



Lenders Taking Security over Mining Rights for Financing: Nature, Scope and Requirements under Nigerian Law





1. Introduction

Mining is an essential sector of the Nigerian economy as it serves as a source of revenue for the government and provides employment opportunities to Nigerians. Other than in relation to the manufacturing of cement, mining activities in the country are not yet at an advanced stage. Although there is a robust legal regime for mining in the country, implementation is still at a developing stage. These constitute significant operational and financial challenges for operators in the mining sector. As a result, financing for mining operations can be expensive, and lenders may require some form of security over the borrower's mining rights as part of the security package for providing the required financing for mining operations. In Nigeria, the nature of security over mining rights, the requirements for perfection of the security, and the need for consent from the relevant government authorities are all critical considerations for lenders in providing financing.

The common types of security over mining rights under Nigerian laws are mortgages, charges and assignments by way of security. A mortgage or an assignment by way of security is a security interest created where a holder of a mining right transfers its legal title over the mining right to a lender as security for a loan, while charges create an interest over such mining rights without an actual transfer. Any of the forms of security would allow the lender to take possession of the mining rights in the event of default by the borrower. In any of the cases, to be enforceable and binding on third parties, the security interest is required to be perfected in accordance with Nigerian law. In addition to the above common types of security, security can be created over mining rights by way of sub-lease and hypothecation.

In this article, we will explore the nature of security over mining rights in Nigeria and the requirements for the perfection of this security, including the need for consent from the relevant government authorities. We will also discuss the implications of non-compliance with these requirements and provide practical guidance for foreign and local lenders seeking to create security interests over mining rights in Nigeria.

2. Regulatory Overview of Mining Rights in Nigeria

The Nigerian mining sector is regulated by the Federal Ministry of Mines and Steel Development (the "Ministry"). The Ministry is responsible for formulating and implementing policies for the exploration and development of solid minerals in the country, including the grant of mining rights.

On the legal regime, the Nigerian Minerals and Mining Acts No. 20 of 2007 (the "Mining Act") and the Nigerian Minerals and Mining Regulations 2011 (the "Mining Regulations") are the two principal legislations governing mining activities in Nigeria. The exercise of mining rights is also regulated by other environmental laws, such as the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (as amended) and the Environmental Impact Assessment Act 2004.



As provided for in section 44(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Mining Act vests the rights, control, and ownership of all mineral resources in Nigeria on the Federal Government of Nigeria ("FGN") to hold in trust for the people of Nigeria. The Mining Act also empowers the FGN to grant mining rights to explore, exploit, and process solid minerals in Nigeria to individuals and corporate entities that meet the requirements provided under the Mining Act through the issuance of mineral titles. These mineral titles give the holder the right to mine and process minerals within a specific area of land in Nigeria. Furthermore, the Mining Act and the Mining Regulations also set out the requirements and procedures for obtaining mineral titles and licences from the Ministry and Mining Cadastral Office ("MCO").

The Mining Act established the MCO as the agency responsible for the administration of mineral titles and licences in Nigeria and the maintenance of the cadastral registers. Under the Mining Act, mineral titles can be obtained by individuals, companies, or groups of individuals.

3. Types of Mining Rights

Mining rights are the rights granted to a person to explore, prospect, or mine for minerals in Nigeria. They are primarily granted on a first come, first served basis by the Minister of Mines and Solid Minerals Development ("Minister") through the issuance of mineral titles such as reconnaissance permits, exploration licences, small-scale mining leases, mining leases, quarry leases, and water use permits.

- 3.1 Reconnaissance Permit:** This is a non-exclusive right to carry out reconnaissance work on an area of land for a period of one year, subject to an annual renewal. This permit allows the holder to have access to, enter, fly over and even obtain surface samples of minerals in reasonable quantities. To obtain this permit, an application is made, and a prescribed fee is paid to the MCO. The MCO is expected to give its approval within 30 days of receiving the application.
- 3.2 Exploration Licence:** This gives the holder an exclusive right to carry out exploration activities in an area of land for a maximum period of three years, subject to a renewal for a maximum of two additional periods of two years each. The licence usually covers a mining area of not more than 200 square kilometres. An application for this licence is made, and a processing fee is paid to the MCO. The MCO shall, within thirty days of receiving a valid application from a qualified applicant, grant and issue an exploration licence to the qualified applicant. An application for an exploration licence will be denied by the MCO if it is in relation to a land that (a) is subject to an existing exploration licence, mining lease, small scale mining lease or quarry lease; or (b) its area exceeds 200 square kilometres.
- 3.3 Mining Lease:** This lease creates a proprietary interest over land and confers an exclusive right to explore, prospect, and mine mineral resources in an area of land for a maximum period of twenty-five years. The term is renewable for a maximum of two additional periods of 15 years each. The mining lease only covers an area not exceeding 50 kilometres.
- 3.4 Small-scale mining lease:** This lease is granted for mining operations covering an area of up to five hectares for a period of five years. It is renewable for another term of five years only.



To obtain this lease, an applicant is required to submit an application and pay a processing fee to the MCO. The MCO is expected to give its approval within forty-five days of receipt of a valid application. Where the level of operation of a small-scale lease exceeds the specified area, the small-scale mining lease can be converted into a mining lease by the holder making a written application to the MCO.


- 3.5 Quarry lease:** This creates a proprietary interest over land and confers an exclusive right to mine and process construction materials (such as sand, gravel, and stone) in an area of land for a maximum period of five years. This term is renewable for two additional periods of five years each. To obtain this lease, an application is made, and a processing fee is paid to the MCO. The MCO is expected to grant its approval within forty-five days of receipt of the application.
- 3.6 Water Use permits:** This permit is usually given to the holders of an exploration licence, a mining lease, a small-scale mining lease or a quarry lease who require water utilisation during their operations. It permits them to use water sources for their operations.
- 3.7 Mineral Buying Centre Licence:** This licence allows the holder to use the land for the storage and purchase of mineral resources.
- 3.8 Possess or Purchase Licence:** As the name suggests, this licence allows persons that are not holders of mining licences or leases to directly trade and export mineral resources in Nigeria. This licence will be issued only to corporate bodies duly incorporated under the Companies and Allied Matters Act 2020 (as amended).
- 3.9 Export Permit:** This permit is granted to a holder of a mineral title (that is, all mineral titles other than a reconnaissance or an exploration licence) or licence to possess and purchase minerals for commercial purposes. It is solely for analysis or experiment or as a scientific specimen. An application for this permit is made to the Mines Inspectorate Department of the Ministry.

The regulatory framework for mining rights in Nigeria is designed to ensure that mineral resources are exploited in a sustainable and responsible manner. This is why the FGN has always reiterated its commitment to supporting and improving the development of the mining sector as a key contributor to the Nigerian economy. To this end, the FGN has implemented a range of policies and incentives to encourage investment in the mining sector.¹

4. Nature of Security that Lenders can Take over Mining Interests

As we have already indicated above, the Mining Act and the Mining Regulations provide the legal framework for the regulation of mining activities in Nigeria and provide guidance on the nature of security interests that can be created over mining rights. Under the Mining Act, mining rights can be used as collateral for securing loans or other financial obligations.

¹ Some of these policies and incentives include (a) the Roadmap for the Growth and Development of the Nigerian Mining Industry, which was launched in 2016 to set out a vision for the mining sector to contribute significantly to Nigeria's gross domestic product (GDP) and create jobs for its citizens; (b) the establishment of the Ministry of Cadastre Office to process and grant mineral title, as well as the Solid Mineral Development Fund ("SMDF") to provide financing for mining projects.



In that regard, section 147(2) of the Mining Act provides that the rights arising from a mineral title or permit can be wholly or partially assigned, sub-leased, pledged, mortgaged, charged, or hypothecated.

The implication of the above provision is that the nature of the security interest that a lender can take over mining rights under the Act includes:

- (a) **Mortgage:** This involves the transfer of the legal title to the mineral right by one party (the borrower/mortgagor) to another (the lender/mortgagee) as a security for the payment of the debt or the discharge of some other obligation for which it is given. This will be subject to a condition that the mineral title shall be re-conveyed to the mortgagor if the secured obligation is discharged by the borrower. This security interest can either be a legal mortgage which transfers title to the lender with immediate right over the mortgaged mineral title and must be created by a deed, or an equitable mortgage which is created by a mortgage over a mining right already subject to a legal mortgage or by depositing the title documents to the mineral rights with the lender with or without a memorandum of deposit.

Unlike a legal mortgage which gives the lender immediate rights over the mortgaged title, an equitable mortgage creates a personal right against the borrower and, in some instances, unless it crystallises into a legal mortgage, would require an order of the court to enforce the right.

- (b) **Charge:** This creates a security interest in favour of the lender over the mineral title. That security interest can be enforced on the occurrence of specified events of default. A charge created over the mineral rights of a borrower does not transfer the title in the charged title to the lender but simply creates a security interest in favour of the lender, which can be enforced upon the occurrence of specified events. A charge can either be fixed or floating. A fixed charge is created over a specific mineral right of the borrower, attaches to the charged mineral title from the time of creation, and restricts the rights of the borrower to deal with the mineral rights without the consent of the party in whose favour the charge is created. A floating charge, on the other hand, is an equitable charge on all or any of the borrower's mineral rights, which fastens to the charged title upon crystallisation. It allows the borrower to deal with the mineral title in the ordinary course of business until an event of default occurs that causes the charge to crystallise.
- (c) **Pledge:** This involves the deposit of the instrument of title over the mining rights with a lender as security for the secured obligation. This will be on the condition that the pledged items will be re-delivered to the borrower if the debt is repaid. The essential element of a pledge under Nigerian law is actual or constructive possession of the instrument of title over the mining right. If the lender must part with the possession of the mineral title in an enforcement scenario, then the borrower will be required to execute a trust receipt in favour of the lender. This is not a common form of security over mineral rights.



- (d) **Assignment:** An assignment involves the transfer of ownership rights over a mineral title to a lender as collateral for a debt or other obligations. This will be on the condition that the transferred right will be reassigned to the borrower upon the repayment of the debt or discharge of the secured obligations. The mining rights may include exploration licences, mining leases, quarry leases, and small-scale mining leases.
- (e) **Sublease:** This involves the transfer of the proprietary rights to use a mining right or mineral title to a lender as collateral for a debt or other obligations. The parties must ensure that the duration of the sublease is at least a day less than the term granted to the holder by the Minister under the Mining Act and Mining Regulations. This is not a common form of security over mining rights for lenders.
- (f) **Hypothecation:** Hypothecation is a form of a security interest created when a mining right or mineral title is pledged as collateral for a debt obtained by the holder of the mining right. A mining company may hypothecate its mining rights to a lender as security for a loan. This security interest entitles the lender to take possession of the hypothecated mining rights if the borrower/mining company defaults on the loan. This is also not a common form of security over mining rights for lenders.

In view of the above, the nature of security a lender can take over mining rights in Nigeria depends on the type of mining rights that the borrower/mining company has. For instance, Regulation 91(2) of the Mining Regulations allows only holders of an exploration licence, mining lease, quarry lease, small-scale mining lease, or a water use permit to create security over their mining rights or assign the ownership of that mineral title to a third party. A reconnaissance permit titleholder is restricted from creating security over such permit to any party.

A security interest created over mining rights or related property is only valid if it is created to secure financing for the mining rights or operations.² What this means is that the loan must be directly related to the mining activities of the borrower, and the security interest cannot be created for any other reason. We believe that this provision is in place to ensure that the collateral being used for a loan is directly related to the mining operations and not being used for unrelated purposes. This restriction provides protection for both the lender and the mining company as it ensures that the loan is being used for its intended purpose and that the collateral being used is appropriate for the loan.

5. Mode of Application

An application for the transfer of mineral title is made to the MCO. An application in the prescribed form is required to be submitted in triplicate for registration and processing, specifying the terms and conditions of the security interest created over the mining rights. The application is accompanied by a copy of the instrument creating the security interest.

² Section 93(1) of the Regulations



In addition, an applicant must pay a non-refundable processing fee as prescribed by the MCO/Ministry from time to time. The MCO, upon receipt of the application, will issue a receipt and record the application for registration in the mineral title register.

After the application has been submitted, the Minister is expected to, within 15 days, approve the application for the transfer of the mineral rights, provided the applicant satisfies the requirements stated in the Mining Regulations. If the application is denied by the Minister, an aggrieved applicant may seek redress by appealing to the Federal High Court within 60 days of notification of such denial.

6. Taking Security in Practice

In practice, when taking security over mining rights and interests, lenders would generally agree to create the security by way of a floating charge (in some cases both fixed and floating charge) in an all-asset debenture, security deed or deed of charge depending on the transaction structure. This is because the floating charge is an equitable interest that hovers over the asset and will not attach to the asset immediately. The use of a floating charge also allows the holder of the right to continue to deal with it in the ordinary course of business without the interference of the lender. The floating charge will only crystallise to a fixed charge upon the occurrence of certain prescribed crystallisation events, usually events of defaults. In addition, the lender would take an assignment (by way of security) of rights and interest of the rights holder in the project documents relating to the operations with the mining titles.

7. Perfection and Consent Requirements for Security over Mining Rights

For a security interest created over a mining right to be valid under the Mining Act, the Mining Regulations and other relevant laws, it must be perfected. The perfection process involves stamping of the security documents at the stamp duties office, obtaining the Minister's approval and the registration of the security interest at the MCO, registration at the National Collateral Registry ("NCR"), registration at the relevant land registry and registration of the security documents at the Corporate Affairs Commission ("CAC") –Nigeria's companies registry. These perfection steps are discussed below.

- (a) **Stamping:** The Stamp Duties Act 2004 (as amended) governs the assessment and collection of stamp duty on various transactions, including security documents over mining rights. Section 22(4) of the Stamp Duties Act requires stamp duty to be paid, at the rate specified in the Stamp Duties Act, on instruments executed in Nigeria or relating, wheresoever executed, to any property situate or to any matter or thing done or to be done in Nigeria. The security documents, being instruments that relate to property situate, and to a matter or thing done or to be done in Nigeria, will be subject to the payment of stamp duty In Nigeria.

Although payment of stamp duty on security documents is a statutory obligation of the lender, the secured parties will usually seek, contractually, to pass on this obligation to the borrower.



Stamp duties is required to be paid within 30 (thirty) days after the execution of the instrument except where such document is executed outside Nigeria, in which case stamp duty on the document must be paid within 30 (thirty) days after a physical or electronic copy of the document is first received in Nigeria. Failure to stamp the documents will, among other things, render the security documents inadmissible in evidence in civil proceedings by Nigerian courts and arbitrators.

The stamp duty payable on a secured transaction, such as a mortgage or charge over mining rights, is calculated based on the value of the consideration or amount secured by the security document. The value of the consideration is the amount of money or other assets that the security document is securing, such as the loan amount. Although the final determination of the stamp duty rate will only be obtained from the Commissioner of Stamp Duties ("Commissioner") on the relevant assessment date, the applicable stamp duty for secured loans is calculated at 0.375% of the secured sum.

The procedure for stamping security documents involves submitting a copy of the security documents to the Commissioner for assessment of the stamp duty payable on the documents. Once the assessment is obtained and payment is made in accordance with the instructions on the assessment, the security documents and evidence of payment will be submitted to the Commissioner for stamping. Typically, the stamping process can be completed within seven business days.

- (b) Registration at the MCO:** –Pursuant to section 147(2) of the Mining Act, the rights under a mineral title may be wholly or partially assigned, subleased, pledged, mortgaged, charged, hypothecated or subject to any security interest. On this basis, section 147(1) of the Mining Act provides that the transfer of a mineral title is subject to the Minister's approval and registration at the MCO. Section 147 (1) which requires the approval of the Minister for a transfer (which suggests an absolute transfer of title) is, however, subject to the provisions of section 147 (2) which deals the types of interests that mineral titles could be subject to. Regulation 93 of the Regulations provides that the requirements for creating security over a mineral title are: (a) the security interest must be in relation to financing activities in respect of the mining rights; (b) the MCO's confirming the status of the mineral title; (c) the MCO being notified of the creation of the security interest within 30 days of the notice of encumbrance; and the MCO recording the notification and security interest in the mineral's titles register. Non-compliance with items (a) and (b) may result in the MCO rejecting the notification.

In view of the foregoing, the application for registration of a security interest created over a mineral title is made to the MCO using the prescribed form and providing details regarding the security interest created. The applicant, that is, the holder of the mineral title, is also required to pay the prescribed processing fee for the registration of the security interest. Failure to register security over the mining rights with the MCO will make the security interest created not to be recognised in the mineral titles' register at the MCO.



- (c) **Registration at the CAC:** Where the borrower or the grantor of the security interest over mining rights is a corporate entity, the security document will need to be registered at the CAC within 90 days after the date of creation of the security. Failure to register the security with the CAC will render the security void against the liquidator and other creditors of the borrower if the borrower should become insolvent. The security will remain valid against the company, and the amount secured will, however, become immediately payable. This is a requirement under section 222 (1) of the Companies and Allied Matters Act 2020 (as amended) (“CAMA”) which provides that every charge (which is defined to include mortgages) created by a company shall be void against the liquidator and any other creditor of the company, unless the prescribed particulars of the charge together with the instrument by which the charge is created or evidenced, have been delivered to the CAC for registration within 90 days after the date of its creation.

The CAC has a portal for post-incorporation filings, such as registration of security. This digitalised process for registration of security requires all the information relating to the creation of the security interest, such as the stamped security documents and the stamp duty certificate, to be uploaded on the portal for registration. A registration fee of 0.35% of the secured amount is payable to the CAC to register the security. The effect of registration of the security at the CAC is that it gives constructive notice of the existence of the security to third parties.

(d) **National Collateral Registry**

The Secured Transaction in Movable Assets Act 2017 applies to all security interests in movable assets created by an agreement that secures payment or the performance of an obligation. It requires that security interests in movable assets be registered at the NCR to be perfected. The movable assets covered are both tangible and intangible properties other than real property. Accordingly, the security documents creating security over the mining rights will need to be registered at the NCR. Based on our experience, registration of the security documents at the NCR costs nominal fees. Priority between relevant perfected security interests in the same collateral is determined by the order of registration at the NCR.

(e) **Land Registry**

In relation to leases in respect of mining rights which create a proprietary interest in land, the instrument creating a charge or mortgage over a mining lease will also need to be registered at the relevant land registry in the state to which the lease relates. A mortgage is registrable at the land registry because it transfers interest in the land covered by the lease, while a charge is registrable at the land registry to give notice to third parties that the lease is subject to a security interest. Before the registration of a mortgage, the consent of the Governor of the State in which the land is located must first be obtained. This is pursuant to section 22 of the Land Use Act 2004. Failure to obtain the Governor’s consent will render the mortgage inchoate until registered. Various fees are payable to obtain the Governor’s consent and to register the security interest at the relevant land registry. The applicable fees vary from state to state.



In the case of a charge, even though it does not immediately transfer title to land, it creates an interest in land. It is, therefore, important to register the charge over a lease at the land registry to give notice to third parties of the existence of the charge.

(f) Notice of Assignment

Following the execution of the assignment agreement or any security document assigning the interest in the asset or project documents relating to the exploration and exploitation of mining rights, the borrower will need to give notice of the security interest to the other holders of the asset and counterparties to the project documents. The counterparties will, in some cases, be asked to issue an acknowledgement of receipt of the notice of assignment and state their readiness to comply with the directives therein. The notice of assignment, however, suffices for the creation of an assignment by way of security and binds such counterparties to the lenders/security trustee.

8. Conclusion

As earlier discussed, the mining sector is an integral part of the Nigerian economy and a major source of revenue to the country and provision of employment opportunities. With the possibility of increased provision of financing to operators in the sector secured by the creation of security interest in favour of lenders, the level of financing of the Nigerian mining sector will be further enhanced and greatly improved. This is because there will be an increase in the availability of resources to the operators to deepen their operations and increase profitability. With the perfection of the security interest created in favour of lenders, the security interests of the lender will enjoy priority and will be enforceable against other third parties. Mining rights provide a valuable source of security for lenders, we believe that lenders and stakeholders will hopefully find these processes for perfecting security helpful in the course of securing financing for mining activities in Nigeria.

This update has been provided by Yinka Edu, Joseph Eimunjeze, Chisom Okolie and Ikenna Edeh of the Banking and Finance team at Udo Udoma & Belo-Osagie. For more information about our Banking and Finance practice group offerings, please visit our website at www.uubo.org or email us at uubo@uubo.org.

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