Energy & Natural Resources
8th October 2019

Peter Olaoye Olalere, Esq[1]

Raising Finance to develop the Petroleum Asset/Field in Nigeria: Can the Petroleum underground be charged? [PART 2]

The financiers will usually use different Finance Structuring Tools by way of various back to back agreements, one or some of which give(s) the financier the right, authority and option of taking over ownership, interests and operation of the project for the purpose of realizing the project cost/fund, profits and interests of the lenders. As a stringently and structurally regulated industry, the regulator and government of Nigeria have robust regulatory regime on how interests in Oil and Gas Assets can be transferred or acquired by another entity in Nigeria as set out in part one of this article. The regulatory regime and guidelines on assignment, transfer or acquisition of rights and interests in the Oil and Gas assets basically require that the licensee of the assets obtain ministerial consent before same can be legally transferred to, assigned or acquired by another party. Some of the project finance arrangements/agreements, on the other hand, provide that lender can take over; or is deemed to have acquired rights, title and interest in; the project, and consequently the title in the licence, once the borrower is in certain level of default. The central question here has to be: whether or not the Consent of the Minister is required for raising funds using an Oil Prospecting License Oil or Mining License Asset as collateral in Nigeria.

Assets under the ground belongs to Government

It should be noted that the oil and gas under the ground remains the asset of the Federal Government as provided by Section 44(3) of the 1999 Constitution of the Federal Republic of Nigeria, and Section 1 of the **Petroleum Act, Cap P10 LFN, 2004** and confirmed by

[1] **Notary Public for Nigeria and *Senior Associate with the Dispute Resolution Department of S. P. A. Ajibade & Co., Lagos Office, Nigeria*.**

decided cases.[2] Consequently, until the operator of the field brings out the oil and gas and before applying the sharing formula after the cost oil is deducted (under the Profit Sharing arrangement) the OPL/OML asset licensee cannot ordinarily mortgage the asset to develop the asset or field as the asset does not belong to the licensee at that stage. The reason is that any such mortgage of the asset will require the consent of the Minister as same amounts to assignment of an interest, right or equity in the underlining asset of the oil and gas licence. The consent of Minister is not generally easily obtainable within the time required to make a case for financing for the licensee of an oil and gas asset because of the government bureaucracy and sometimes, other intra-party issues within the project partners. Thus, in practice, a lot of creative ways of charging the oil and gas asset or their derivatives are designed and deployed to ensure that the financier allows the asset holder or its affiliates to draw down on the finance to be able to develop the project. Sometimes, the licence holder just charges the underlying oil and gas asset under the ground to the financial institution without seeking the consent of the Minister while sometimes, the finance agreement is structured in such a way that what is charged is only the share of the produced oil and gas that belongs to the licensee. This means only future asset is charged at the point of drawing down on the loan to develop the field in some instances.

Operators believe that consent is not required to charge the asset

The generality of the operators and license holders in the industry assume, some based on general long time practice while others on what they claim the Industry regulator, DPR advised them, that they do not require the consent of the Minister to raise funds to develop the field; and consequently, to mortgage the underlying asset of the OPL/OML. The general belief is that there is no need for such consent, even the belief is not backed up by any law, regulation or guideline. So while the financier will definitely want the underlining asset (the oil and gas underground) as the main collateral for the loan, in addition to all other collaterals including the borrower's share of the produced oil, the asset holder who is not completely unaware of the need not to encumber the asset in view of the fact that the asset does not belong to it will be reluctant to have the asset listed as a collateral. At the end, parties charge the asset without registering same with the regulator on the basis that it will be difficult to effect registration that the regulator does not require them to register such

2. See *Attorney –General of the Federation v. Attorney – General of Abia State & 35 Ors. (No. 1)* (2001) 11 NWLR 689; Attorney-General of the Federation v. Attorney General of Abia State & 35 Others (No. 2) (2002) 6 NWLR (Part 764) 542 and *Moni Pulo Limited v. Brass Exploration* (2012) 6 CLRN pg. 153-235. See also the unreported case of Famfa Oil v. AGF. & NNPC (Suit No. CA/A/173/06).

agreement. These regulatory regime and guidelines on assignment, transfer or acquisition of rights and interests in the Oil and Gas assets as highlighted in the first part of the paper clearly require that the licensee of the assets obtain ministerial consent before same can be legally transferred to, assigned, charged or acquired by another party.[3] Some of the project finance arrangements/agreements, on the other hand, provide that lender can take over; or is deemed to have acquired rights, title and interest in; the project, and consequently the title in the licence, once the borrower is in certain level of default.

Can an OPL/OML asset be mortgaged without the consent of the Minister? As seen in the reviewed provisions of the statute, regulations and guidelines in the first part of the paper, mortgaging an oil and gas asset means in practical terms, changing or assigning the ownership of same to the mortgagee. **Paragraph 4.1 (c)** of the guidelines 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** stipulate several other conditions/procedures that the assignor must follow to obtain the consent and ultimately the divestment or assignment of the asset. **Paragraph 4.16** provides that 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. ***Paragraph 6.1*** gives the Minister the discretion to grant consent where he is satisfied of the criteria as to **good reputation, financial capacity** and **acceptability to the Federal Government of the** assignee **as** set out in the paragraph. The next thing is to conduct **due diligence** on the proposed assignee, or the parent company of the assignee (as the case may be) within **3 months** of the nomination of the technical team as afore-stated.

Again, as the law and regulations stand today, there is no doubt that any divestment, charge or assignment of assets whether described as equity, rights, interests, ownership, mortgage or even possession in an oil and gas licence cannot be done without obtaining the prior

[3] See Guidelines and Procedure for obtaining Minister's consent to the assignment of interests in oil and gas assets in Nigeria was issued on 11th 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.

consent of the Minister. The oil and gas to be produced from the acreage of the licence belongs to the Federal Government, and the law and regulation require that licence of the minister be obtained prior to mortgaging that asset, otherwise the mortgage if the loan crystalizes, is null and void ab initio having not obtained the said consent. This is the reason a receiver or receiver manager appointed by the mortgagee of an oil and gas licence holder in Nigeria may not be able to take over and or operate the underlying asset of licence in the event of default. In such instances, the mortgagee will not be able to have recourse to the oil and gas whether under the ground or on the Float Production Storage and Offloading (FPSO) platform after production. Although the portion of the receivables belonging to the mortgagor from an oil and gas field, can be mortgaged, even that will require that the mortgagor registers that mortgage with the regulator to enable an unhindered access to the asset eventually.

In concluding this part two of the paper, as the oil and gas industry keeps evolving, the laws and regulations guiding it must also continue to evolve to meet the interest and needs of stakeholders. The regulations must continue to take cognizance of the central role of lenders, financiers, or creditors and provision appropriately for them to continue to play their role without losing their fund. In the third part of the paper with the title **"Case Study of Insolvent Oil and Gas Asset Holder in the Nigerian Petroleum Industry: Matters Arising"**, we will do a case study of at least 2 asset holders that have been affected by insolvency in the industry to underscore the kind of practical issues these insolvencies have thrown up in the industry.

For further information on this article and area of law, please contact **Peter Olaoye Olalere** at: S. P. A. Ajibade & Co., Lagos by telephone (+234 1 472 9890), fax (+234 1 4605092) mobile (+234 815 979 4216) or email (oolalere@spaajibade.com).

www.spaajibade.com