law, several issues arise with multiplier effects on the stakeholders in the industry when an asset holder becomes insolvent. In the next part of the paper titled “**Raising Finance to develop the Petroleum assets/fields in Nigeria: Can the petroleum underground be charged?**” which we invite the reader to look out for, we will review the practical ways the operators and asset holders raise financing for the development of the oil and gas assets and fields in Nigeria to clarify the reasons why some of the issues identified above arise in insolvency situations of an asset holder.

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