PROJECT FINANCE

Nigeria

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SECTION 1: Market overview

1.1 Please provide an overview of the project finance market in your jurisdiction.

In Nigeria, project finance has been increasingly used to finance activities in the energy and infrastructure sectors. Predominant players in this space are the local commercial banks and this is a major challenge, as such banks are limited in their ability to fund projects due to limited balance sheet sizes and a preference for short term loans.

Local commercial banks are estimated to have funded about $3.3 billion, through project finance structures, for the acquisition of power assets during the privatisation program in Nigeria. The liquidity issues in the power sector have led to a lot of these loans becoming bad loans. As such, the sector has witnessed restructurings. Several restructurings have also occurred in the oil & gas sector, due to the fall in the price of crude oil in the international market. The above has in turn led to the emergence of more innovative approaches to project financing, including forward sale and contractor financing arrangements.

Use of project specific bonds is expected to grow significantly with the establishment of InfraCredit (discussed below) which has backed the issuance of the first corporate infrastructure bonds in the Nigerian debt capital markets.

1.2 What is the composition of the market in terms of the types of active lending institutions and has this been evolving?

The project finance market in Nigeria typically involves local commercial banks as lenders with international finance institutions, development finance institutions and multilateral agencies playing supportive roles. Other players include export credit agencies.

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About the author
Abiodun Oyeledun is a senior associate at Detail Commercial Solicitors and has been a member of the firm's finance practice since joining the firm. He has advised on several financing transactions across a number of sectors. He is a cerebral and proactive lawyer, who consistently aspires to exceed client expectations by delivering on quality and depth. His transactional experience includes advising the Central Bank of Nigeria and the Nigerian Electricity Regulatory Commission (NERC) on the N213 billion ($590 million) Intervention Fund for the Nigeria Electricity Supply Industry; acting as lenders counsel to Stanbic IBTC Bank with respect to $55 million term loan facilities for the refinancing of Mall developments in Delta State and Imo State; advising Kann Utility Company as borrower's counsel on its debt raise for $121 million for financing the purchase of Abuja Electricity Distribution Company and refinancing of the $121 million debt.

Oyeledun earned a bachelor's of law degree from Olabisi Onabanjo University in 2009 and was admitted to the Nigerian Bar in 2010.

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About the author
Nnenda Hayatuddini is an astute commercial lawyer who has a passion for excellence and goes the extra mile to meet clients' needs. She is a member of Detail's finance and power teams. She brings to Detail her experience in the power sector as a pioneer member of the legal department of the Nigerian Bulk Electricity Trading (NBET). Her transactional experience includes advising Stanbic IBTC on the provision of a senior term loan facility to an international cereal manufacturing company for the construction of a cereal processing factory, equipment, and other related infrastructure within a Nigerian Free Trade Zone; advising EMA and Aiteo Consortia on its acquisition of 80% interest in Calabar, Benin and Alaoji Generation Companies under the privatisation process valued at $2.7 billion; and advising The Infrastructure Bank on various structures for the project financing and establishment of a $500 million infrastructure fund.

Hayatuddini earned a bachelor's of law degree from Kwame Nkrumah University of Science & Technology, Kumasi, Ghana in 2010. She was admitted to the Nigerian Bar in 2011 and earned a master's in law from the University College London in 2014.

1.3 Please describe any major current projects or initiatives that are influencing activity.

The infrastructure credit enhancement company (InfraCredit) was established in 2017 to provide guarantees to enhance the credit quality of eligible local currency debt instruments issued to finance eligible infrastructure related assets in Nigeria. It is expected that these guarantees will increase the number of project specific bonds issued by project sponsors and address the dearth of long term financing options for infrastructure projects.

On April 5 2017, the Federal Government of Nigeria (FGN) launched the Economic Recovery & Growth Plan (ERGP), which will run from 2017 to 2020. The ERGP seeks to restore economic growth; build a globally competitive economy; invest in the Nigerian people by investing in infrastructure; improve the business environment and drive industrialisation by focusing on small and medium enterprises (SMEs).

The FGN, in collaboration with the World Bank Group, has also developed a draft Power Sector Recovery Program (PSRP), recognising the deterioration of the power sector and the urgent need to address the challenges in the sector to improve its financial viability. The PSRP is a series of strategic policy actions, operational governance and financial intervention initiatives to be implemented by the FGN over five years (2017 – 2021) aimed at providing support to the sector and improving its financial viability, transparency and service delivery.

Finally, the Credit Reporting Act (CRA) has been passed into law with the aim of creating a credit database to determine the credit worthiness of individuals and corporates trying to access credit and to aid creditors to reduce the risk of non- performing loans.

SECTION 2: Transaction structures

2.1 Please review some recent notable transactions involving your market and outline any interesting aspects in their structures.

Azura IPP – This project is reportedly Nigeria's first project financed independent power project (IPP) with 459 MW capacity located in Edo State. Debt financing of $900 million has been provided by a consortium of 15 banks from nine different countries, including most of the European development finance institutions.

In terms of structure, the Azura IPP is the first Nigerian power project to benefit from both the World Bank's Partial Risk Guarantee structure and the political risk insurance supplied by the Multilateral Investment Guarantee Agency (MIGA).

In addition, a put call option agreement (PCOA) was executed with the FGN granting the project sponsors/financiers the right to sell the plant (or its shares) to the government in certain default scenarios in exchange for the "purchase price" which, at a minimum, covers the outstanding debt used to finance the construction of the plant. The Azura IPP is expected to set the template for the successful development of IPPs in Nigeria.

Central Bank of Nigeria – Nigerian Electricity Market Stabilisation Facility (CBN – NEMSF) – The CBN supported and refinanced a facility provided by 18 local commercial banks to settle outstanding payment obligations due in the power sector. In terms of structure, certain conditions precedent to the financing were developed, key amongst which are:

(i) Ensuring a cost reflective tariff in the sector sufficient to cover repayment of the facility and other sector obligations of the market participants.

(ii) Activation of electricity sector contracts to ensure adequate remedies for any payment risks between parties.

Shell divestments – In 2014 Royal Dutch Shell initiated the process of selling off some of its onshore assets to cut costs. Shell put up for sale its 30% share stakes in four oil blocks in the Niger Delta – Oil Mining Licences (OML) 18, 24, 25, 29, as well as a major pipeline, the Nembe Creek Trunk Line.

2.2 What might the projects above mean for the market and have you noted other noteworthy developments in the way project finance transactions are being structured for a) energy projects and b) infrastructure development?

The success of the Azura IPP would serve as an incentive for other prospective independent power developers who have been sceptical about investing in the Nigerian power sector and restore investor confidence in the sector.

Under the CBN-NEMSF, it is expected that with the settlement of existing debts and the de-risking of the sector by transitioning into a contract based market, the power sector will attract more investment.

The Shell divestments is also notable as it creates more investment opportunities for Nigerian companies with the relevant capacity to undertake oil exploration and production activities.

SECTION 3: Legislation and policy

3.1 Describe the key legislation and regulatory bodies that govern project financing in your jurisdiction.

There is no specific project finance legislation or regulatory body in Nigeria governing project finance. However, project finance transactions will involve:

- general laws of contract;
- laws governing corporate activities (in Nigeria, principal legislation is the Companies and Allied Matters Act (CAMA) and activities of corporate entities are regulated by the Corporate Affairs Commission);
- fiscal legislation in respect of stamp duties and income taxes as may be applicable, administered by the Federal Inland Revenue Service; and
- insolvency laws.

Certain other governmental agencies and bodies play roles in regard to overseeing the activities of players in the project finance market such as the Infrastructure Concession and Regulatory Commission (ICRC), Central Bank of Nigeria (CBN), National Environmental Standards & Regulations Agency (NESREA) and Securities and Exchange Commission (SEC).

3.2 Have there been any recent changes to regulations or regulators that may impact the finance structuring in terms of guarantee and security regimes, local currency rules and foreign investment restrictions?

Taking security

The Secured Transactions in Movable Assets Act 2017 (STMA Act) was adopted on May 25 2017 and published in the official gazette on May 31 2017. The STMA Act seeks to facilitate financial inclusion in Nigeria by stimulating responsible lending to micro, small and medium enterprises; and aiding access to credit secured with movable assets such as equipment, livestock, farm produce and bank accounts.

Foreign investment restrictions

The Nigerian Investment Promotion Commission Act (NIPC Act) of 2004 permits 100% foreign ownership of Nigerian companies and this has not changed. However, the CBN on September 7 2017 issued a circular to Nigerian banks directing that physical certificate of capital importation (CCI) will no longer be issued for foreign exchange inflows and that the processing of CCIs will only be done electronically. All investors with physical CCIs that had not been fully utilised were required to have such certificates dematerialized and converted into e-CCIs by May 19 2017. (Where there is an importation of capital investment (debt or equity) such foreigners are required to process a certificate of capital importation (CCI) which essentially guarantees access to the official foreign exchange market for repatriation of capital and returns on investment.)

3.3 Please describe the regime governing renewable energy investment.

The renewable energy sector in Nigeria is largely guided by the Renewable Energy Masterplan issued by the Federal Ministry of Environment in 2006 to articulate a roadmap for national development through the exploitation of renewable energy.

There is no specific regime governing investments in renewable energy in Nigeria, however the following notable initiatives have been implemented to promote investment in renewables:

- In 2015, the Nigerian Electricity Regulatory Commission (NERC) published feed-in-tariffs for use of renewable energy sources, which

provide investors cost recovery and a return on their investment;
- The Energy Commission of Nigeria developed a National Renewable Energy and Energy Efficiency Policy 2015, which is expected to drive the development of Renewable Energy resources in Nigeria;
- The Rural Electrification Agency (REA) has been established in accordance with the EPSRA to promote the use of renewable energy in rural areas.

3.4 Does your jurisdiction have incentive schemes in place for various types of energy or infrastructure project development?

- Fiscal incentives to the gas industry: A company engaged in gas utilisation is entitled to certain incentives including a tax-free period of three to five years, investment and capital allowance.
- Rural investment allowance: Where a company incurs capital expenditure on the provision of facilities for a trade or business which is located at least 20 kilometres away from where such facilities are provided by the government, the company shall be entitled to an allowance of a percentage of that expenditure.
- Pioneer status: This is a tax holiday granted to qualified (or eligible) industries/products anywhere in Nigeria for a period of three to five years.
- InfraCredit guarantee: InfraCredit provides guarantees to enhance the credit quality of debt instruments issued to finance creditworthy infrastructure assets in.
- Export processing free zones: Locating a project in a free zone within Nigeria will provide certain benefits, principal amongst which is an exemption from all Federal, State and local government taxes, levies and rates (Section 8, Nigeria Export Processing Zones Authority Act)
- Special incentives: Section 22 NIPC Act empowers the NIPC to negotiate, in consultation with appropriate Government agencies, special incentives for strategic or major investments.

3.5 Are there any rules, legislation or policy frameworks under discussion that may impact project finance in your jurisdiction?

The following initiatives are at various stages of structuring and the governing framework for their implementation is expected to be released soon:
- The Light Up Lagos Initiative is a programme to be undertaken by the Lagos State Government geared towards the generation and deployment of 3000MW to Lagos State through embedded power generation. The aim of the Initiative is to make Lagos State self-sufficient in terms of its energy requirements thereby becoming less dependent on the national grid. The Initiative contemplates Lagos State assuming responsibility for the different aspects of the power sector value chain (feed stock, generation, distribution and collection). To provide the Initiative with the required legal backing, the Lagos State Government is currently in the process of enacting the Lagos State Electric Sector Reform Bill.
- The Federal Executive Council has recently approved a payment guarantee fund for the power sector.
- The REA is to set up a rural electrification fund to support/finance the implementation of rural electrification projects

SECTION 4: Market idiosyncrasies

4.1 Please describe any common mistakes or misconceptions that exist about the project finance market in your jurisdiction.

The most common misconception is that the statutes and general project finance rules can be interpreted and applied in isolation of the practical realities of our market.

4.2 What measures should be taken to best prepare for your market idiosyncrasies?

In structuring a project finance transaction in Nigeria, it is advised that parties seek legal advice from Nigerian counsel at an early stage of the transaction to ensure that the proposed transaction is viable and to adequately mitigate against any foreseeable risks.

SECTION 5: Practical considerations

5.1 How established is the legislative framework and authorities that govern public-private partnerships (PPP) and where have PPP structures most successfully been applied?

The legislative framework governing public-private partnerships is well established. The framework is comprised of the following laws and regulatory bodies:

The Infrastructure Concession Regulatory Commission Act, 2005 (ICRC Act) and the ICRC – The ICRC Act provides for the participation of the private sector in financing the construction, development operation or maintenance of infrastructure or development of new projects of the federal government through concession or contractual arrangements and establishes the Infrastructure Concession Regulatory Commission (ICRC) to drive PPP projects in Nigeria.

The Public Procurement Act (PPA) and BPP – The PPA applies to all procurement of goods, works and services carried out by the FGN and all its procurement entities. The PPA establishes the Bureau of Public Procurement (BPP) which issues Certificates of No Objection for contract awards.

State PPP Laws – A key aspect of PPPs in Nigeria is that there are dual regimes at federal and state government levels. The ICRC Act does not apply to infrastructure projects undertaken by state governments where no federal asset or ministry is involved. As such, several states have developed their own frameworks for PPPs, and a number have made great progress in this regard. The following states have enacted PPP laws and corresponding PPP offices/bureaus: Abia, Akwa Ibom, Cross River, Delta, Ekiti, Kogi, Kwara, Lagos, Oyo, Plateau, Rivers. The use of PPPs has been successfully deployed in various sectors in Nigeria (including energy, rail, roads, housing, aviation) and it is further expected that PPP structures would still be deployed in the aviation and Oil & Gas sector as reports and recent government policies are indicative of the government's intention to concession four government owned airports and the four petroleum refineries currently operated by the Nigerian National Petroleum Corporation (NNPC).

5.2 What are the key considerations relating to foreign investment into projects as regards insurance and tax structures?

Tax considerations

- The Companies Income Tax Act (section 11) provides for certain tax exemptions in respect of interest payable on foreign loans, depending on the tenor of the loan and the moratorium.
- Creditors may also consider relying on investment routes structured through low tax jurisdictions which have double taxation avoidance arrangements with Nigeria; or applying for the grant of pioneer status (see Section 3.4).

Insurance considerations

- Under Nigerian insurance law, any insurance policy taken in relation to an insurable interest in Nigeria must first be taken out using a Nigerian insurance company unless the Nigerian insurance industry lacks the capacity to retain the risk of such portfolio.
- The assignment of reinsurances is not permitted as is typically required in project financing. Although the prudential guidelines for the insurance industry permit the noting of the lenders interest as first loss payee, this does not create a proprietary interest and there is a risk that if this provision is not adhered to (albeit unlikely), the lenders would rank as ordinary unsecured creditors of the insurer's estate.

5.3 Are there any specific issues creditors should be mindful of regarding a bankruptcy and restructuring scenario?

- Failure to register a registrable charge against a project company renders same void against the liquidator of the company.
- Statutory preferential payments: Nigerian law guarantees certain preferential payments in the event of the winding up of a company. Such payments will be made ahead of payments to creditors.
- Secured vs Unsecured creditors: It should also be noted that holders of perfected security interests are entitled to payment ahead of all other unsecured creditors.
- Setting aside of transactions based on fraudulent preference: Any act relating to the property of a company shall be deemed a fraudulent preference of its creditors, and be invalid where such act is done within three months of the institution of winding up/ bankruptcy proceedings.
- Floating charges may be rendered invalid: A floating charge created within three months of the commencement of winding-up proceedings is invalid, unless it is proved that the company was solvent immediately after the charge was created (section 498, CAMA).
- Transactions after commencement of winding up are void: Any disposition of property, attachment, sequestration, distress or execution against the estate or effects of a company, which is made or commenced after the commencement of winding up is void (sections 413, 414 and 497, CAMA);
- Trust arrangement shields assets from bankruptcy regime: Nigerian law recognises the concept of trusts and further recognises that any property which is held in trust is bankruptcy remote and cannot be dealt with by its liquidators and creditors.

SECTION 6: Outlook

6.1 What are your predictions for the next 12 months in the project development and financing sector and how do you expect legal practice to respond?

The FGN in line with the ERGP seeks to encourage the development of six priority sectors and has identified the agriculture, manufacturing, solid minerals, services, construction, real estate and downstream oil & gas operations. It is expected that several initiatives (some of which have been listed in the ERGP) will be implemented to achieve governments objectives including the concession and divestment of key infrastructure in the above sectors.

The CBN initiatives in the power sector as well as the proposed launch of the power sector recovery program in conjunction with the World Bank is expected to boost investments from development finance institutions, foreign investors and other institutional investments in the power sector. It is also expected that with the success of the Azura IPP and the Light Up Lagos initiative, several States and project sponsors will be encouraged to invest in power generation.

With the establishment of InfraCredit, we further expect access to long term financing to be unlocked via the capital market.

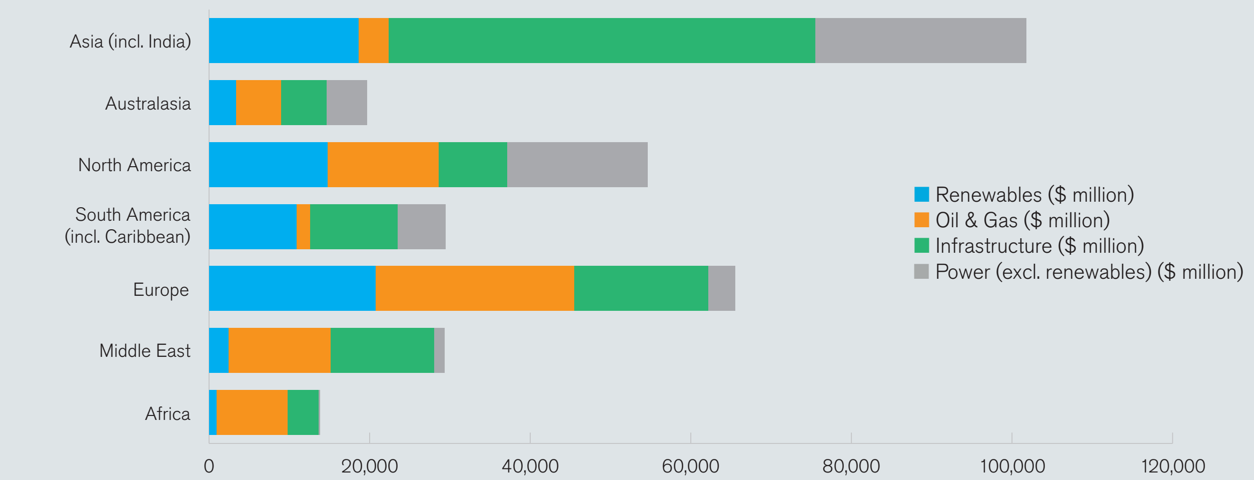
The above initiatives would rely heavily on foreign investments and such investors will need proper guidance through the legal and regulatory terrain in order to make proper investment decisions. With the development of various sectors simultaneously, we expect to see specialisation in the legal practice and the growth of emerging practice areas.

Year in numbers

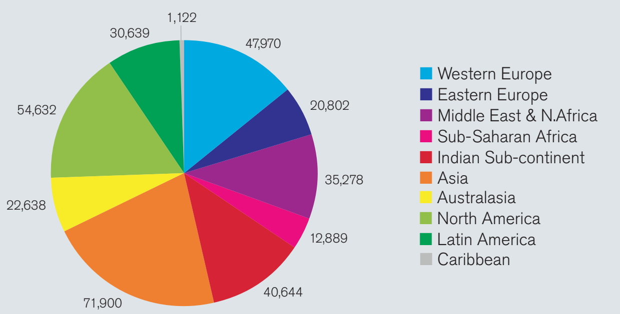
Some key statistics on project financing during 2017

Source: Dealogic. Data period: Jan 1-Dec 31. Value: $ million.

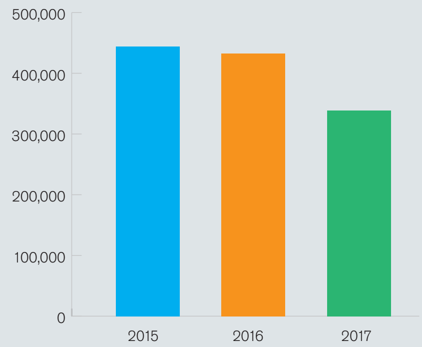
Biggest four sectors by region 2017



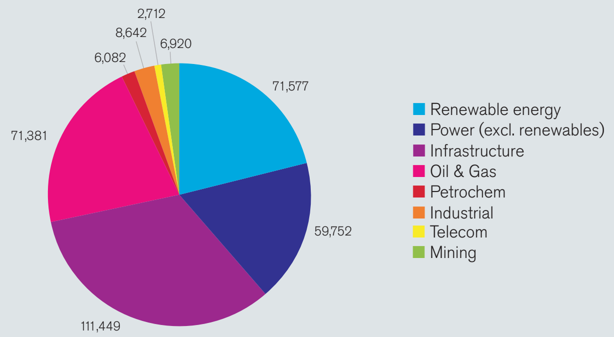
By region in 2017



Totals 2015-2017



By sector in 2017



Top 10 countries for project finance 2017

Country	$ million	No. of deals
US	43 871	128
India	38 264	279
China	33 585	24
Australia	22 472	52
Indonesia	17 922	19
Russia	16 611	3
UK	13 640	46
Brazil	13 330	149
Canada	10 761	28
Mozambique	10 393	3