

NIGERIAN LENDING:

PERFECTION. BANKS AND
BORROWERS KEEP MAKING
THESE 5 MISTAKES

*An unsecured security interest is not a secure interest.
The mistakes that make this possible are listed below.*

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Background

There is no loan facility stronger than the security that underlies it. Any bank that doesn't properly secure its assets is not a secured creditor. And a borrower that does not understand its perfection obligations might find that its representations to its lender were false. These are five security perfection mistakes we see often and every party involved in a Nigerian credit transaction needs to know about them.

01. Unregistered Charges at the CAC

Charges by a Nigerian company over its assets must be registered with the CAC within 90 days under the Companies and Allied Matters Act 2020. An unregistered charge is void against a liquidator, administrator, or any other creditor, so the secured lender is essentially on par with all other unsecured creditors in an insolvency or enforcement situation.

We know this is a requirement, but it is often not met, especially in transactions where several parties move very quickly, where the borrower's lawyers are doing all the perfecting without the lender being involved in the process, or where post-closing perfection undertakings are given but never enforced.

A documented perfection checklist, under lender counsel supervision, with CAC registration evidence gathered and verified before drawdown - that's the solution. The principle is simple: There is no registration and there is no drawdown.

02. Missed or Incorrect Stamp Duty

Loan agreements, debentures and mortgages in Nigeria are subject to Stamp Duty. In Nigerian courts, an unstamped or inadequately stamped document is not admissible as evidence. The document does not disappear; the parties remain obligated to each other. It removes the possibility that those obligations can be enforced in courts.

In many cases, the stamp duty position on complex instruments such as debentures with multiple asset classes, syndicated facilities with multiple lenders, and cross-border security packages is not clear, and Nigerian stamp duty law has not kept up with the pace of modern lending transactions. Lenders and their advisers should not rely on precedent or think that what was accepted in a previous transaction will be accepted here. Specific advice on the position of each instrument before execution is the standard.

The most common defects are:

- It fails to mention the asset classes that bear the primary security value.
- Use of ambiguous descriptions of charged assets.
- Not including important provisions for the crystallization of the floating charge into a fixed charge.

Debenture provisions that violate the company's articles of association are unlikely to be fit for purpose. That goes for FinTechs, technology companies and businesses whose assets are intangible.

03. DEFECTIVE DEBENTURES

Debentures with defects create both fixed and floating charges on a company's assets. But the scope and enforceability of those charges depends entirely on how the debenture is written - and badly written debentures are very common in Nigerian lending transactions.

04. Mortgages Over Land

Under the Land Use Act, to obtain a legal mortgage over land in Nigeria, the Governor of the state must give his consent. Any mortgage written or executed without Governor's Consent is null and void.

It takes time to get Governor's Consent. But in Lagos and other high-volume states the wait is often months or even longer. If the transaction is moving quickly, there is commercial pressure to obtain Governor's Consent before the drawdown can be completed. For the period in which consent has not been obtained, lenders taking this approach make an unsecured loan for that period - regardless of what security documentation says.

You could get a specific legal opinion on whether the security is enforceable absent consent and then price the residual risk accordingly. But lenders should not just hope that nothing goes wrong while seeking consent.

05. POST-CLOSING PERFECTION FAILURES

Many Nigerian lending transactions close based on commitments to perfect security post-closing. In return for this, the borrower shall register the charge at the CAC,

obtain the Governor's Consent, pay stamp duty, and deliver the perfected security documents to the lender within a certain period.

Of course, they are rarely enforced. And because the borrower is paying now and the relationship is good, the lender does not chase those outstanding perfection items. On the closing checklist, nothing is closed until all items are checked off. The gaps are most obvious months or years later when the borrower defaults and the lender sues for its security.

Solution: A rigorous post-closing management process, under the direction of the lender's legal counsel, independent of the relationship team, with triggers for post-closing obligations that are outstanding beyond the agreed timeframes.

An unsecured security interest is not a secure interest. This is just paper wrapped in an unsecured manner. The cost of getting security perfection right is tiny compared to the cost of discovering that the security you thought you had does not exist.

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