

REALWORLD LAW

Nigeria



Downloaded: 09 Aug 2018

ABOUT

REALWORLD is the home of DLA Piper's expertise in the real estate sector. The resource includes REALWORLD LAW, a guide that allows us to share with you our local knowledge about how the law works wherever you invest or operate.

DLA Piper became one of the largest global law firms in 2005 through a merger of unprecedented scope in the legal world. DLA Piper today has lawyers in offices throughout Asia Pacific, Europe, the Middle East and the Americas. Our global real estate team operates from 78 offices worldwide. Real estate is an inherently local business and requires strong local knowledge. Wherever there is a DLA Piper office, you will find our local team embedded in the market. If you are in the business of real estate, DLA Piper can meet every legal need you face.

We work closely with investors, lenders, developers and managers in every aspect of their real estate activities: establishing real estate funds and investment vehicles in new markets, implementing acquisitions and financings for cross-border portfolios or restructuring loan facilities secured on assets in multiple jurisdictions. Come to us if your business is setting up facilities and operations in a new country for the first time and you need to find your way in unfamiliar territory.

Your law firm should offer you a consistently high standard of personal service and quality advice. DLA Piper embodies that principle, whether you come to us in Sheffield or in Sydney, in Antwerp or Atlanta. We are the one-stop-shop for real estate.

KEY GLOBAL CONTACTS



Dr. Olaf Schmidt
Partner and Co-Chair, Global
Real Estate Sector
T: +39 02 80 618 504
olaf.schmidt@dlapiper.com
Milan



Jay Epstien
Partner and Co-Chair, Global
Real Estate Practice
T: +1 202 799 4100
jay.epstien@dlapiper.com
Washington DC

NIGERIA



Last modified 24 May 2018

The country is a federation of 36 states and the Federal Capital Territory, Abuja. It has a federal constitution governing the entire country and in which lands and real property rights of the state and individuals are placed under the Concurrent List. This connotes that the federal government can make laws that apply to the entire country, the state government can make ancillary legislations governing their respective states and which are subsidiary to federal statute.

The subsidiary legislations by the states are not radically different and the principles and practice are generally similar across the country. The overriding legislation in operation is the Land Use Act.

Other subsidiary legislations include:

- The Land Registration Act
- The Land Tenure Law
- The Property and Conveyancing Law
- The Land Instruments Registration Law of the various states
- The Registration of Titles Law
- Acquisition of Land by Aliens Law
- Tenancy Law of Lagos State 2011
- Recovery of Premises Law
- Rent Control and Recovery of Residential Premises Law

The Nigerian government has taken a strong stance on the ease of doing business and has devoted considerable resource with a committee established headed by the Vice President of the country. Real property registration is one of the avenues being streamlined by the ease of doing business committee.

COMMERCIAL LEASES

Legal characteristics of a lease

What types of arrangement does the law recognize which allow occupation and use of real property for a limited period of time?

Under the Land Use Act which covers the whole of Nigeria, the law does not differentiate between a Commercial, Residential or Mixed Development Lease. The nature of interests in real property after 1978 is leasehold for terms not exceeding 99 years.

In practice, the land is vested in the government and the Governor grants the interests to individuals and corporate entities to hold and use subject to the conditions of the grant.

What is the usual length of each type of commercial lease?

Commercial lease terms are subject to the agreement of the parties. Usually, there are no limits to the length of the term that parties can agree and fix for a commercial lease if the grant does not exceed the term which the lessor holds under the head lease. A lessor can therefore, lease the entirety of the term held under its proprietary title deed or for a lesser period of one year or even months, subject to the conditions and covenants agreed by the parties and provisions of the head lease.

In state allocation or direct grants of proprietary real property interests by government, it is the discretion of the state as grantor to give any term of years, typically not exceeding 99 years.

Are there any specific regulations and/or laws which apply to leases of particular categories of real estate, such as residential, industrial, offices, retail or hotels and what is their impact?

The laws regulating leases in Nigeria are not specifically targeted to separate and distinct categories of real property. There are no specific laws especially promulgated to regulate real property in the categories of either residential, commercial, offices, retail or hotels. There are however, in the various states similar regulations applicable to all forms of tenancies, irrespective of the categorization of the property.

The Nigerian Constitution empowers the States within the Federation to make regulations with respect to recovery of premises, rental control, lands use and property rights, subject to the provisions of the Land Use Act.

In ascertaining real property interests and rights, much reliance is placed on case law as espoused by judicial authorities and are overriding and applicable as municipal laws regulating all forms of real property rights together with relevant statutes.

In Nigeria generally, the terms of contract pertaining to all commercial leases are enforceable by the courts, subject to municipal laws. Such instances, are irrespective of the agreement of parties on re-entry and surrender of possession for breach of covenant to pay rent, or termination of the lease or even expiry of the terms agreed, the lessor must comply with the requirement to issue specific notices to quit or notice of owner's intention to recover possession and wait for the notice period to lapse before commencing legal action to evict the lessee (as tenant) from the property.

Lessees' rights to possession

Does a lessee have a right to continue to occupy the relevant real estate after the expiry of a commercial lease?

A lessee of real property under any category whether residential or commercial is protected under the law to hold over possession even after expiration of the lease. The lessor does not have an automatic right to re-enter or recover possession of the property despite that the parties inserted in the contract a provision for re-entry into the property by the lessor, upon the expiry of the lease.

Where parties agree in the lease Agreement for the mode of notice to be issued before recovery of possession, same must be complied, otherwise, the lessor must comply with the requirement to serve on the lessee, all mandatory notices to determine the lease (notice to quit and notice of intention to recover possession) and

seek an order of the court to recover possession and evict the lessee from the property.

A lessee holding over after the expiration of its lease is regarded as a statutory tenant and cannot be evicted except by laid down procedures which mandatorily are to be strictly complied with by the lessor. Where the lease that is not for term certain expires, the mode of payment of the rental determines the nature of the notice and the length of time that will apply. Where rental is payable on a yearly basis, six months's notice is required and for monthly tenancies, a month's notice.

What does a lessor need to do to ensure that a lessee leaves on the date originally agreed?

Where the lessor has no intention of renewing the lease, it should engage with the lessee to agree on delivery of possession within a reasonable period before the expiry of the lease and also ensure that all notices are issued within time. This is to give sufficient time to for the lessee to make preparation to vacate the property and for the lessor to comply with the legal prerequisite of issuance of appropriate notices. The lessee should be prepared to take legal action immediately if the lessee holds over possession after the date agreed.

A lessee is shielded from forceful eviction upon expiry of the lease if it is convenient to remain in possession for as long as the eviction process will take and at the same rental. Therefore, contractual conditions that make it inconvenient and costly for the lessee to breach its obligations including holding over after expiry should be considered. Such provisions to include the lessee indemnifying the lessor against liabilities arising where certain services which are obligations on the part of the lessor are withdrawn after expiry and higher rates as mesne profits payable on the property by the lessee after expiry.

Can a lessee be forced to leave prior to the date originally agreed and, if so, how long will this process take?

The parties to the commercial lease agreement can expressly provide for early termination of the term on the conditions and manners agreed upon. The lessor can trigger the termination provision and comply with the agreed requirements and notices as provided in the lease agreement.

The lessor can also terminate a lease where the lessee is in breach of fundamental conditions of the lease agreement including, inability to pay rent, liquidation, assignment to third party without lessor's consent etc, and where the lessee is unable to remedy within a reasonable period the breaches that can be remedied.

The right of the lessor to an early termination of the lease still does not guarantee that possession will be delivered immediately as the lessor is still obliged under law to give appropriate notices to the lessee and proceed to court to recover possession of the property. The process of evicting a lessee through the court is often tedious and long-drawn depending on the circumstances of the particular case.

Can a lease be terminated by any third party, eg the government or a municipal authority? If so, how long does this process take? Is compensation payable and, if so, who pays it?

There are specific instances in which the government, federal or state can terminate the leasehold interests in real property. Section 28 of the Land Use Act 1978 empowers the government through the governor of the state where the land is located, to acquire land compulsorily from land owners and the acquisition must be for 'public purpose' or for 'overriding public interest'.

The term 'overriding public interest' is wide and may include instance where the property is required by the government for public purposes of government, or for mining purposes or oil pipelines, or for the extraction of building materials, or breach of any of the provisions or any term contained in the certificate of occupancy or in

any special contract between the government and the occupier or alienation of the occupier's proprietary interests (by whatever form) without the consent of the Governor as required by the Land Use Act.

The procedure requires that for compulsory acquisition of land, the government must ensure that adequate notice is issued and served on the owner of the land and compensation is paid. By Section 28(6) of the Land Use Act the revocation shall be signified under the hand of a public officer authorized by the Governor and notice thereof given to the holder and upon receipt of the notice, the rights and interests in the property is extinguished.

The failure to serve the revocation notice on the land owner have been consistently held by the courts as capable of rendering the revocation as invalid. Also, the courts have held that the acquisition of an individual's interests in property by government must be for public purpose otherwise the revocation is invalid.

There are no specific timelines provided in law for the procedure for the acquisition or revocation of a leaseholder's interests.

What additional form(s) of security can be provided to a lessor to protect against a failure by the lessee to meet its obligations?

Parties are at liberty to agree on protective clauses and provisions that envisage failure on the part of the lessee to meet up on obligations and specific covenants under the lease agreement. The usual instances which may engender the need for protection relates to events such as the lessee flouting its obligations to pay the rental for the leased property and failure of reinstatement or repairs of all damages on the property at expiry or termination.

The forms of security which the lessor may ensure that are in place and provided by the lessee are as follows:

- Security deposit in a sum to be agreed. There is no provision of law that limit the amount of the security deposit so long as it is reasonable.
- Personal guarantee of directors of the lessee if a corporate entity.
- Third party guarantee warranting the payment of the rental or damages to lessor's property.
- Bank guarantee or performance bond to be provided by the lessee's bank assuring of the payment of the lessee's rental indebtedness.
- Acknowledge of debt document, to be executed by the lessee against default to pay rent.
- Consent to file report on lessee with Credit Bureau.
- Lien over stocks for lessees of Shopping Malls.

The kind of commercial lease and the nature of the lessee's undertaking or business will impact on the nature of the additional security that can be provided.

Managing leased real estate

Can restrictions be imposed by the lessor on how a lessee uses the real estate and are there any regulations and/or laws which impose further restrictions?

The lessor can restrict the use for which the property can be put by ensuring that there is a contractual provision with respect to use in the lease agreement. The lessee will be liable for breach of covenants and damages if the property is put to any use contrary to those specified in the agreement. Usually, lessee's covenants specify the use of the property as either 'residential' or 'commercial', however, there can be a more specific restriction of the use to avoid the wide interpretation for which the words 'commercial use' can be inferred.

The Certificate of Occupancy or title deed usually also indicates the purpose for which the land is to be used and the lessor as holder of title is bound to comply and ensure compliance by the lessee with the conditions in the title document. A lessor cannot by contract impose an obligation on the lessee to use a property for a purpose at variance with the relevant states government's specified approved land use and zoning regulations. Any such action or use of the property will be a contravention of the law and is a ground for revocation of the leasehold interest or imposition of fines for wrongful use.

The different states in Nigeria are responsible for development control and the regulation of physical and town planning through specific legislations in the different locations within the states. There are circumstances where the government will consider applications for change of use of a particular property and issue approval and in most instance these occur in locations previously zoned for residential purposes being converted to commercial areas or mixed development uses.

Is the lessee permitted to alter or improve the real estate and, if so, what conditions can be imposed on such works?

In contracts for commercial leases, it is usual to impose restriction that the lessee shall not alter or improve the property without the written consent of the lessor and subject to the lessor's approval of the plans of the proposed improvements. In the absence of the lessor's express consent a lessee in breach of the condition will be liable for damages.

All buildings are subject to government's physical planning and building control agency's approval before construction and the law requires that for structural alteration of buildings, the approval of the relevant agency is required and at a fee. It is therefore usual for the lease agreement to contain an obligation on the part of the lessee to obtain all necessary approval of the town planning authorities before commencement of alterations.

The lessor may impose an obligation that at the expiry of the lease, the lessee is to reinstate the property to its state at commencement of the lease. The lessor may choose not to enforce this covenant if it wishes to maintain the improvements.

Except for aesthetical changes to the property desired by the lessee, the obligation for structural repairs where there are damages to the property is the lessor's responsibility. There is no obligation on the lessor to reimburse the lessee for the costs of the improvements of the property without its express consent.

In what ways, if at all, can a lessee transfer its rights to a third party and what restrictions can be imposed on such transfers?

The lessee can transfer its right and interests in the property to a third party subject to the specific covenants contained in the lease agreement with the lessor on the right to transfer. It is usual for lease agreements to impose an obligation on the lessee not to transfer the interests or cede possession of the property to any person without the written consent of the lessor.

For commercial leases the lessee can only transfer the unexpired residue of the agreed term it holds upon fulfilments of any condition agreed for the transfer of the lease interests to be effected through the following methods:

- Assigning by deed, the unexpired residue of the lease. In this instance, the lessee has no reversionary rights in the property; or
- Sublease of all the unexpired residue or a lesser term of years in which case the lessee retains the right of reversion in the property.

The lessor may negotiate with the lessee in the lease agreement the conditions for the transfer of the interests in the property. Such restrictions may include the following:

- Lessor's right of first option to the property at an agreed fee.
- Consent of the lessor which may include an agreed consent fee; and
- Executing a deed of adherence by the sub-lessee to comply with the terms of the lease agreement.

Rent

Will the rent payable remain the same as long as the lease lasts?

Nigerian courts will uphold the sanctity of contracts agreed between parties to a commercial lease and will refrain from introducing provisions that parties did not contemplate and agree in the lease agreement to be binding, particularly provisions on rental escalation rates and review mechanism.

The rent for long-term commercial leases do not have to remain the same for the entire term provided the parties agree in the lease agreement for a rent review clause or provision. Where the lessor fails to negotiate and insert in the lease agreement, a condition that the reserved rental can be reviewed within specified periods, the lessor cannot unilaterally vary the agreement and demand a rent review without negotiating with the lessee and obtaining its consent. It is not sufficient that the applicable commercial rates for similar properties in the location of the property differs from the rent paid by the lessee.

Commercial leases for shorter terms typically have provisions for rent review where on expiry, the lessee exercises an option to renew the lease for a further period. Furthermore, the lessor in a lease that is expiring is at liberty to negotiate new rent rates as a condition to renew the lease.

For leases directly granted by state pursuant to the Land Use Act, the Governor may revise the rent at such intervals as stipulated in the Certificate of Occupancy, otherwise, at such reasonable intervals within the term of the grant.

Where the parties by their contract specify that the rent shall be subject to review and explicitly indicate the review mechanisms, it becomes much simpler to review the reserved rental. This is achieved by inserting a detailed rent review clause in the agreement of the parties.

If the rent is to be changed or increased how will the new rent be determined?

The parties are at liberty to contract and specify the rent applicable to the lease from year to year and at specific periods of the term of the lease. The lease agreement could at the onset of the lease indicate the rental, the period of review of the rent and the rates of escalation of future rents applicable for the lease or the determinants where no specific rates of increase are agreed in the agreement.

In determining the increase in rent, the lessor and the lessee may apply any rates, percentage increment on the base rent for the preceding period or a specific amount already mutually agreed in the lease agreement to be applicable upon renewal. The parties may also agree to use the central bank inflationary index or the market rental value for similar properties in the location.

It is usual for parties to indicate in the lease agreement that the rent shall be mutually agreed based on market rates and further specify that in the event of a disagreement on the rent, a professional qualified as an estate surveyor/valuer or any other qualified person may be agreed to advise on the rate of the increase of the rent.

Is VAT charged on rent?

VAT is payable by the lessee for commercial leases and it is charged at the rate of 5% of the rental. The Value Added Tax (VAT) Act is the legal basis for imposition of VAT in Nigeria and provides that VAT is applicable at a flat rate of 5% on the supply of taxable goods and services, other than those exempted in the Law. The Federal Inland Revenue Service (FIRS), has issued several circulars clarifying the scope of VAT exempt items and as commercial leases of land and buildings are not included in the list, there is the inference that the sales and leases of land and buildings for commercial purposes is not exempt from VAT. It is however, noted that the FIRS in practice, restricts its demand for payment of VAT on outright sale of land or rentals for residential premises. Its published circular (No. 9701) specifically included rent of residential properties in the Schedule of exempted VAT items.

Costs other than rent

What costs if any, other than rent, are payable by a lessee at the start of a lease?

There is no statute imposing costs on the lessee of property or exempting the lessor from responsibility to pay of the costs usually payable by the lessor. Property taxes (land use charges) which comprises of the municipal land rates (ground rents), tenement rates and all land based rates are by law the obligations of the lessor to pay. The lessor may before commencement of the lease, negotiate with the lessee that the stamping costs of the lease agreement is borne by the lessee and the land charges which ordinarily is the responsibility of the lessor is either borne by the lessee or shared by both in a proportion to be agreed by the parties.

The Stamp Duties Act requires lease agreements to be stamped before it is received in judicial proceedings. The lessee has responsibility for stamping of the lease agreement, the obligation is usually not enforceable against the lessee except expressly agreed in the lease agreement. It is usual that for short term lease, a lessor bears the cost for stamping to enable the document to be received in judicial proceedings.

The law requires that leases of terms over five years should be registered at the State Land Registry. The costs for consent, stamping and registration is the responsibility of the lessee, purchaser or person whom the property or interest is vested. The lessor will usually insist that its solicitor is responsible for the preparation of the lease agreement and the lessee to bear the costs for the solicitor's fees for services. The parties may however, agree to bear their own costs and pay for the services of any professional retained by them. The Tenancy Law of Lagos State 2011 which provides for each party to pay the fees of any professional engaged by it is only applicable in areas not considered to be highbrow locations.

Who pays for the maintenance and repair of areas used by several lessees, for example car parks and gardens?

The payments for the costs of maintenance and repairs of common areas in a property comprising several apartment or office units occupied by numerous lessees are shared as service charges and maintenance costs by the lessees and paid to the lessor or its facility management company responsible for overseeing the maintenance and repair of the areas used in common.

In regulated developments, the lessor or its appointed facilities manager may provide services such as security, alternative power supply, cleaning, utility services, refuse and sewerage disposal and other ancillary services to the lessees of the development who are required to pay a service charge along with the rent.

The parties may negotiate the mode of payment for service charge and the time frame that is different from the agreed rent payment periods.

Who pays for the maintenance and repair of the real estate actually occupied by the lessee?

The standard practice is that the lessor is responsible for all external and structural repairs required for the property and all internal maintenance and repair within the premises exclusively occupied by the lessee is the responsibility of the lessee to bear.

However, the parties can deviate from the usual practice by negotiating and agreeing on the apportionment of responsibility for the maintenance and repairs of the property. Where a lessee takes a long-term lease of the whole property, it can by contract assume the responsibility for all maintenance works of the property for the period it occupies same.

How are utilities and telecommunications which serve a property occupied by several lessees paid for?

The lessees of property are jointly responsible for the costs of the utilities, telecommunication and services used in common on the basis of their respective consumption rates or as may be determined by the property facilities managers in agreement with the respective lessees.

The lessees's respective consumption rates for certain utilities like electricity, water and telecommunications are subject to metering on the basis of use and consumption with payments directly to the service providers or through the lessor to the services providers.

Who pays the cost of insuring the real estate which is the subject of a lease and what events causing damage will usually be covered by the policy?

The nature of the lease determines the parties's respective obligations to insure the property. Usually the lessor has an obligation to insure the property against damages covered by unforeseen issues like fire, natural disasters and such other causes which may occur. The lessor's insurance however, does not have to extend to damages to the lessee's chattels and other fittings within the property and for which the lessee has an obligation to insure.

In a property comprising of multiple apartments or office spaces with several occupiers as lessees, the lessor may undertake this obligation to insure the property (except lessee's personal chattels) and recover the costs of the insurance premium from all the lessees, proportionally.

In other cases, particularly long leases, the lessor may pass the obligation to insure the property and the lessee's chattels to the lessee with a further obligation that the insurance policy be taken in the joint benefit and names of the lessor and the lessee.

The incidents that may be insured against are not limited to the following - fire, lightning, storm, earthquake, flood, riot and civil commotion, malicious damage and such other risks as the Parties may consider prudent to insure.

The Tenancy Law of Lagos State, 2011 imposes on the lessor the obligation to insure the property except the agreement of the parties's states otherwise.

CONSTRUCTION

Legal framework

What are the main sources of law that govern and regulate contracts for the design or carrying out of building works?

In Nigeria, common law principles and practices govern and regulate contracts for designs and building works. In a design or construction contract, the fundamentals of common law agreements, parties, intention, considerations etc must be in place. Many states in Nigeria have laws regulating contract and which laws are codifications of common law principles.

Designs and construction contracts due to their unique nature and technicalities usually contain terms that are standard and reflect the agreed construction process in standard uniform forms.

There are a number of local regulations governing designs and building construction works in Nigeria. These regulations specify the designs and building standards which the owners/developers, architects and building contractors must comply with when undertaking the construction works.

Aside the standard forms, construction contracts must not contravene the provisions of the relevant laws contained in the Urban and Regional Planning Laws, National Building Code, 2006, National Environmental Standards and Regulations Enforcement Agency Act, Environmental Impact Assessment Act, Public Procurement Act, and such other laws regulating the professionals engaged in the Construction Industry such as the Builders Registration Act, Engineers Registration Act, Quantity Surveyors Act and Architects Registration Act.

What official permissions, licences or consents are required by a building or engineering contractor before it can start work?

The Construction Industry is well regulated by laws which prescribe certain requirements for commencement of any development. The nature of the development or construction determines the process to be followed and the license and approval required by a building or engineering contractor to commence work.

The permits and licenses required to commence a development construction include the following:

- Title and right of occupancy over the land upon which the development is to be constructed. This is mostly for private developments and may not be necessary for a public project on state land where the state is the sponsor
- Relevant certifications from the appropriate statutory bodies must be obtained by the professionals (Engineers, Architects, Surveyors, Builders, etc) involved in the construction process
- Building design approvals and development permits from the appropriate state department/authority
- Environmental Impact Assessment Clearance and Compliance permit, and
- Relevant Fire, Health and Safety permits and licenses

Under the extant regulations every building development or project construction requires the inspection by relevant technical officials and certifications of compliance on quality and approved specifications.

In this country, what are the main rules relating to health and safety on construction sites? Do these rules in any way relate to the use of the development after construction is completed?

There are statutory provisions that provide for health and safety in buildings whether during construction or after completion. The minimum legal requirements relating primarily to health safety and welfare of the

workforce which must be taken into account in planning and execution of construction works are specified under regulations provided in laws such as the Labour Act, the Factories Act, Cap F1, the Employees Compensation Act, and the National Building Code, 2006.

The health and safety rules and regulations prescribed under the relevant statutes do not only regulate health and safety in the construction process, they also stipulate minimum standards for the use of the developments after the construction. The Nigerian Social Insurance Trust Fund Management Board implements the Employees Compensation Act which makes provisions for compensation in cases of death, injuries, diseases and disability arising from employment.

The Factories Act enables the Inspectorate Department of the Federal Ministry of Labour and Productivity to enforce minimum standards and requirements of health and safety under the Act.

There is currently a bill awaiting the assent of the President known as the Labour, Safety, Health, and Welfare Bill which seeks to repeal the Factories Act and when passed into law will provide a comprehensive Occupational Health and Safety Legislation in Nigeria.

What type of legislation exists dealing with environmental issues affecting building works and with promoting sustainable developments?

There are several environmental legislations enacted for the purpose of regulating and enforcing public policy on environmental protection and sustainability. The various States have specific environmental laws copying the Federal Act with slight modifications. The environmental legislations in Nigeria include the Environmental Impact Assessment Act, the National Environmental Standards and Regulations Enforcement Agency Act 2007 (NESREA Act) and the Harmful Waste (Special Criminal Provisions, etc) Act.

The National Environmental Standards and Regulations Enforcement Agency (NESREA) established under the NESREA Act 2007 has developed a number of Environmental Regulations targeted on particular areas of concern and published in the Federal Government Gazettes. More specific to the Construction sector, there is the National Environmental (Construction Sector) Regulations, which purpose is to regulate and minimize environmental hazards such as pollution from construction, decommissioning and demolition activities. Also, the National Building Code makes provisions for environmental issues relating to building construction.

At the Federal and the States levels, there are established specific government Ministries, Departments and Agencies tasked with oversight and implementation of environmental regulations.

In Lagos State for example, there is the Environmental Management and Protection Law, 2017 with the Ministry of Environment and the Lagos State Environmental Protection Agency (LASEPA) responsible for enforcement of all policies on the environment.

What arrangements are usually made with the local authorities and utility suppliers in relation to infrastructure (new roads, sewers etc) to support a new development?

Infrastructure and utility arrangements to support a new development are dependent on the project sponsor. Where the project is privately owned the provision of infrastructures and utilities (roads, sewers etc) are the responsibility of the owner/developer. The development of infrastructure is subject to layout design planning approvals showing the land and proposed infrastructure.

Where the project is a public sector initiative or a public private partnership project, there are usually arrangements with the utility suppliers in relation to the necessary infrastructure required in the real estate development.

Infrastructure development should be in the contemplation of the project developers and it is usual to liaise with the relevant utility companies in relation to obtaining connections such as electricity or water. Electricity generation and distribution has been the sole responsibility of a Government owned Corporation but now currently liberalized with private sector involvement and other power generation companies participating. The developer has the option of connecting to the general power grid and making arrangements with the private power companies for supply of energy.

Are any terms and conditions imposed or implied by law or mandatory in contracts for the design or carrying out of building works?

Federal Government developments are subject to the Public Procurement Act, 2007 which require that certain contracts or procurements are to be approved by the Bureau of Public Procurement (BPP) except a waiver is obtained. One of the guidelines for the approval of contracts by the BPP is that they be governed by Nigerian law. If works are procured by a state government, the rules may differ in accordance to the respective states' procurement law.

In the case of private sector developments, the parties are free to contract provided the general legal requirements of a valid contract are satisfied. There is a general duty of compliance with standards prescribed under the applicable laws and regulations and parties cannot agree to exclude the provisions of extant laws regulating design standards and the carrying out of building works.

The terms that are implied by law includes the contractor's duty to carry out the construction works with proper skill and care; obligation to adhere to particular best standard; fitness for the expected purpose particularly as the employer relies on the contractor's design skills; must meet the standard imposed by regulations and codes.

Forms of contract/procurement methods

Do any industry bodies, organizations or associations produce standard form contracts for use within the construction and engineering sectors? Are any international forms of contract ever used? How is the form of construction contract to be used selected?

Standard form contracts are often used in the construction industry in Nigeria. The forms may be amended depending on the requirements of individual projects but the choice of the particular standard form contract depends on the size, complexity and nature of the project.

The standard form contracts used in the Nigerian Construction Industry includes the following:

- The International Federation of Consulting Contracts Engineers Forms (the FIDIC Books) is the most common forms with the specific form used, depending on risks allocation and contract structure
- The Standard form of Building Contract in Nigerian 1990 (SFBCN)
- The General Conditions of Contract for the procurement of works, 2011 (the GCC)
- The Joint Contract Tribunal Standard form of Contract (JCT) 2005, and
- Federal Ministry of Works Contract (variant of the JCT)

Typically, who are the parties to an engineering or construction contract or package of contracts and who is responsible to whom?

Generally, the nature and size of a construction project will to a large extent determine the parties to the

contract for the project and the responsibilities. The main parties involved in a construction contract are:

Employer/Client

The employer/client is the party procuring the work, conceives the idea and employs the contractors and consultants to undertake the works for the project. He is responsible for procuring funding and obtains relevant permits for the project. The employer is obliged to ensure that the Contractor is qualified.

Contractor

The Contractor in a construction project undertakes and completes the works in accordance with statutory requirements, the contract drawings and contract bills and may engage with sub-contractors for separate parts of the works. The contractor is independent and not under the control of the employer.

The Architect

The Architect is the party responsible for the preparation of the designs or drawings for the construction project and supervising the implementation on the employer's behalf.

The Quantity Surveyor

The Quantity Surveyor is responsible for costing (Bill of Quantities) and adjustments to the pricing in the course of the construction work.

Civil/Structural Engineers

They are engaged in the designing of the projects working closely with the Architect to ensure structural integrity of the construction project.

Other Subcontractors

Other subcontractors and Suppliers of specific services under the supervision and control of the Contractor.

What risks in a construction or engineering contract are normally borne by the contractor? To what extent is force majeure relevant in such contracts?

All risks pertaining to damages to persons and property during the construction process are the contractor's responsibility.

Construction contracts usually contain force majeure clauses in the event of the occurrence of the specified happenings regarded as being out of the control of the parties

Are public private partnerships (PPPs) common? Are they promoted or encouraged by the government?

In Nigeria, there is an increased focus in the area of Public-Private Partnership (PPP) in public infrastructure development. The Infrastructure Concession and Regulatory Commission (ICRC) Act 2005 established the Commission responsible for regulating PPP processes in Nigeria and provides for the government of any of its agencies to enter into a contract or grant concession to private entities for the financing, construction, operation or maintenance of any infrastructure in the Country. Many States have enacted their own PPP laws towards public infrastructure development.

The notable PPP projects in Nigeria have been in areas of development of roads, bridges and power

infrastructure under various PPP models.

Is it possible for parties to enter into a construction contract where the price to be paid to the contractor is fixed?

The parties are free to agree on fixed price contract. Fixed price or lump sum contracts are commonly used in construction contracts in Nigeria. This allows for certainty in terms of costs of the building works. The major standard form of contracts utilized in Nigeria are predominantly fixed contracts.

What insurances need to be put in place by law or under a typical construction contract?

The law mandates a building or project developer to take out an all risk insurance upon commencement of the construction. The insurances in a typical construction contract are the following:

- All risks insurance cover for liability arising from damage to the works, materials by the Employer or Contractor or jointly.
- Public Liability Insurance cover against liability arising from personal injuries or death to third parties by the Contractor.
- Professional Indemnity Insurance against liability resulting from professional negligence such damages caused by errors in design of the project by Professionals/Consultants.
- Latent defects insurance cover against events of defects in the design, workmanship or materials used in the construction works which become apparent after the project is completed and delivered to the Employer. This is taken the employer to provide cover for up to 10 to 12 years after delivery of project.

Apart from the contract are any other documents commonly entered into by way of security such as a guarantee from a building contractor's parent or ultimate holding company or a bond from a third-party surety?

In Nigeria, the usual security required by the parties for a building or construction contract are performance bonds and advance payment guarantees by third parties and usually commercial banks.

The bonds and guarantees provides security to the employer in the event that the contractor fails to commence or complete the construction works.

The parties may agree that the employer shall provide a payment bond to ensure or guarantee that that the contractor is paid as appropriate. The contractor may provide this security in favor of the subcontractors.

The parties may also agree that in lieu of the employer retaining 5% of the amount due to the contractor under any payment certificate, to ensure that the contractor is put in funds to execute the construction works, a retention bond will be taken out by the contractor by which the employer will be paid the amount which it would have retained in the event that the contractor fails to carry out the works or remedy any defects.

Implementing the contract

How are payments to contractors, design consultants and subcontractors normally structured?

Generally, payments are structured in phases or stages. The contractor upon completion of each phase submits

an invoice for the works and the employer on confirmation of the works issues a certificate of completion whereupon the payment is made to the contractor.

The parties may agree an advance payment to the contractor of a sum representing 10% of the total contract sum for mobilization and commencement of the works which is deducted from payments due to the contractor under the contract. Usually, there is provision for retention from each payment due to the contractor for the purpose of rectifying defects after completion of the project or paid back to the contractor upon certification by the employer's architect that all defects have been rectified by the contractor.

This mode of payment may also be adopted for design consultants where their responsibilities run for the entire span of the project duration.

The responsibility of paying subcontractors is on the contractor and this is also structured in line with payments upon successful completion of each phase or stage of the works until completion of the specific subcontractors' contractual obligations.

Is it possible for the parties to a construction contract to agree that the time/date for completion of the works is to be fixed? How would delay be dealt with?

Construction contracts generally specify the duration of the contract and the date of completion of the contract and the contractor is expected to comply with this provision failing which he will be deemed to be in default except where the delay is caused by the employer or by a *force majeure* event in which case the contractor is excluded from liability.

Where the delay is caused by the employer, invariably the contractor should be entitled to an extension of time for completion. In the event that the delay is caused by the contractor, the employer is entitled to claim for extra costs and inconveniences arising therefrom against the contractor.

Construction contracts usually make provision for liquidated damages which are a means of compensating the employer when the contractor does not complete his works within a stipulated time agreed. Any extra time required to complete the project will result in a deduction at a predetermined rate under the contract calculated per day, week or month that the works are delayed beyond the agreed completion date. There is a limit to the amount that can be claimed as liquidated damages and usually not exceeding a specific percentage of the total contract price.

How are variations to the specification for engineering or construction works normally dealt with?

Standard form construction contracts usually contain provisions which guide the parties' relationship in the event that a variation is required and matters such as variations, the formalities, valuation of the works and payment for the variation works would be covered thereunder.

Generally, where the variation is authorized by the employer, the contractor is usually entitled to claim payments for the variation and may request for an extension of time to carry out the variation works. Unauthorized variations by the contractor will amount to a breach of contract for which damages are recoverable by the employer.

Does the law state what has to be achieved before 'completion' of the building works can be certified and, if so, can this be overridden by specific terms in the contract? Who would certify completion of building works carried out in accordance with a construction contract?

The parties are at liberty to agree in their contract what events will amount to completion of the construction works, however, this is generally implied to mean that the development is completed and fit for the intended purpose.

Upon completion of the construction works, the contractor will give notice that the works are complete and upon inspections carried out by the employer's architect and satisfaction that the works are complete, a Certificate of Practical Completion is issued by the architect or engineer to the contractor certifying that the works are complete.

Under the relevant state's Physical and Urban Planning law, there is a requirement for the issuance of a Certification of Completion and Fitness for Habitation by the appropriate agency of the Government certifying the completion of the building works. The law empowers the Building Control department to issue Certificate of Completion and Fitness for Habitation for all building developments and this is a legal requirement that cannot be waived by the parties under their contract.

Liability

During what period of time following execution of a construction contract may a party to that agreement bring a claim in the courts for breach of contract?

The Limitation Act and the relevant States Limitation Laws prescribes the specific periods within which legal actions are to be commenced or instituted from when the injury or omission, causing the damage or loss, arose or occurred. The prescribed period for contracts under Sections 8 (1) (a) and 12 (1) (a) of the Limitation Law of Lagos State is six years for simple contracts and twelve years for contracts under seal (made by way of a Deed).

Typically, most construction contracts are made by way of deed. A claim for breach of the contract must be commenced within 12 years from the date the event giving rise to the breach occurred. In the event that the construction contract is not made by way of a deed, a simple contract, the limitation period is six years.

To what extent would a person who procures or carries out building works have liability for any physical damage or economic loss suffered by the end user(s) of the completed development? Can such liability be excluded in any way?

Upon completion of the building development, it is handed over to the employer who may in turn transfer the development to other end users. Depending on the nature of the relationship between the end user and the employer, claims for damage to the property may be made either under contract or in tort.

Where a contractual relationship exists between the end user and the employer, the employer is liable to the end user for defects to the building and this liability may by agreement of the parties be limited to the defects liability period, the period within which any defects identified is to be made good. The end user is entitled to claim damages against the employer for any loss accruing from such defects.

The parties may also by their contract exclude any liability for defects after hand over of the building development or may agree to adopt the liquidated damages approach by which the amount of the damages payable in the event of any defect is pre-determined at the commencement of the contract.

Where no contractual relationship exist between the end user and the employer, the end user cannot claim damages under contract but can sue the employer in an action in tort for breach of a duty of care in the construction of the building.

To what extent would an architect, another designer, the building contractor or any subcontractor have liability for any physical damage or economic loss suffered by the end-user(s) of a completed development? Can such liability be excluded in any way?

There is no contractual liability on the part of the architect, contractor, engineer and subcontractors in favor of the end users. The end user therefore cannot directly claim against an architect or contractor if there is no privity of contract between them.

Instances of liability may occur in tort where there is a breach of professional duty by the architect in the designing of the building project and which has occasioned damage and loss.

How are third parties who are not parties to the construction contract – such as purchasers, tenants and lending banks providing finance towards the development – afforded protection and given rights against the original designers and contractors involved in the design and construction of the project?

Third parties and end users such as subsequent purchasers, lessees and perhaps financial institutions have no contract and cannot seek legal redress for contractual breaches against the architects, engineers and contractors of the designs and construction of the development.

The options towards affording some measure of protection for third parties can be by the Employer insisting on the following provisions:

- Obtaining specific collateral warranty contracts or agreements for a specified period. The purpose is to provide for a duty of care to be extended by the Architects, Engineers and Contractors to a third party and therefore damages caused by defects are actionable.
- Step-in rights provision in the construction contract is for the benefit of the beneficiary to step into the role of the employer for the purpose of assuming the obligations and rights of the employer under the contract where certain agreed event occurs.

Dispute resolution

Which courts specialize or deal with construction disputes? Can decisions be appealed?

There is no court established by law in Nigeria specifically for the purpose of adjudication on construction disputes. Construction disputes being civil matters arising from contract fall within the jurisdiction of the High Court of the state where the property or project is located. The decision of the High Court can be appealed to the Court of Appeal and the decision of the Court of Appeal can also be appealed to the Supreme Court being the apex Court in Nigeria.

Is it common for construction disputes to be referred to arbitration? If so, how does arbitration compare with litigation through the national/federal courts?

Most standard-form construction contracts in Nigeria provide for alternative dispute resolution by which the parties agree that any dispute between them shall first be settled amicably failing which the dispute shall be referred to arbitration or mediation for resolution. This avoids the costs and adversarial disadvantage of litigation. This is achieved by providing clause or agreement in the construction contract to refer to arbitration the resolution of disputes between the parties.

The Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004 and other State's

Arbitration Laws make provisions for the processes and procedures for arbitral proceedings in Nigeria. The parties may agree on the specific locations and laws to govern and apply to them and generally awards from foreign arbitral proceedings are enforceable in Nigeria.

In comparison to litigation in the High Courts, arbitration is a much faster and less cumbersome procedure of dispute resolution affording the parties a less formal, speedy and flexible mechanism for resolution of their disputes. Generally, litigation involves a more complex and time-consuming process.

Is it common for construction disputes to be referred to ADR â such as adjudication, determination by an expert, mediation or conciliation? Is a form of ADR required by law, perhaps as a mandatory first step in the dispute resolution procedure?

In Nigeria, parties are free to agree under their contract the dispute resolution options in the event of a dispute. It is usual for parties to a construction contract to prescribe alternative dispute resolution mechanisms such as mediation, conciliation and arbitration. Where the parties elect to explore any of the alternative dispute resolution options, in the event of a dispute, they would be precluded from referring their disputes to the High Court.

In Lagos State, there is the Multi-Door Courthouse established by law and the Lagos Chamber of Commerce and Industry which provides alternative dispute resolution services and encourages parties as a first step in any litigation proceeding to explore amicable resolution and mediation.

CORPORATE VEHICLES

Real estate investment by foreigners

Are foreigners allowed to invest by directly purchasing a commercial real estate asset?

Generally, under Nigerian Law, foreigners are not allowed to own landed property. A foreigner may be allowed to own real estate subject to the conditions made by the National Council of States.

No specific regulations are in force with regards the enforcement of these provisions. Similarly, by the Acquisition of Lands by Aliens Law a non-Nigerian may only with a prior approval of the governor, acquire landed property from a Nigerian citizen. Notwithstanding this, the restriction does not apply to a Nigerian registered company wholly owned by foreigners.

For practical business purposes, a non-Nigerian may invest in real property in Nigeria by the acquisition of such property through a corporate vehicle duly incorporated in Nigeria.

Does the concept of a 'permanent establishment' apply when a foreign person invests in real estate and, if so, how much does it cost to set up such a permanent establishment, how long does it take and what corporate governance requirements apply?

A foreign investment in real estate may be effected through the acquisition of shares in an existing corporate entity that owns landed property or through the establishment of a local special purpose vehicle for sole purpose of acquisition of real estate. The concept of permanent establishment under Nigerian law applies in relation to the taxation of corporate entities carrying on business or deemed to be carrying on business in Nigeria. Under the taxation rules, the income of a company resident in Nigeria is subject to taxation (as such income is derived from Nigeria). Investment returns to a foreigner from an investment in Nigeria would also be

subject to taxation where the income is derived from business operations in Nigeria with or without an established entity in Nigeria.

Under Nigerian law, a company, like a person, has the capacity to hold land, enter into transactions amongst other functions. Typically, the minimum statutory costs for establishing a company (whether private or a public company) is depends on the proposed authorized share capital, specific requirements within sector. For a company with an authorized share capital NGN 1m ((US\$2,800) the minimum statutory cost is about US\$100.

The incorporation process usually takes about five to seven working days. Generally, a company duly incorporated in Nigeria is required to maintain up to date records (directors, shareholders, registered address etc) with the Nigerian Corporate Affairs Commission (CAC) and also file with the CAC its annual returns in accordance with the provision of the law. Compliance with specific corporate governance requirements may be necessary where such company operates in a regulated environment.

Types of corporate vehicle for investment

What types of corporate vehicle to hold real estate assets are available to investors in this country?

There are two major investment vehicles that may be used to invest in real estate:

Limited liability company

This is a company limited by shares with legal personality to own property distinct from its owners, the shareholders. This could be a private or public limited liability company organized in accordance the provisions of the Companies and Allied Matters Act (CAMA) 2004 and registered with the Corporate Affairs Commission (CAC). A private limited liability company is one incorporated with a minimum of two members and a maximum of fifty and a minimum share capital of NGN 10,00 (about US\$28). There is no local ownership requirement and all the shares can be wholly owned by foreigners or foreign entities. A public limited liability company is one incorporated with a minimum of 50 members and a minimum share capital of NGN 500,000 (about US\$1,400).

Collective investment schemes

Collective investment schemes are schemes that pool funds from the public for the purpose of investing in assets and portfolio of corporate entities. The schemes may be structured as open-investment schemes, unit-trust schemes and real-estate investment trust schemes or companies.

What are the main features of the constitution of each type of corporate vehicle used to invest in real estate?

Limited Liability Companies

A company limited by shares can be set up as a special purpose vehicle to hold property by foreign investors. The entire share capital of the company can be fully foreign owned or held with Nigerians. There are currently no requirements on local ownership of shares in a property owning company. The Company Limited by shares can be either private of public company. With regards to private company, it must have a minimum share capital of NGN 10,000 (about US\$28) and between two to fifty members. A private company is required to provide for the restriction of transfer of its shares in the Articles of Association and cannot seek public subscriptions for its shares or raise capital from the public.

A public company limited by shares must have a minimum share capital of NGN 500,000 (about US\$1,400). Unlike a private company, it can raise capital from the public and there is no restriction on the transfer of its

shares. Being a public company, in addition to general corporate compliance requirements of the CAC, its activities are also regulated by the Securities and Exchange Commission (SEC).

Collective Investment Schemes

Collective schemes are regulated by the Nigerian Securities and Exchange Commission. Individual schemes are regulated by the terms of an executed trust deed. The scheme is under law, required to have an investment committee comprising of three persons knowledgeable in investment and financial matters. Collective investment schemes are required to have (i) a fund manager; (ii) a custodian and (iii) a trustee. It is required to have a prospectus for the sale or sale of units of the proposed investment scheme.

The sponsor of a collective investment scheme is required to subscribe to a minimum of 5% of the units of the scheme at the inception of the scheme and hold a minimum of 5% of the units of the scheme throughout the life of the scheme. The distributable income of the scheme should not be less than 75% of its rental income or dividend income. The quorum for meetings of the unitholders shall be five unitholders holding not less than 25% of the units of the Scheme. The Trustees are able to borrow up to 15% of the net asset value of the scheme in the ordinary course of business.

Real estate Investment Trust Company

This is a form of collective investment scheme structured as a corporate entity. Such entity is regulated by the Securities and Exchange Commission. The features of the real estate investment company are similar to that of a collective investment scheme. The company is required to have stated in its object clause that it is registered to invest in real estate or real estate related business. The company must have a property manager that is duly registered with the Securities and Exchange Commission and reports to the fund manager. It is important to note that a real estate investment company or scheme may only be established by a fund/portfolio manager duly registered as such with the Securities and Exchange Commission and 90% of the revenue of a Real Estate Investment Company or Trust shall be derived from rental income or dividend income. A Real Estate Investment Company or Trust is required by the SEC Rules to make annual distributions to its investors every year to remain duly registered with the Securities and Exchange Commission.

Setting up a corporate vehicle

What is the minimum capital required to set up each type of corporate vehicle used to invest in real estate?

Company limited by Shares

A company limited by shares may either be structured as a private company or a public company. A private company is required to have a minimum authorized share capital of NGN 10,000 of which, at least 25% of its share capital allotted to the subscribers at incorporation. A public company is required to have a minimum authorized share capital of NGN 500,000 with at least 25% of its share capital allotted to the subscribers.

Collective Investment Scheme

Collective Investment Scheme (Real Estate Investment Trust Scheme/company). The relevant share capital would be that of the Fund Manager. A Fund manager is required to have a minimum paid up share capital of NGN 20 million.

How much does it cost to set up each type of corporate vehicle used to invest in real estate?

Company limited by Shares

The major cost implications of registration of a company are the CAC registration costs and the stamp duties payable on the authorized share capital of the Company. The statutory costs are calculated based on NGN 1 Million share capital. A private company with a share capital of NGN 1 Million or less will be required to 1% of the authorized share capital as CAC registration fees and NGN 7,500 (circa US\$22) as stamp duties. Where the share capital is above NGN 1 Million and up to NGN 500 million, the CAC registration fee will be 0.5% of the subsequent Millions of the authorized share capital. Where the share capital is above NGN 500 million, the CAC registration fees will be 0.75% of the subsequent millions of the authorized share capital.

The CAC registration for a public company with share capital of NGN 1 million or less is 2% of the authorized share capital. Where the share capital of such company is above NGN 1 million and up to NGN 500 million, the CAC registration fee will be 2% of the first NGN 1 million and 1% of the subsequent millions of the authorized share capital. The CAC registration fee for a public company with share capital above NGN 500 million is 1.5% of the subsequent millions of the authorized share capital.

Collective Investment Schemes

The cost implication depends on the complexity of the structure of the scheme.

How long does it take for each type of corporate vehicle used to invest in real estate to become operative?

The registration process for a company limited by shares at the CAC typically takes between five to seven days. A collective investment scheme may be established within 14 to 21 days of application to the Securities and Exchange Commission.

Governance and taxation of corporate vehicles

What corporate governance requirements apply to each type of corporate vehicle used to invest in real estate?

Company limited by Shares

The Corporate and Allied Matters Act comprehensively sets out the corporate and governance requirements of all types of companies limited by shares, whether private or public. Also, both types of companies are regulated by the provisions of their Memorandum and Articles of Association filed at the corporate affairs commission. Additionally, private companies may have supplementary governance requirements in shareholders' agreement, joint venture agreements or other similar documents.

In relation to public companies, additional corporate governance requirements are contained in the Rules and Regulations of the Securities and Exchange Commission (SEC Rules) and the Financial Reporting Council of Nigeria Act as well the Listing Rules of the Nigerian Stock Exchange if the public company is listing on the exchange.

Property Unit Trust under Collective Investment Scheme

The terms of the Trust Deed as well as the provisions of the SEC Rules govern and regulate the Unit Trust Scheme. Under the SEC Rules, the asset manager manages and allocates the assets and takes investment

decisions generally. The custodian ensure custody of the underlying assets and title documents, which are jointly registered in its name and that of the trustee. The trustee monitor compliance by the Fund Manager and Custodian of the terms of trust deed and SEC Rules.

Real Estate Investment Company

In addition to the corporate governance principles set out in the Articles of Association, the activities of the company are regulated by the Securities and Exchange Commission. The property manager is vested with the day to day management of the investment and makes key decisions on the sale and purchase or lease of property in consultation with the board of directors.

The SEC rules provides that the level of development activity by the fund manager shall not exceed 20% of the gross asset value of the scheme. Where the company is targeted at qualified investors, the level of developmental activity shall not exceed 30% of the gross asset value of company. The Real Estate Investment Company or Trust may invest up to a maximum amount of 25% of the total assets of the Real Estate Investment Company or Trust outside Nigeria but within Africa. A Real Estate Investment Company or Trust is prohibited from borrowing from third parties more than an amount which constitutes more than 40% of the gross asset value of the Real Estate Investment Company or Trust either directly or through a special purpose vehicle.

No single asset of the Real Estate Investment Company or Trust should constitute more than 20% by value of the gross asset value of the Real Estate Investment Company or Trust. The Real Estate Investment Company or Trust shall own a minimum of 75% legal interest in its real asset and must exercise effective control over the assets.

How much does corporate and accounting compliance cost for each type of corporate vehicle used to invest in real estate?

Corporate compliance costs will vary with the complexity of the corporate structure and the extent of regulatory oversight. Some of the requirements may include filing of annual returns, holding of board meetings, maintaining a registered office, filing of requisite forms to effect a change in the corporate structure and other company secretarial functions.

A Real Estate Investment Company or Trust is required to maintain with respect to each asset acquired, a comprehensive insurance policy, evidence of which is to be filed with the Securities and Exchange Commission within 90 days of the asset acquisition. A Real Estate Investment Company or Trust is also required to carry out a valuation on its assets annually and file with the Securities and Exchange Commission, a valuation report every two years. A Real Estate Investment Company or Trust is also required to file with the Securities and Exchange Commission quarterly reports on the performance of the scheme. There are costs associated with these returns which are largely dependent on the complexity of the structure and extent of operations.

Accounting compliance cost, which is graduated, usually depends on the turnover of the company. For example, the personal income tax is graduated and the fee to be paid to file at the revenue office is dependent on the turnover of the company for the year.

How is each type of corporate vehicle used to invest in real estate taxed?

Generally, each of the corporate structures operate under similar taxation regime. A limited liability company would be liable to pay companies income tax in respect of the income generated as proceeds of its investments. The investors will also be liable to income tax in respect of the dividends received from the Company. Similarly, a real estate investment scheme would be required to render income taxes on the proceeds of its investment and the distributions made to the unitholders are tax deductible.

Both limited liability companies and real estate investment schemes are liable to land transfer taxes which are incidental to the transfer of property. Such taxes include: governor's consent fees, registration fees, capital gains tax and stamp duty. These usually amount to between 13 to 32% of the value of the asset.

The Securities and Exchange Commission rules permits the real estate investment trusts to hold or acquire real assets through the use of declaration of trusts where by the legal interests in the real assets is subsists in the vendor and the all beneficial interests are transferred to the real estate investment trust. This allows for a huge reduction in the applicable land transfer taxes. Also, it is worthy of mention that where shares are purchased from an existing corporate entity holding the assets, capital gains tax and stamp duties would not be applicable.

PLANNING / ZONING

Legislation and planning/zoning controls

In outline, what legislative and governmental controls apply to strategic planning/zoning across regions and in localities?

In Nigeria, land use, planning and zoning matters are residual matters in the Constitution of the Federal Republic of Nigeria 1999 (as amended) and regulated under specific legislations promulgated by the respective States Houses of Assembly in the 36 states and the National Assembly for the planning and zoning matters in the federal capital, Abuja.

The various states in Nigeria have enacted their own Physical Planning Laws which were adapted from the Federal Act (the Nigerian Urban and Regional Planning Act No. 88 1992 (as amended by the Urban and Regional Planning Act No. 18 1999) with necessary amendments to suit the peculiar circumstances and realities. In 2010 Lagos State enacted its Physical Planning Law known as the Urban and Regional Planning and Development Law of Lagos State 2010.

The Land Use Act also plays a significant role in physical planning and zoning within the country as certain specific provisions of the Land Use Act must be complied with for successful formulation and implementation of land use and zoning policies. Section 28 (5) of the Urban and Regional Planning and Development Law of Lagos State 2010 makes it imperative that any Planning permit granted shall satisfy the provisions of State Land Policy and the Land Use Act.

Generally, the conditions for the grant of development permit by the Control Department must conform to the conditions of use stated in the title document or grant of right of Occupancy for the land in question.

Does public law control whether a landowner may construct a new building or refurbish an existing building on its land?

Under Section 34 of the Urban and Regional Planning and Development Law of Lagos State 2010, approval is required from the relevant planning permit authority for all building developments regardless that it is the construction of a new building or refurbishment of an existing building. The law provides that the Planning Permit Authority may with or without conditions to an applicant, grant in respect of the following:

- Use and development of land
- Change in the use of land, seabed or structure
- Alteration of an approved development plan
- Renovation of existing approved building structures, and
- Demolition of the existing structure by the owner/developer

Does public law control the detailed design, appearance and method of construction of any new building?

By law, every applicant for planning permit must submit the detailed architectural drawings (building development plan) of the proposed development for vetting and approval by the Planning Authority. There are regulations with respect to the design and appearance of the building development and such matters as setbacks, plot coverage, permissible height and number of floors, easements of access and rights of way etc.

Aside from the respective States Urban and Physical planning regulations, there is the National Building Code 2006, which regulates the design, construction and maintenance of buildings in Nigeria. The Building Code lays down minimum standards for the quality and durability of construction materials and the building systems covering all aspects of building construction ranging from fire and safety issues, structural designs, security, mechanical, electrical and plumbing systems, minimum air quality standards, energy conservation and accessibility.

Are there any legal restrictions on the designated use to which any new building may be put or on any change in the designated use of an existing building?

Yes, there are restrictions on the use to which a new building may be put and particularly, the change in use of an existing building is prohibited except approval for the change in use is obtained.

Every building development and use thereof, must comply with the permissible use in accordance with development plan in force and other regulations made pursuant to the applicable laws. Section 28 (2) of the Urban and Regional Planning and Development Law of Lagos State 2010 mandates that all applications for building permit shall comply with all requirements and standards of an operative development plan.

State grant of rights of occupancy prescribes the purpose of use which are usually for residential, commercial, recreational, tourism, industrial or mixed use (residential and commercial) purposes.

In this regard, the conditions attached to the grant of a development permit should not conflict with the conditions of the grant of the right of occupancy.

Which authorities are responsible for regulating the development and designated use of individual parcels of real estate in this country and which legislation applies?

The States and the Federal Capital territory, Abuja all have respective Urban and Regional Planning laws specifying the authorities duly established and empowered to implement the provisions of the respective physical planning and development control laws and regulations. The respective Authorities are charged with responsibility for matters relating to development control, implementation of physical development plans and enforcement of building control regulations.

In the Federal Capital Territory, the Development Control Department is the Authority (Section 27(1) of the Nigerian Urban and Regional Planning Act 1992). In Lagos State, the Building Control Agency collaborates with the Physical Planning Permit Authority, all established under the Urban and Regional Planning and Development Law of Lagos State 2010.

Which other statutory permit regimes must be considered in relation to planning/zoning and development?

The permissible use of the land, location and nature of the proposed building development will determine the

necessary permits to be obtained. There is also environmental considerations, health and safety concerns, compliance with fire service regulations, rights of way (highways and waterways) regulations, which all play a part in planning and zoning development.

The respective Urban and Regional Planning laws of the respective States and the Federal Capital Territory, Abuja all have provisions requiring for certain developments and locations, the submission of environmental impact statement along with the application for development permit in the following instances:

- Development of a residential land in excess of 2 hectares
- Building or expanding a factory, and
- Construction of an office building in excess of four floors or 5,000 square meters of lettable space and major recreational development.

Section 4 of the Environmental Impact Assessment Act No. 86 of 1992 prescribes the minimum content of the Environmental Impact Assessment Report which should be met for acceptance.

Obtaining permission for development

What is the process for obtaining permission for development or carrying on a new designated use?

The process for obtaining permission for development commences by an application for planning information to confirm the land use/zoning, building development control and land status. The application for planning information to the relevant authority is usually accompanied by copies of the land survey plan and relevant title documents.

In Lagos State, the application for building development is made to the Physical Planning Permit Authority in the local area district, which the land is located. The documents to be submitted with the application letter are five copies each of Architectural and Structural Drawings, Survey Plan and Title documents. All applications must be in compliance with the Operative Development Plans and Planning Standards in Lagos State as well as the National Building Code.

The application will be processed and approved after final screening and payment of permit processing fees assessment that is required for the grant of a planning permit. The processing fees payable includes Registration/Application Form Fee, Layout Fee, Fencing Fee, Local Planning Office Fee, Lagos State Emergency Management Agency (LASEMA) Levy, Spatial Enhancement Fee and Infrastructural Development Charge.

The process for a change of designated use is by formal application by the owner of property to the Physical Planning Department of the Ministry of Physical Planning and Urban Development of the respective state where the land is located. The decision to grant the application is at the discretion of the state government and cannot be challenged as of right.

The grant or approval is subject to payment of the assessed official fees and compliance with the procedure as may be determined by the location and valuation of the property. The process involves submission of an application letter with copies of title documents (evidence of ownership), perimeter survey of site, set of approved building plan, technical report to be prepared by a registered Town Planner, photographs of land, location sketch showing land in relation to surrounding development, tax clearance certificate, development levy receipt, evidence of payment of processing fee for change of use.

In relation to official permissions for the development or carrying on a designated use of real estate, do third parties have the right to object?

Third parties whose civil and property rights are adversely affected by a building development may object or appeal to the relevant state authority. By Section 15 of the Nigerian Urban and Regional Planning Act, 1992 and Sections 8 and 16 of the Urban and Regional Planning and Development Law of Lagos State 2010, any member of the public, any tier of government, non-governmental organizations and professional bodies can submit written objections against a development plan. Section 33 of the Urban and Regional Planning and Development Law of Lagos State 2010 provides that the Planning Permit Authority may consider representation made to it by a person, body or organization to be affected by an intended development.

There is the Physical Planning and Building Control Agency Appeals Committee (Lagos State) and an Urban and Regional Planning Tribunal (Federal) which functions includes consideration of appeals from members of the public, investigation of complaints on matters relating to grant of planning permit and hearing of appeals from decisions made by the Control Department.

Are there any circumstances in which an application for permission for development or the carrying on of a designated use or the permission itself is reviewed by another body, eg a court?

Third parties and other persons who are aggrieved by an approved proposed development may institute civil proceedings in the High Court against the property owner and the state government/relevant authority.

Generally, an aggrieved party may seek appropriate reliefs from the High Court against a decision of the Planning Permit Authority granting license for a development or for change from designated use or zoning for an area. The law, under Section 89 (1) and (2) of the Urban and Regional Planning and Development Law of Lagos State 2010, grants to an aggrieved person or an interested party the right to appeal against the decision of the Appeals Committee to the High Court of the State.

How long does it take for an initial decision to be made after receipt of an application for permission for development or the carrying on of a designated use?

The prescribed period under the relevant statutes/laws for the Control Department/Planning Permit Authority to communicate its decision to the applicant is a maximum timeline of three months from the date of submission of the application. The timelines are uncertain and may not apply depending on a variety of factors such as compliance with requirements and regulations by the applicant. In reality, the process may exceed the three months deadline.

There is no prescribed period for applications for change of designated use for property. This is dependent on the efficiency and expertise of the person processing the change of use.

Is there a right of appeal against a relevant authority's decision in respect of an application for permission for development or the carrying on of a designated use?

In Nigeria, the regimes regulating matters of physical planning provides for the establishment of Appeals Tribunal in the case of the Federal Act and an Appeals Committee under the Lagos State Physical Planning Law. The laws allow an aggrieved person the right of review of the decision of the relevant Control Department or Planning Permit Authority.

An aggrieved person also has a right to approach the high court of the relevant state or the Federal Capital Territory to seek redress against the decision of the Planning permit Authority or the Appeals Tribunal/Committee.

As well as obtaining a permission, is it possible or necessary to enter into agreements with local or

governmental authorities or agencies or with utility suppliers in order to facilitate the carrying out of development?

The property owner has the discretion to engage with the local or governmental authorities or agencies or with utility suppliers to facilitate the carrying out of the development. There are, however, no regulations that impose obligations on the owner of property to enter into agreements to facilitate the carrying out of developments.

In cases where the development or provision of utilities ancillary to the development may significantly impact the general public or adjoining land owners, the local or governmental authorities or agencies will encourage any agreement that will facilitate the enterprise. It may be necessary for the developer to undertake the provision of ancillary amenities to mitigate or serve as a palliative to any adverse effect on the development. Agreements with utility services providers may also be necessary for the actualization of the development.

The Nigerian authorities at all levels are exploring developments through public-private partnership collaborations and are encouraging discussions and agreements of mutual benefit to the developer, the general public and government. The government will grant concessions for any morally beneficial agreements.

Validity of permissions and enforcement

For how long is a permission for development or the carrying on of a designated use valid?

A Planning or development permit will become invalid where development has not been commenced within two years of the grant of such permit. Where the development with planning permit is not commenced within the two-year period, the permit will be subject to revalidation by the Planning Permit Authority on the payment of prescribed fees (Section 35 (2) of the Nigerian Urban and Regional Planning Act 1992 and Section 37 of the Urban and Regional Planning and Development Law of Lagos State 2010).

Generally, development permit has no deadline for developments, the construction of which has commenced or completed.

How are restrictions on development and designated use enforced?

The appropriate Building Control Department or Authority in the Federal Capital territory and the respective States are responsible for enforcing restrictions on development and designated use. The relevant Authority will issue enforcement notices and serve on the owner of the property for a development that is commenced without planning and building control authorization or where the building constitutes danger to occupiers or the public.

An enforcement notice will contain the restrictions breached and stipulate a deadline for compliance with the regulations or remedial measures to be carried out. A stop work order may be issued if the development does not comply with the planning permit issued for the purpose. The contravention of Physical Planning Regulations may cause the demolition of the building at costs to be paid by the owner or forfeiture to the property.

In Lagos state, criminal prosecution is prescribed for a contravention of the provisions of the Physical Planning laws and regulations.

REAL ESTATE FINANCE

Forms of security

What sort of security is typically created or entered into by an investor who is borrowing to acquire or develop real estate?

The typical forms of security created over real property in Nigeria are:

- Legal mortgage
- Equitable mortgage, and
- Equitable charge

A legal mortgage is the form of security which involves an actual transfer of legal interest from a mortgagee to a mortgagor subject only to reversionary rights in the asset where payment obligations are settled. The equitable mortgage on the other hand may take the form of an agreement to create a legal mortgage in future or a deposit of title deeds without an actual transfer of legal interest to the mortgagee for the period for which repayment obligations remain outstanding. An equitable charge connotes an appropriation of interest in real property giving the chargee the rights to enforce the security without an actual transfer of legal interest in such an asset.

It is important to note that the creation of security and the nature of interest created over real property is subject to the governor's consent and due registration with the appropriate land registry under the relevant provisions of the Land Use Act and registration of the security provided for the borrowing at the Corporate Affairs Commission.

Which assets and rights are considered to be real estate or real rights over which security can be granted to a lender?

A lender may create security interests in the land and buildings and erections on the land.

Is the concept of a trust or a split between legal ownership and beneficial ownership recognized?

The concept of a trust is recognized under Nigerian Law in relation to investments amongst others. Where a trustee holds, property, such property is held in trust for the benefit of designated beneficiaries. This concept is commonly used with investment structures such as collective schemes and extensively regulated by the stipulated provisions of the law and the Securities and Exchange Commission.

Is secured debt traded between lenders? If so, how is a transfer of the debt to another lender effected?

Debt trading is subject to the agreement of parties in the facility or loan agreement. Where there are no restrictions in the agreement between parties, all or a portion of the loan debts can be transferred to a third party. Receivables under a credit facility can be transferred to another lender by:

- Assignment
- Novation, and
- Sub-participation arrangements

Creating security

Are there restrictions on granting security over real estate to foreign lenders, and, if so what are they?

Generally, a Nigerian company may source for funding through various means including borrowing, subject to the provision of its memorandum and articles of association. A lender may take security rights over the property of the company including real property but any security interest on the property must be registered at the relevant lands registry and the Corporate Affairs Commission.

Are taxes or fees paid on the granting and enforcement of security over real estate, such as documentary taxes, registration fees and notaries' fees?

The grant of enforceable security is subject to the perfection requirement. By the provisions of the law, any transfer purporting to grant an interest in land whether by way of an assignment, sublease, mortgage or transfer of possession is required to be effected subject to the governor's consent; without which it would be void. The perfection process involves:

- The governor's consent
- Stamping, and
- Registration with the land registry

Some of the applicable charges and fees in this regard include: the consent fee, stamp duties, capital gains tax, registration fees, business premises charge, direct assessment, neighbourhood improvement charge and any other charges that may be determined by the relevant lands bureau.

Does the law lay down any rules which must be complied with before a corporate entity can give valid security over its real estate assets, for example 'financial assistance' rules and 'corporate benefit' rules?

The law provides that it is unlawful for a company to provide financial assistance including but not limited to guarantee, security or indemnity, loan or any form of credit and any financial assistance for the purpose of a person acquiring or proposing to acquire its shares, the company acquiring its own shares or the shares in its holding company. As such the law prohibits any form of financial assistance in the form of the grant of an interest in real estate property to facilitate the purchase of shares in such a company.

Directors stand in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf thus a director of a company must only act in a way that he considers, in good faith, is most likely to promote the best interest of the company. In this regard, a director is required to consider the rationale for decisions taken by the board in connection with assets of the company including real estate.

It is also important to note that under Nigerian law, any conveyance mortgage, payment etc done or made in relation to property, which if done or made in bankruptcy of an individual shall be deemed as a fraudulent preference, shall if done or made against a company be deemed as fraudulent preference of its creditors and therefore invalid when done or made in the event of a winding up.

Are there any restrictions on re-payments being made to a foreign lender under a security document or loan agreement?

There are no restrictions to repayment of foreign loan facilities under financing documents. However, it is worthy of mention that the foreign lender should obtain a certificate of capital importation (CCI) at the point of advancing the loan capital to the Nigerian entity. A CCI guarantees ease of repatriation of the loan capital and interests by granting access to the official foreign exchange market.

Is it possible for existing secured debt to become postponed to newly created debt in any circumstances

in this country, whether by agreement or otherwise? If so, how does this happen?

Generally, secured creditors rank in priority over unsecured creditors, also a registered security ranks above an unregistered security interest. A secured creditor may by contract take subject to the interest of another secured creditor which was subsequently granted a security interest in the property. This arrangement is typically documented in an inter-creditor agreement or subordination/priority agreement.

Also, under Nigerian law, a fixed charge on any property has priority over a floating charge affecting the same property; however, the floating charge may take priority over any subsequently registered fixed charge where the terms upon which the charge was granted prohibited the Company from granting a later charge having priority over the floating charge and where the latter security holder had actual notice of the prohibition at the time the charge was granted to it.

Consequences of taking security

Will a clause in a security document making a foreign law apply be recognized and applied by the local courts? Does local law always apply in certain circumstances?

Parties have the freedom to decide the governing law of a contract and the courts will generally give effect to the parties' choice of law and only intervene where the terms of the contract are contrary to public policy. However, there are instances where the local court may not be deprived of jurisdiction and this includes where the subject matter of the dispute is real estate, the applicable law with respect to real estate is the law of where the property is located.

If a security interest has not been validly perfected, what is the position of the holder of that security if the borrower becomes insolvent?

Under Nigerian law, the enforceability of a security interest so granted is determined by the status of the perfection of such security interests. Specifically, the perfection requirement for a security interest in real property requires:

- The consent of the governor
- Stamping of documents, and
- Registration with the Land registry and the Corporate Affairs Commission (CAC)

In the absence of the consent of the governor, a purported security interest so created is void and unenforceable; where the relevant conveyance documents are not duly stamped, same cannot be admitted in evidence in a court of law as evidence of a security interest in the property. Failure to register the security interest at the CAC within the stipulated period makes any such security interest created void against a liquidator or any other creditor of the company.

Can a lender holding or enforcing security over real estate in his country be liable under environmental laws, even if it did not cause any pollution of the real estate?

Generally, environmental liability of a property is borne by the owner or occupier of the real estate. The holder of security interest in the property, not in possession will not be liable for environmental pollutions. Under the law, the holder of a certificate of occupancy may be liable where in breach of a covenant under the certificate of occupancy for the development or improvement on the land.

Borrower insolvency/enforcement

When a borrower is in default, are there any formalities required or obstacles to be overcome before the lender is able to enforce its security over real estate?

Usually, the loan facility agreement states the events of default, an occurrence of which triggers the rights of the lender to enforce its security. The means of enforcement may be by way of an exercise of power of sale, the appointment of a receiver or by taking possession. Where the lender seeks to appoint a receiver, such appointment and the powers of the receiver is to be in accordance with the provision of the relevant law.

Are there any schemes or arrangements which can be implemented in relation to a debtor company or business which is in financial difficulties (other than insolvency proceedings)? How do they affect the rights of a lender with security?

One of the formal rescue procedures is by way of a scheme of arrangement with the creditors or a corporate restructuring. This would involve a meeting and the passing of a special resolution (75% of the members present and voting), the approval of the Securities and Exchange Commission and the sanction of the Federal High Court.

Another is the appointment of a receiver/manager. Once a receiver is appointed, the power of the directors and shareholders to deal with the assets over which the receiver was appointed ceases and same is vested in the receiver. If a receiver is also appointed manager, he has the power in law to carry on and manage the business of the company while the directors remain in office.

Are any security interests created by a borrower in favour of a lender made void if the borrower becomes insolvent? Are there any other effects?

Provided that the security interest created by the Lender was duly perfected prior to the insolvency of the borrower, the lender can validly enforce its security against the borrower. Under Nigerian law, any court attachment, sequestration, execution put in force against the estate or effects of the borrower or any disposition of property of the company when the in the course of a winding up proceeding shall be void.

In what order are creditors paid on a debtor's insolvency, and if more than one creditor holds the same security interest over the same real estate asset, how is that situation resolved?

The order of priorities is as follows:

- Creditors secured by way of a fixed charge on any property shall have priority over a floating or ambulatory charge even if created after the floating charge. (Except where the terms of the prior floating charge says otherwise and the holder of the fixed charge is aware of same.)
- Preferential creditors
- Creditors secured by way of a floating charge will rank in priority according to the date of their creation
- Subordinated creditors (depending on the terms of the contract), and
- Unsecured creditors

SALE AND PURCHASE

Ownership of real estate

What are the categories of property right that can be acquired? Are there any interests in real estate other than exclusive ownership?

The Land Use Act vests control and administration of all land in the Governors of the States where it is located and the Governor is empowered to grant rights of occupancy over such lands for a term of years. By Section 49 of the Land Use Act, title to land can be held by the Federal Government or any of its agencies.

Private ownership of land is recognized but is subject to the rights of the state government to the reversion of the interests after the term granted to the owner, such terms of years on expiry are renewable continuously subject to conditions of grants and renewal imposed by the State.

Also, private ownership of land can before expiry of the term be terminated by revocation for breach of the terms of the grant or provisions of state regulations or by state acquisition where the property or land is required for public use or purposes.

Are there any legal restrictions on foreign investors acquiring real estate?

A foreign investor can acquire real property in Nigeria through any company or organization registered in Nigeria. Section 17 of the Nigerian Investment Promotion Act, 1995 provides that a non-Nigerian may invest and participate in the operation of any enterprise in Nigeria. Any company that is empowered by any law to acquire land in Nigeria can do so like a citizen whether it is owned by foreign investor or Nigerians.

The Section 22 of the Land Use Act provides that it shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease without the consent of the Governor, a provision which applies to foreign investors and Nigerians alike.

Do mandatory pre-emption rights apply to the sale of real estate assets in this country?

The state grants evinced in the Certificate of Occupancy usually provides that the holder of the title shall not alienate the rights granted within 10 years of the grant and is obliged to first offer the property to the Governor. In practice, upon the sale of real property within the 10-year period of the state grant, an additional fee (about 1.5 % of the value) will apply at registration of the transfer.

In a private sale, the contracting parties may by agreement covenant that a property is not to be sold to a third party without first offering it to the seller on terms as agreed in the document.

Legislation affecting real estate sales

Which legislation applies to property transactions?

The Constitution of the Federal Republic of Nigeria 1999 and the Land Use Act are the major uniform laws for the entire country. There are however, other subsidiary legislations regulating property transactions within the respective 36 states and the Federal Capital territory which include but are not limited to the following:

- Land Instrument Registration Act and Land Instrument Registration Laws

(of various States)

- Property and Conveyancing Law
(States in the South West except Lagos State)
- Conveyancing Act 1881
(States in Northern and Eastern Nigeria)
- Rent Control and Recovery of Premises Laws
(various States)
- Land Registration Law of Lagos State
- Land Use Charge Law of Lagos State
- Tenement Rate Laws
(various States)
- Wills Act 1837
- Wills Laws
(various States)
- Administration of Estate Laws
(Various States), and
- Tax legislations
Capital Gains Tax Act 1967, Personal Income Tax Act 2011, Stamp Duties Act, and Companies Income Tax Act 2004.

Does a special set of laws apply to the transfer of title to any of the following types of real estate: residential, industrial, offices, retail and hotels?

The laws regulating transfer of interests in land apply generally to all categories of real estate.

Transactional process

How is a lawful and proper transfer of title to real estate to a purchaser effected?

The transfer of title and interests in real property is required by law to be in writing and by deed duly executed by the parties. The parties to the transfer transaction are required to fill and sign the relevant forms of application for consent of the Governor to alienate the interests in real property along with a formal application for registration of the interests.

The payments of applicable statutory transaction taxes and transfer fees such as Capital Gains Tax, Stamp Duty, Consent and Registration fee and other outstanding land charges are required for the registration of the transfer Deeds to lawfully vest title in the real property to the purchaser.

Is real estate registered/does a reliable register of land ownership exist? Are transfers of title recorded? Is title insurance common?

There are Land Registry Offices in all states of Nigeria where the registers and records of all real property in urban areas are registered and updated as further real estate transactions occur.

There are however, no registries for title or records of ownership rights for undeveloped lands in rural areas, however, all lands within a state are covered by the geometric survey plans prepared by the States Survey General and kept in the survey departments of the states where land information confirming state rights and purpose can be obtained by an intending purchaser.

An investor in real estate in a rural land that is unregistered and free from government acquisition may after purchase from the customary owners apply to the State Governor for a direct grant of the right of occupancy.

Title insurance against losses due to defects in owner's title in real property is not common in Nigeria. Are transfers of title recorded in this country?

Real estate title records are duly documented in the Register of Deeds securely kept at the respective Lands Registry Offices in the respective states in Nigeria. The register is an authoritative record of the interests in specific properties. All subsequent transfer of interests in real property are registered in the respective files as a charge and record of the transfer of the title to the purchaser or assignee.

What are the normal steps involved in a real estate transaction?

Upon a satisfactory due diligence by the parties and consensus on the transaction costs, completion of the real estate transaction includes preparing and execution of the relevant documents which depend on the nature of the transfer transaction. The usual documents are Sale and Purchase Agreement, Deed of Assignment or Deed of Lease or Sublease and Power of Attorney (optional).

The application form for Consent of the Governor (or Minister for Federal Government owned titles) signed by the seller or lessor is a mandatory requirement.

Upon execution of the relevant documents and transfer of possession of the property to the purchaser or lessee, the process for obtaining consent of the Governor (or Minister for Federal Government land interests) and registration of the transfer of interests should commence subject to payment of the applicable taxes and fees.

Do buyers usually carry out due diligence?

Conducting due diligence on title to the property and the capacity of the seller to alienate the interests is the discretion of the purchaser. It is a necessary process to be carried out for the buyer's protection and it is usual in the transfer of title process for the buyer to instruct a solicitor to conduct due diligence to ascertain the title and interests in the real property, the land use and zoning purpose, external or third party interests, residue or the term of years and the status and capacity of the seller.

Are special consents required for certain transactions (for example, consent by a spouse)?

In Nigeria, the Land Use Act provides that the consent of the Governor is required for any alienation or transfer of interest in real property. In practice, it is after completion of the transfer that consent is processed together with the registration of the deed of transfer.

The consent of a partner, joint or co-owner of the interests in real property must be sought for there to be a valid transfer of the title by a seller. A spouse who is a co-owner on the records of title in real property must

give consent for any sale to be valid, otherwise spousal consent is not required.

Where the property is owned by a company, the resolution of the members or the directors of the company is necessary for the sale of the interests in the property.

A liquidator duly appointed for a company in liquidation, must give consent to any sale.

All named executors or administrators of an estate of a deceased and upon grant of letters of probate by the High Court must give consent for the transfer transaction to be valid.

Generally, where alienation of the interests in property is subject to the consent of the overlord or head-lessor with the right of reversion, any alienation of the interests or any portion of same must be with the consent as agreed in the agreement for the property.

Contents of a contract

Are there formal requirements regarding the content and structure of a sale and purchase contract relating to real estate (SPA)?

An agreement for the sale of property must be in writing and by deed, it must also state the date of the transaction, details of the parties, describe the exact property, recite the root of title, state the consideration or purchase price, be properly executed by authorized persons and duly witnessed.

The parties are at liberty to agree on the terms of the transaction and the warranties which each undertake to provide to the other party.

What is a typical contract or SPA in this country like?

The features of typical agreement states the parties full identity and details, the title history of the property, its location and description including the area of land it is comprised, the agreed purchase price and mode of payment (lump sum or instalment), residue of the term of years, sellers warranties to deliver possession, undisturbed enjoyment and assist with all information toward the registration of the buyers interest, delivery of sellers title deeds and other property documents to the buyer, indemnity against defects in title and provision for dispute resolution.

What seller's warranties are provided under statute in the sale of real estate in this country (for example, as to the state of the building, asbestos etc)?

There are no sellers's warranties provided by the law with respect to the state and condition of the building. The parties are at liberty to agree the specific warranties to apply to each party.

What are the buyer's remedies against misrepresentation by the seller of real estate?

The buyer is at liberty to treat the agreement as terminated and thereby claim damages. The parties may by their agreement specify the amount of the damages payable by inserting a limitation of liability clause in the agreement.

Generally, the buyer will be entitled to recover damages to cover any losses suffered as a result of the seller's misrepresentation.

The nature of the misrepresentation will determine the action that the buyer may pursue against the seller.

Where upon investigations, the seller is shown to have been deliberately fraudulent in the misrepresentation to the buyer, the Police and other agencies of state may prosecute the seller under the relevant extant laws in the country.

Real estate sales and public law

What are the most important areas of public law for an investor to consider when purchasing real estate?

- Land Use Act
- Companies and Allied Matters Act 1990
- Nigerian Investment Promotion Act 1995
- Capital Gains Tax Act, Personal Income Tax Act, Stamp Duties Act, Companies Income Tax Act (Tax legislations)
- Land Instrument Registration Act (States)
- Land Registration Law of Lagos State
- Urban and Regional Planning and Development Law 2010
- Land Use Charge Law of Lagos State, and
- Tenement Rate Laws (States)

The Land Use Act, Companies and Allied Matters Act, Nigerian Investment Promotion Act 1995 and Tax legislations are Federal statutes applicable uniformly. The other legislations are enactments of the respective states, but with similarities in most of the states.

Is the buyer of a real estate asset in this country responsible for soil pollution or contamination of the building even if it did not cause the pollution or contamination?

The law requires for an environmental impact assessment to be carried out by professionals and a report issued and filed with the relevant town planning and building control agency of the state. The nature of the building construction or development determines whether the environment assessment report is required (Environmental Impact Assessment Act, 1992 and Nigerian Urban and Regional Planning Act No. 88, 1992). This is to ensure that the potential environmental hazards posed by a proposed building development are identified prior to construction and adequate mitigation actions are put in place.

Generally, the owner, tenants and occupiers of property are directly responsible for the environmental sanitation of their premises and it is not an excuse that the pollution or contamination was caused by another person. The federal and state laws impose liability for causing pollution or contamination and impose liability for non-compliance by owners of buildings.

The buyer or owner of real estate has a responsibility for the environment sanitation of the property but will not be liable for any offence where the pollution or contamination to the property is caused by a third party's action if the owner is not contributory thereto.

How can a buyer ascertain the permitted uses of a parcel of real estate under the applicable zoning or planning law in this country?

The permitted uses or purposes for a land or property are usually indicated in the title deeds that are lands certificates or grants directly from the state. Usually the land certificates indicate whether it is granted for residential, commercial or even mixed development. The lands certificates may sometimes be more specific on the nature of the business to be carried out and building development permitted on the real estate.

It is also prudent for a buyer to apply to the relevant state physical and town planning office for Planning Information as to ascertain the land use and zoning for the area where the property is located and the permissible use.

Is it possible to enter into specific development agreements with relevant public authorities in this country in order to facilitate a project?

A private investor (foreign or local) can negotiate with the government or through the relevant agency for development agreements for specific projects in Nigeria.

The Nigerian government have in recent years actively engaged and promoted development projects and infrastructures through public-private partnerships which it considers as a mechanism to stimulate economic development and growth in Nigeria. Foreign investors are specifically encouraged to invest in the country with the government at all levels with the federal and the state government establishing dedicated offices to ensure the ease of doing business in Nigeria.

The Infrastructure Concession and Regulatory Commission (ICRC) Act 2005 established the Infrastructure Concession Regulatory Commission responsible for regulating PPP processes in Nigeria.

There is currently, a Presidential Enabling Business Environment Council (PEBEC) which was set up in July 2016 by the Nigerian President with a focus on removing bureaucratic constraints to doing business in Nigeria and making the country an increasingly easier place to start and grow a business. Also, the Nigerian Investment Promotion Commission is charged with encouraging, promoting and regulating foreign investments in the country.

Is expropriation (compulsory purchase) possible in this country?

Only the state (government) can forcibly acquire or expropriate property in Nigeria. Section 28 of the Land Use Act empowers the Governor to compulsorily acquire property where the land is required for overriding public purpose by either the state government or the federal government and compensation is payable to the owner of the land. Where land is acquired by government for overriding public purpose, fair and reasonable replacement costs is payable to the owner as compensation.

The other reason for which property can be expropriated is where the owner of the property is in flagrant breach of the terms or conditions for the grant of the right of occupancy like failure to pay ground rents (land use charges), disregard for town planning and building control regulations and fails to remedy the breach.

Taxation of real estate sales and purchases

Which taxes are relevant/which transaction costs will be incurred when buying real estate as an asset (asset deal) and how are the transaction costs shared between the buyer and seller?

Real estate sale and purchase transactions are by law subject to taxation. The applicable taxes are the following:

- Capital Gains Tax is based on gains or profits from the sale of property and is payable by the seller. In practice however, the payment for capital gains tax is made by the buyer at registration of the buyer's interests. It is charged at the rate of 10% of the gain made from the disposal of the property. In reality, at registration of the transfer, the usual rate charged by the Federal Inland Revenue Service is about 1% of the value of the property.

- Stamp Duty is paid at the registration of the transfer deed and the buyer of property is responsible for the payment. The Federal Inland Revenue Service charges about 1.5% of the value as duty.
- Consent and registration fees. By law, transfers of real estate must have the consent of the State Governor to be valid. The law also provides that transfer of real estate interests in for terms that are above five years should be registered. The different states have different rates for consent fees and registration fees. The rates applicable in Lagos State are 1.5% and 0.5% respectively for consent and registration fees.

In practice, all transfer taxes and costs are not shared and are paid by the buyer.

Which taxes are relevant/which transaction costs will be incurred when buying real estate via the shares in the owning company (share deal) and how are the transaction costs shared between the buyer and seller?

In Nigeria, there are no taxes on the sale and purchase or transfer of shares in a company irrespective of the real assets holdings of the company. Section 30 of the Capital Gains Tax Act provides that gains accruing on the sale of stocks and shares shall not be chargeable gains under the Act.

All documents relating to the transfer of stocks and shares are exempt from the payment of Stamp duties, as provided by the Stamp Duties Act (item 13 of the General Exemption Schedule). In practice, only a nominal stamp duty of NGN 500 is payable as stamping costs for a share transfer agreement in the event that the buyer is required to have the document stamped.

TAXES

Investment structures

How can investment in real estate by an individual/organization/company be set up?

Rule 510 of SEC Rules and Regulations 2013 pursuant to Section 193 of the Investment and Securities Act, 2007 provides that investors can participate in real estate investment through a company incorporated for the purpose of acquiring interests in real estate or property development or, a Trust constituted for the purpose of investments in real estate and real estate related assets. The investor in the Nigerian real estate space has the discretion to determine the structures to adopt in considering investments in real estate. An individual or company may elect to directly acquire and control a real estate asset or choose to invest through other previous existing or new specifically setup corporate investment vehicles such as companies, cooperative societies, real estate investment trusts, partnerships, pension schemes etc. It is key that only juristic persons and going concerns are recognized as being able to own and invest, acquire title and interests in real property. Investors must give careful consideration to the particular structure adopted for any real estate investment as it will impact on the investors control and direction of the asset, benefits, liabilities and tax implications.

Tax on acquisitions

What taxes are payable in relation to the purchase of real estate via the various types of corporate vehicle available and who is responsible for the payment of these taxes?

The various taxes that apply on real estate transfer transaction includes Capital Gains Tax (CGT), Stamp Duties and Value Added Tax (VAT) (where the property is not undeveloped land).

Capital gains realised on the sale of real property is subject to CGT and payable by the seller of real estate. The rate under the Capital Gains Tax Act is 10% of the gains from the sales. In reality the tax authorities (Federal Inland Revenue Service) decides the amount payable on a "best of judgment assessment" basis which uniformly is about 1% of the value of the property. All deeds for transfers of interests in real property are required to be stamped under the Stamp Duties Act and the purchaser or assignee is responsible for this payment. The Federal Inland Revenue Service (FIRS) assessed rates for stamping of transfer documents for is 1.5% for transactions involving a corporate entity. A different tax regime and rates apply to transfer transactions where individuals are parties and the rates vary within the 36 States in Nigeria. In Lagos State the rates payable CGT and Stamp Duties is currently 0.5% of the property value.

Is VAT payable on the purchase of real estate and if so, can it be recovered?

The Value Added Tax (Amendment) Act 2007 (the Act) provides that VAT is chargeable on all goods and services with certain exceptions as listed in the First Schedule to the Act. The Act does not define land as a good and it has been debated that real property interests is not a "good" susceptible to VAT. The Federal Inland Revenue Service in practice, restricts its demand for payment of VAT on outright sale of land or rentals for residential premises as its published circular specifically included rent of residential properties in the Schedule of exempted VAT items. Based on the judicial pronouncements, transfer of title in undeveloped land should not qualify as supply of goods and therefore not liable to VAT, however, the value of any improvements or building developments constructed on the land is subject to VAT. Where VAT is applicable, the rate is 5% of the property value and where the seller is registered to collect VAT, it has responsibility to charge same to the buyer, collect and remit to the Federal Inland Revenue Service.

What costs/charges (other than tax and VAT) are payable on completion of the purchase of real estate and who is responsible for paying these costs and to whom are they payable?

A combination of land charges such as ground rents, tenement rates, Neighbourhood Improvement Charges, Business Premises permits apply to properties at different rates across Nigeria. The responsibility for these payments is on the owner and occupier of the premises and ought to be paid to Government before a transfer of the interests to the purchaser otherwise it becomes the responsibility of the purchaser or assignee to make the payment on any outstanding after transfer.

The Land Use Act requires that the Governor of State where the property is located shall give consent for a transfer of the interests to be valid. The Governor's consent is subject to payment of official fees or taxes and other fixed costs including all applicable property taxes for the registration of the transfer. The purchaser is responsible for ensuring that all required costs and taxes for consent and registration of the transfer interests are paid.

The fees for the Solicitors and other professional consultants including estate surveyors and agents also arise in transfer of property transactions.

The purchaser is usually responsible for the payment of the transaction costs and the taxes except where expressly agreed by the parties that the costs and taxes are to be shared by the parties.

Recurring taxation

What taxes (if any) are payable by the owner of real estate on a recurring basis and can these be reduced or offset in any way?

The recurring taxes outside the transfer costs that are payable by a owner of real estate are the annual charges

for land use which includes ground rents, tenement rates and such other levies for development and business premises which the government authorities imposes on owner and occupiers of real property. The rates are uniformly imposed on properties depending on locations and the nature of the building developments.

The Taxes and Levies (Approved List for Collection) Act 1998, provides for state governments to charge and collect business premises registration fee and development levy, annually from property owners. Also, the Personal Income Tax Act and the Companies Income Tax Act, provides that rental payable to the owner of a property Withholding tax and imposes an obligation on the person paying rent to withhold 10% for remittance to the tax authority and collect a tax credit note in favor of the owner of the property to offset its tax liability at the end of the tax year.

What costs/charges (other than tax) are payable by the owner of real estate and who are these payable to?

Professional fees of solicitors, property managers, estate agents and such other consultants engaged by the owner of real estate are payable by the owner. The owner is also responsible for maintenance of external structures and parts of the building.

Where the owner is the sole occupier of the property, the costs for services and utilities consumed in the property are payable by the owner. Also, the building insurance costs are the responsibility of the owner.

Tax on income from real estate

What types of income can be expected from ownership of real estate?

The most common income from ownership of real estate are rental payments by made by tenants, lessees and licensees of the property and capital gains or profits arising from the sale of the property.

The owner of property will also derive income from the business operations conducted within the property whether providing hotel, hospitality, leisure, recreational and such facilities that permitted users pay a fee.

How is income arising from an investment in real estate taxed and can these taxes be reduced or offset in any way?

The income from real estate is subject to the applicable tax laws and rates in the country. A company that owns real estate pays income tax from the profits on the rent based on the applicable rates under the Companies Income Tax Act. The income of an individual owner of real estate is also taxed based on the Personal Income Tax Act. The income tax rates for companies are 30% and for individuals, between 7% and 24%.

The owner of a property on whose behalf withholding tax deductions were made from rental income and remitted to the appropriate tax authorities is entitled to utilize the tax credit note thereof to offset the income tax liabilities for the year.

Are additional taxes incurred if any income generated from a real estate investment is transferred to the shareholders or partners in the relevant vehicle and can these be reduced or offset in any way?

Withholding taxes apply on the dividends or profits due to shareholders of a company or partners in a partnership, with investments in real estate. The shareholders or partners on the other hand, are subject to payment of personal income tax under the Personal Income Tax Act and may apply the withholding tax deductions made from their incomes as tax credit.

Are any costs/charges (other than tax) payable in respect of income generated from an investment in real estate and who are these charges payable to?

Costs may accrue as fees payable to professional consultants engaged by the real estate owner or to suppliers for supplies and other services rendered and pertaining to the property.

Are there any additional costs/charges (other than tax) payable if income generated from an investment in real estate is transferred to the shareholders or partners in the relevant vehicle and who are these charges payable to?

No additional costs apply in this regard.

Tax on disposals

What taxes are payable on the sale of real estate and can these be reduced or offset in any way?

Capital Gains Tax is payable by the seller; Stamp Duty is also payable by the purchaser. Lands Use Charges that are outstanding are payable by the purchaser before the registration of the interests in real property. Consent fee and registration fees apply for the registration of the title at the relevant State Lands Registry Offices.

What costs/charges (other than tax) are payable on the sale of real estate and who are these charges payable to?

Professional fees Solicitors. The fees are either based on the scale of charges provided in the Legal Practitioners (Remuneration for Legal Documentation and Other Land Matters) Order 1991. This specifies the rates for solicitor's charges; or by agreement of the parties based on the total value of the transaction.

Agency fees to the estate surveyors and valuers handling the sale. The fees are negotiated based on a percentage of the value of the property.

Surveyors fee for a survey plan of the property. A survey plan of the property is required for privately owned properties.

KEY CONTACTS



Abutu Odu

T: +234 | 279 3853

aodu@olajideoyewole.com

Plot 5 Block 14 Bashorun
Okusanya Avenue,
Off Admiralty Road, Lekki
Peninsula Scheme I
Lagos



Samuel Salako

T: +234 | 279 3852

ssalako@olajideoyewole.com

Plot 5 Block 14 Bashorun
Okusanya Avenue,
Off Admiralty Road, Lekki
Peninsula Scheme I
Lagos



Omobola Tinubu

T: +234 | 279 3672

btinubu@olajideoyewole.com

Plot 5 Block 14 Bashorun
Okusanya Avenue
Off Admiralty Road, Lekki
Peninsula Scheme I
Lagos

Disclaimer

This publication is intended as a general overview and discussion of the subjects dealt with. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication. If you would like further advice, please contact Olaf Schmidt (olaf.schmidt@dlapiper.com) or Jay Epstein (jay.epstien@dlapiper.com) or your usual DLA Piper contact on +44 (0) 8700 111 111.