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The International Comparative Legal Guide to:

Private Equity 2016

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A practical cross-border insight into private equity

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EDITORIAL

Welcome to the second edition of *The International Comparative Legal Guide to: Private Equity*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of private equity.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key private equity issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in private equity laws and regulations in 25 jurisdictions.

All chapters are written by leading private equity lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Dr. Lutz Zimmer and Simon Rootsey of Skadden, Arps, Slate, Meagher & Flom LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Overview

1.1 What are the most common types of private equity transactions in your jurisdiction? What is the current state of the market for these transactions? Have you seen any changes in the types of private equity transactions being implemented in the last two to three years?

The most common types of private equity ("PE") transaction in Nigeria include acquisitions of shares (via subscription for new shares or transfer of existing shares) and quasi-equity instruments. The market remains resilient, with continuing significant investor interest in the financial services, telecommunications, FMCG, real estate and insurance sectors, and increasing diversification into the industrial, agriculture, health, IT and retail sectors.

1.2 What are the most significant factors or developments encouraging or inhibiting private equity transactions in your jurisdiction?

Democracy, the rapid growth of the consumer class, investor-friendly policies and the restructuring of strategic sectors have helped to boost investment. Global changes in oil and commodity pricing, currency volatility and the absence of a developed PE-specific regulatory and fiscal framework may delay or require greater creativity in investment structuring, but even less cyclical challenges do not appear to permanently inhibit PE transactions in Nigeria.

2 Structuring Matters

2.1 What are the most common acquisition structures adopted for private equity transactions in your jurisdiction?

Equity investments through offshore-registered SPVs ("BuyCos").

2.2 What are the main drivers for these acquisition structures?

Tax efficiency – companies' legislation requires foreign companies to "do business" through a Nigerian-registered limited liability company. BuyCo liability is limited to its shareholding and it can readily divest via capital gains tax ("CGT")-exempt share transfer.

2.3 How is the equity commonly structured in private equity transactions in your jurisdiction (including institutional, management and carried interests)?

The target's equity structure will typically reflect capital contributions. Shareholders and management may participate through BuyCo, with management interest being, typically, in the region of 5%. Carried interest is usually structured through a separate vehicle; typically an offshore limited partnership vehicle that also owns equity in a BuyCo subject to agreed percentage splits.

2.4 What are the main drivers for these equity structures?

Regulatory, tax and governance considerations are the main drivers.

2.5 In relation to management equity, what are the typical vesting and compulsory acquisition provisions?

Transaction documents will typically include "good leaver" (employment terminated by retirement, death or disability) and "bad leaver" (e.g. employment terminated for fraud) provisions which determine acquisition pricing for the employee's shares. Vesting provisions may determine conditional equity allocations, e.g. based on length of service or achievement of performance milestones.

2.6 If a private equity investor is taking a minority position, are there different structuring considerations?

No. Please see questions 2.1 and 2.2.

3 Governance Matters

3.1 What are the typical governance arrangements for private equity portfolio companies? Are such arrangements required to be made publicly available in your jurisdiction?

Governance issues including board participation, voting and veto rights (where companies' legislation permits flexibility), organisational

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structure, investor exit and related issues are typically formalised in shareholders' agreements which are usually confidential, or incorporated into the portfolio company's constitution, which is required to be filed at the companies' registry. In listed portfolio companies, Nigerian Stock Exchange ("NSE") rules require information that could materially affect the price of a company's shares to be disclosed.

3.2 Do private equity investors and/or their director nominees typically enjoy significant veto rights over major corporate actions (such as acquisitions and disposals, litigation, indebtedness, changing the nature of the business, business plans and strategy, etc.)? If a private equity investor takes a minority position, what veto rights would they typically enjoy?

PE investors that acquire majority stakes can enjoy veto rights over major corporate, financial, and commercial matters at both the shareholder and board levels, subject to companies' legislation. PE investors investing as minorities would usually seek veto rights via inclusion in the quorum prescribed for meetings at which key decisions are made, and affirmative voting on such matters where companies' legislation permits flexibility.

3.3 Are there any limitations on the effectiveness of veto arrangements: (i) at the shareholder level; and (ii) at the director nominee level? If so, how are these typically addressed?

Veto arrangements are subject to the provisions of the Nigerian Companies and Allied Matters Act ("CAMA"), which in specific instances will override conflicting provisions of shareholder arrangements and constitutional documents, rendering such arrangements unenforceable. Director nominees have fiduciary obligations to the target and may not fetter their discretion to vote, and would not, in their personal capacity, be bound by voting arrangements.

3.4 Are there any duties owed by a private equity investor to minority shareholders such as management shareholders (or *vice versa*)? If so, how are these typically addressed?

PE investors are not generally subject to any specific statutory obligations to management shareholders. All director nominees to the portfolio company board have fiduciary obligations to the investee company.

3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including (i) governing law and jurisdiction, and (ii) non-compete and non-solicit provisions)?

The Nigerian Supreme Court has affirmed that a "real, genuine, *bona fide* and reasonable" choice of law (other than Nigerian law) that has "some relationship to and (is) […] connected with the realities of the contract considered as a whole" in any agreement will generally be upheld. Non-compete clauses and non-solicitation clauses are subject to negotiation but must be reasonable.

3.6 Are there any legal restrictions or other requirements that a private equity investor should be aware of in appointing its nominees to boards of portfolio companies? What are the key potential risks and liabilities for (i) directors nominated by private equity investors to portfolio company boards, and (ii) private equity investors that nominate directors to boards of portfolio companies under corporate law and also more generally under other applicable laws (see section 10 below)?

The CAMA requires that directors meet certain qualifications, including that they must not be fraudulent, convicted by a High Court of any offence connected with the promotion, formation or management of a company, or be bankrupt or mentally unsound. Sectoral qualifications may also apply (for instance, the Central Bank imposes additional qualifications for bank directors). All directors have fiduciary obligations to the targets and may not fetter their discretion to vote in any manner. They may, therefore, not be bound by any agreements that they sign which are inconsistent with this. Directors may incur personal liability, such as for any loss or damage sustained by a third party as a result of any untrue statements or misstatements in a public company prospectus, under the Investment and Securities Act ("ISA"). The termination of employment of an executive director does not result in automatic removal from the board; removal (as distinct from the procurement of resignation) of directors is subject to a prescribed statutory meeting and process. Disclosure of (unpublished, price-sensitive information) information by nominee directors to PE investors may breach insider dealing provisions under the ISA and the Securities and Exchange Commission ("SEC") rules and regulations ("SEC Rules").

3.7 How do directors nominated by private equity investors deal with actual and potential conflicts of interest arising from (i) their relationship with the party nominating them, and (ii) positions as directors of other portfolio companies?

Section 280 of the CAMA provides that the personal interest of a director shall not conflict with any of his duties as a director. A director may not, in the course of managing the affairs of the company, misuse corporate information in order to derive a benefit and is accountable to the company for any benefit so derived, even after he resigns from the company. Sitting on the board of more than one company concurrently does not excuse a director from his fiduciary duties to each company, including a duty not to (mis)use property, opportunity or information. Actual or potential conflicts of interest are disclosed to the board of investee companies for consideration.

4 Transaction Terms: General

4.1 What are the major issues impacting the timetable for transactions in your jurisdiction, including competition and other regulatory approval requirements, disclosure obligations and financing issues?

Transactions can be completed fairly quickly if the transaction is not complex, the parties are experienced (or use experienced advisers), and no regulatory approvals are required. Delays may, however, arise in the process of obtaining pre- and post-acquisition regulatory

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approvals from the SEC and other sector-specific regulators such as the Central Bank of Nigeria, the National Insurance Commission, the Nigerian Communications Commission, and the Nigerian Stock Exchange ("NSE") (where applicable). Delays could also arise in the process of raising finance for investments and in conducting legal, financial, and technical due diligence, where investee companies sometimes provide inadequate information or documents.

4.2 Have there been any discernible trends in transaction terms over recent years?

We are seeing the emergence of increasingly creative structures for addressing current foreign exchange challenges and concerns, as well as the adoption of offshore transaction structures aimed at providing PE investors with additional powers and flexibility in governance and management matters.

5 Transaction Terms: Public Acquisitions

5.1 What particular features and/or challenges apply to private equity investors involved in public-to-private transactions (and their financing) and how are these commonly dealt with?

The ISA, SEC Rules and (for listed targets), the NSE's Listing Rules and the SEC's mandatory Code of Corporate Governance apply to transactions involving public companies and impose disclosure and reporting requirements where such transactions exceed prescribed thresholds or, in listed companies, involve changes that could affect the price of the target's shares. PE investors usually retain skilled advisers (legal and financial) to ensure compliance.

5.2 Are break-up fees available in your jurisdiction in relation to public acquisitions? If not, what other arrangements are available, e.g. to cover aborted deal costs? If so, are such arrangements frequently agreed and what is the general range of such break-up fees?

It is unusual for a Nigerian target that is a public company to agree to pay break fees. In relation to takeover bids involving the shares of a public listed company, the listing rules of the NSE provide that no offer may be conditional on the payment of compensation for loss of an offer. Where such payment is proposed, it must be disclosed in the relevant bid document.

6 Transaction Terms: Private Acquisitions

6.1 What consideration structures are typically preferred by private equity investors (i) on the sell-side, and (ii) on the buy-side, in your jurisdiction?

Cash structures are generally preferred, although share swaps involving portfolio companies and BuyCos are also not uncommon to achieve structuring objectives.

6.2 What is the typical package of warranties/indemnities offered by a private equity seller and its management team to a buyer?

This is subject to negotiation. Exiting PE investors will typically give undertakings regarding title and capacity except where they have been involved in management of the business where the buyers may insist on additional warranties. Where the PE investor and the target's founders exit together, a comprehensive set of warranties and indemnities may be required.

6.3 What is the typical scope of other covenants, undertakings and indemnities provided by a private equity seller and its management team to a buyer?

While this is subject to negotiation, PE sellers do not typically offer a comprehensive suite of undertakings beyond those indicated at question 6.2, and will resist restrictions on their capacity to freely invest in competing businesses.

6.4 Is warranty and indemnity insurance used to "bridge the gap" where only limited warranties are given by the private equity seller and is it common for this to be offered by private equity sellers as part of the sales process? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such warranty and indemnity insurance policies?

Such insurance is increasingly commonplace, but at the preference of the PE sellers, who may resist attempts to make their procurement of such insurance to mitigate the exposure of counterparties to an express covenant in transaction documents.

6.5 What limitations will typically apply to the liability of a private equity seller and management team under warranties, covenants, indemnities and undertakings?

This is subject to negotiation between the relevant parties. There is no standard practice other than as prescribed by generic statutory limitations of contractual liability.

6.6 Do (i) private equity sellers provide security (e.g. escrow accounts) for any warranties / liabilities, and (ii) private equity buyers insist on any security for warranties / liabilities (including any obtained from the management team)?

Please see question 6.2. PE sellers do not often provide security for warranties, etc. in an exit scenario. This is more likely in a PE investment scenario where the payment of consideration for equity is disbursed in tranches and subject to the target or its founders meeting conditions and performance milestones set by PE investors.

6.7 How do private equity buyers typically provide comfort as to the availability of (i) debt finance, and (ii) equity finance? What rights of enforcement do sellers typically obtain if commitments to, or obtained by, an SPV are not complied with (e.g. equity underwrite of debt funding, right to specific performance of obligations under an equity commitment letter, damages, etc.)?

Availability of investment funds in the PE investor account, and deposit of funds in an escrow account, which is disbursed to the target or its founders subject to specific conditions being met. Please refer to the response to question 6.6. Such comfort may not be required where the buyer has good reputation and standing, in which case an equity commitment letter addressed to both the target company and the seller may suffice, backed up with an appropriate financial capacity warranty.

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6.8 Are reverse break fees prevalent in private equity transactions to limit private equity buyers' exposure? If so, what terms are typical?

Reverse break fees are not generally market practice, and would be negotiated on a case-by-case basis.

7 Transaction Terms: IPOs

7.1 What particular features and/or challenges should a private equity seller be aware of in considering an IPO exit?

Issues to be considered include the cost of effecting the IPO, the value of the seller's shares after an increase in the share capital has been effected and issued and underwriting of shares not taken up/ issued to third parties, etc.

7.2 What customary lock-ups would be imposed on private equity sellers on an IPO exit?

Other than as contained in any shareholders' agreements relating to the shares in the target/investee company to which the seller is a party to, the lock-up requirements to be adopted would usually depend on the contractual arrangements between the seller and the buyer which vary from one transaction to another, and may range from two months to a longer period as may be contractually agreed by the parties (i.e. the period of the buyer's investment).

7.3 Do private equity sellers generally pursue a dual-track exit process? If so, (i) how late in the process are private equity sellers continuing to run the dual-track, and (ii) were more dual-track deals ultimately realised through a sale or IPO?

It is not usual for PE sellers to pursue dual-track exit strategies simultaneously, as regulatory approvals, which are not speedily obtained, would need to be procured for both exit strategies and this process is usually more strenuous on the parties. In Nigeria, it is more common for the sellers to identify which strategy they wish to exit the company with, either by IPO, identifying strategic investors by way of private placement or such other method as may be approved by the appropriate regulators (i.e. the SEC and the NSE where listed companies are the investee/target companies).

8 Financing

8.1 Please outline the most common sources of debt finance used to fund private equity transactions in your jurisdiction and provide an overview of the current state of the finance market in your jurisdiction for such debt (particularly the market for high yield bonds).

The granting of loans (convertible or non-convertible) is probably the most commonly used form of debt-financing for private equity transactions in Nigeria. If the loan is convertible, the parties usually enter into an agreement wherein the money being brought into the company in the form of convertible debt could be converted into equity upon certain conditions or events occurring. This would usually be documented in the form of a convertible loan note instrument. The issuance of bonds is rarely used.

8.2 Are there any relevant legal requirements or restrictions impacting the nature or structure of the debt financing (or any particular type of debt financing) of private equity transactions?

If the debt is not convertible, other than corporate approvals and the routine requirement to obtain a certificate of capital importation as evidence that foreign capital was brought into Nigeria, no regulatory approval will be required. For a typical PE investment in the form of a convertible debt, the conversion of the debt into equity will require the approval of the SEC together with the target company's corporate approvals. In addition to the above, the parties would also need to comply with the terms and conditions of any shareholder agreements and all other constitutional documents of the target company, and file the resulting shares upon conversion with the Corporate Affairs Commission. Subject to the above requirements being obtained, there are usually no other restrictions applicable to a particular structure of debt financing.

9 Tax Matters

9.1 What are the key tax considerations for private equity investors and transactions in your jurisdiction?

These include:

(a) an analysis of the nature of the investment assets and vehicle;

(b) applicable taxes at the time of the investment and on exit (including corporate and related taxes, stamp duty on transaction documents, and capital gains tax on exit);

(c) applicable taxes on income derived from the investment (e.g. withholding tax on dividends, interest on loan and management fees, etc.);

(d) applicable transfer pricing regulations (for shareholder loans/related party transactions) and thin capitalisation rules (impacting on the debt to equity ratio) relating to the funding of the target company; and

(e) tax incentives (e.g. 2.5% deduction on withholding tax on dividends, interest and royalties for investors resident in countries with which Nigeria has a double tax agreement ("DTA")), and exemptions (e.g. on foreign loans up to 100% depending on the tenor of the loan, including moratorium and grace period).

9.2 What are the key tax considerations for management teams that are selling and/or rolling-over part of their investment into a new acquisition structure?

Gains realised from a disposal shares in Nigeria are exempted from capital gains tax under section 31(1) of the Capital Gains Tax Act, even if the proceeds are used to acquire shares in another entity. Asset disposals are, however, subject to CGT except where investors acquire new business assets using sale proceeds from the sale of other assets. Related entities may also avoid CGT subject to the clearance and direction of the Federal Inland Revenue Service (where assets are transferred at their tax written down value).

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9.3 What are the key tax-efficient arrangements that are typically considered by management teams in private equity portfolio companies (such as growth shares, deferred / vesting arrangements, "entrepreneurs' relief" or "employee shareholder status" in the UK)?

Management teams invest through vehicles registered in DTAs to: reduce withholding tax on dividends; grant tenured loans of up to seven years and above to achieve 0% withholding tax on interest; and structure exit strategies through share disposal sales to benefit from CGT exemption on gains. Investments in pioneer status and gas utilisation entities, among others, confer tax advantages, e.g. exemption from corporate and withholding tax on dividends for up to five years.

9.4 Have there been any significant changes in tax legislation or the practices of tax authorities (including in relation to tax rulings or clearances) impacting private equity investors, management teams or private equity transactions and are any anticipated?

There have not been any significant changes of which we are currently aware.

10 Legal and Regulatory Matters

10.1 What are the key laws and regulations affecting private equity investors and transactions in your jurisdiction, including those that impact private equity transactions differently to other types of transaction?

PE investors and transactions are regulated primarily by the Investments and Securities Act 2007, the rules and regulations made by the Securities and Exchange Commission, and various generic investment, corporate, partnership and tax laws. Corporate targets are regulated by the provisions of the Companies and Allied Matters Act Chapter C20, LFN 2004 and, where listed, by the rules of the Nigerian Stock Exchange.

10.2 Have there been any significant legal and/or regulatory developments over recent years impacting private equity investors or transactions and are any anticipated?

Recent developments include: the SEC's imposition of mandatory registration and reporting requirements for funds with commitments of NGN 1 million and above; and the revised Pensions Commission ("PENCOM") Regulations permitting the investment of up to 5% of pension funds in PE funds that are SEC-registered and managed by SEC-licensed managers, subject to restrictions (e.g. managers subscribing between 1% and 3%+ of the fund).

10.3 How detailed is the legal due diligence (including compliance) conducted by private equity investors prior to any acquisitions (e.g. typical timeframes, materiality, scope etc.)? Do private equity investors engage outside counsel / professionals to conduct all legal / compliance due diligence or is any conducted in-house?

The scope of the inquiry, materiality and timelines for due diligence are subject to: negotiation between the parties; the availability of information and documents; feedback received from, and the record keeping practices of, the target; the responsiveness of regulators to compliance verification enquiries; and the experience and competence of the review teams, among other factors. The typical timeframe for a detailed review can be four to six weeks subject to such factors. Investors usually engage external counsel to conduct legal due diligence and to liaise with their in-house legal and transaction teams.

10.4 Has anti-bribery or anti-corruption legislation impacted private equity investment and/or investors' approach to private equity transactions (e.g. diligence, contractual protection, etc.)?

Yes, especially where such investors are caught by applicable anti-bribery and anti-corruption laws such as the UK Bribery Act 2010 and the U.S. Foreign Corrupt Practices Act.

10.5 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies (including due to breach of applicable laws by the portfolio companies); and (ii) one portfolio company may be held liable for the liabilities of another portfolio company?

Please see question 3.5.

11 Other Useful Facts

11.1 What other factors commonly give rise to concerns for private equity investors in your jurisdiction or should such investors otherwise be aware of in considering an investment in your jurisdiction?

Other factors that should be taken into account include Forex availability challenges, negotiating ESG arrangements and the impact of regulatory bureaucracy on transaction timing.

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