The extant petroleum laws in Nigeria charge the Minister for Petroleum with the responsibility of issuing licences and leases for the exploration and production of petroleum. Recent debate has however focused on the assignment of oil and gas licenses and leases by holders of same to third parties and whether such assignments require ministerial consent for them to validly pass from the assignor to the assignee.

The provisions of the Petroleum Act Cap P10, LFN 2004 are unambiguous in their affirmation that Ministerial consent is indeed required for the assignment of oil and gas licences and leases in Nigeria. Specifically, paragraph 14 of the First Schedule to the Petroleum Act provides “without the prior consent of the Minister, the holder of an Oil Prospecting Licence or an Oil Mining Lease shall not assign his Licence or Lease, or any right, power or interest therein or thereunder”. This provision is further reinforced by Regulation 4(a) and (b) of the Petroleum (Drilling and Production) Regulations which are made pursuant to the Petroleum Act. The regulations provide that:

“(a) An application for the assignment of an oil prospecting licence or oil mining lease (or of an interest in the same) shall be made to the Minister in writing and accompanied by the prescribed fees and the applicant shall furnish in respect of the assignee all such information as is required to be furnished in the case of an applicant for a new Licence or Lease”.

“(b) Application for the assignment or takeover of an oil prospecting licence or oil mining lease (or of an interest in the same) shall be made to the Minister in writing and accompanied by the prescribed fees at the discretion of the Minister; and the applicant shall furnish in respect of the assignment or take over all such information as is required to be furnished in the case of an applicant for a new licence or lease”.

Whilst the above provisions clearly support the notion that Ministerial consent is required for the assignment of a Licence or Lease or the interests therein, they fall short of providing clarity as to the following:

a. what amounts to an assignment as contemplated by the Act;

b. when should ministerial consent be sought- before the commencement of the assignment process, at the commencement of the assignment process or upon the conclusion of the assignment transaction; and

c. whose responsibility is it to apply for Ministerial consent in the event of a proposed assignment – The Assignor or Assignee?

This lack of clarity has given rise to different interpretations as to what amounts to an assignment which requires ministerial consent. In 1997, Perenco, a French energy company, sought to extend its oil exploration and production operations in West Africa to Nigeria by purchasing Ashland Oil Company’s oil’s assets in Nigeria. The transaction between Ashland and Perenco was structured as a sale of stock in the two Ashland Nigerian subsidiaries holding Ashland’s interests under Production Sharing Contracts (PSC) with the Federal Government of Nigeria, as opposed to a sale or assignment of the PSC’s themselves so as to avoid the express requirement under the PSC that formal consent to any sale or assignment of the PSCs must be obtained from the NNPC. Perenco
was advised that ministerial consent was not required as the transaction was for the sale of stock as opposed to the underlying assets thus, the only approval required was that of the Nigerian Stock Exchange and that was not an approval with which the Minister for Petroleum was legally vested. The parties went ahead and executed the Sales and Purchase Agreement for the sale of the stock in the two Ashland Nigerian entities without procuring ministerial consent and upon announcement of same, the Minister revoked Ashland’s two PSCs thereby nullifying the contract for the purchase of the stock.

The Minister’s reasoning for the revocation was that his consent was not procured for the assignment of the interests as required by the provisions of the PSCs and the extant petroleum laws. His decision went unchallenged in the courts and not only re-enforced the fact that ministerial consent is required for transfer of shares in a company holding an interest in an oil and gas licence or lease but also the fact that ministerial consent is required for the transfer of contractual interests under a contractual arrangement such as a PSC.

More recently, in a similar transaction to that above, Moni Pulo Limited (Moni Pulo) protested the transfer of shares earlier held by Petro SA in Brass Exploration Unlimited (Brass) to CAMAC Energy Resources Limited (CAMAC) thereby indirectly transferring its 40% interests in the Lease held jointly with Moni Pulo to CAMAC.

Whilst in the earlier case, both Perenco and Ashland did not seek judicial interpretation as to whether the sale of stock in a company holding an interest in a Licence or Lease amounted to an assignment, Moni Pulo sought the court’s intervention in PetroSA’s transfer of its stock in Brass to CAMAC, stating that same amounted to an assignment which required Ministerial Consent, the lack of which, made the purported transfer by PetroSA illegal.

The Federal High Court agreed with Moni Pulo’s contention stating inter alia:

“The words used in paragraph 14 of the First Schedule to the Petroleum Act and Paragraph 4 of the Petroleum (Drilling and Production) Regulations are simple and clear that no transfer, assignment, sale and/or takeover of an oil mining lease or any right, power or any interest therein or thereunder can be validly effected without the consent of the Minister of Petroleum Resources...”

The court defined the meaning of the word takeover as follows: “... it clearly refers to a situation where another person or company gains control of the affairs of a company, either by the acquisition of the controlling shares or other interest in the company; the incidence of which is to make the company being taken over a subsidiary of the company that is taking over”. It further held that the sale, transfer and/or conveyance of the entire (100%) share capital of Brass by PetroSA to Camac remains fluid until concretized by the approval of the Minister of Petroleum Resources.

Though the parties in the Moni Pulo case have each appealed the unfavourable aspects of the judgement, this decision by the courts remains a landmark decision on the issue of the requirement of ministerial for the assignment of interests in oil and gas assets under Nigerian petroleum laws.

In a bid to further re-enforce the judgement of the Federal High Court, and ensure greater clarity on the issue, the Department of Petroleum Resources recently issued a guideline which now outlines the procedure for obtaining the consent of the Minister for Petroleum for the assignment of any rights, power or interests in an Oil Prospecting License (OPL), Oil Mining Lease (OML), Marginal Field (MF) and Oil & Gas Pipelines License (OGPL).

The salient points of the guideline are as follows:

1. The meaning of “interest in a license or a lease” has been expanded to include “any arrangement such as Production Sharing Contract (PSC), Production Sharing Agreement (PSA), farm-in or farm-out agreement, sale, purchase, mortgage or other business arrangement”. This is a marked difference from the provisions of the Petroleum Act which did not specify what qualified as an ‘interest’ in a licence or lease. The requirement of Ministerial consent for the transfer of contractual rights under petroleum arrangements such as PSC’s and Production Sharing Arrangements (PSA) has now been expressly affirmed. This affirmation seems to be in consonance with the Minister’s reasoning in the Ashland/Perenco matter.

2. A definition has been provided for an assignment to mean “the transfer of a license, lease or marginal field or an interest, power or right therein by any company with equity, participating, contractual or working interest in the said OPL, OML or marginal field in Nigeria, through merger, acquisition, take-over, divestment or any such transaction that may alter the ownership, equity, rights or interest of the assigning company, not minding the nature of upstream arrangement that the assigning company may be involved in, including but not limited to Joint Venture (JV), Production Sharing Contract (PSC), Service Contract, Sole Risk (SR) or Marginal Fields Operation”. The definition provided herein aligns with the decision in the Moni Pulo case.

3. The Guideline goes further to give instances of assignment to include- transfer by shares, private or public listing of a part or the whole shares, mergers, acquisition, re-organization, devolution of shares by operation of law. This amplifies the meaning of
assignment to include the public offer of shares. This amplification comes with its own attendant issues such as the lack of a threshold for the offer and subsequent transfer of shares in a publicly quoted company that would trigger the requirement of ministerial consent.

In addition to the above, the Guideline also outlines the procedure and steps now required to affect a transfer of an interest in an oil and gas lease or licence. These are outlined as follows:

a. The holder of a Licence or Lease or a MF who desires to assign an interest in the licence, lease or marginal field shall notify the Department of Petroleum Resources (DPR) prior to the commencement of the transaction and shall not proceed with any process incidental to the transaction until so authorised by DPR.

b. The responsibility to secure the consent of the Minister is that of the assignor and the assignor shall not make any press release, advertisement or publication pertaining to the assignment without the prior approval of DPR.

c. In the notice to DPR, the Assignor shall state the reason for the proposed assignment, the method for the conduct of the assignment, and the possible technical and economic value such assignment would bring to the operation of the lease.

d. The notice should also state the process of assignment- open bidding process, selective tendering or negotiated transfer- prior to the commencement of the process.

e. After the technical evaluation of candidates, the assignor shall submit to DPR a list of qualified candidates to enable DPR carry out preliminary due diligence to ensure that any such company that may not otherwise be acceptable to the Government of the Federal Republic of Nigeria is not allowed to proceed to the commercial stage of the transaction. The assignor will bear the cost of the due diligence. Failure of the assignor to submit the list of qualified candidates renders the assignment ineligible for the consent of the minister.

f. The assignor shall not impose Crude Sale/Purchase Agreement as a condition for the consummation of the transaction, and any other conditions that will serve as an impediment to the takeover and/or operation of the asset in a business-like manner or Domestic Gas Supply Obligations (DGSO) volumes on the assignee without DPR’s authorization.

g. An assignor in a Joint Venture arrangement involving the Nigerian National Petroleum Corporation (NNPC) must accompany the application with a letter of waiver of right of pre-emption by the non-assigning parties in the Joint Venture as provided for in the Joint Operating Agreement.

h. An assignor in a Production Sharing Contract (PSC) arrangement as Contractor or a member of the Contractor Party to the NNPC as the Concessionaire of an asset, shall accompany the application with a letter from the NNPC acceding to the assignment as may be provided for in the Production Sharing Contract Agreement and if the PSC contains a pre-emption right, a letter from the other members of the Contractor Party, waiving their right of pre-emption.

i. An assignor who is the operator in an asset in which the NNPC is either a Joint Venture partner or Concessionaire, shall not purport to transfer the right of operatorship to the assignee and shall therefore not make the right of operatorship a part of the commercial consideration in the transaction.

j. Where the assignment involves a sole risk asset, not more than 40% of the overall interest in the asset can be assigned to a foreign entity except that in the case of marginal field, where the total interest assignable to a foreign entity is pegged at 49% of the total overall interest in the asset.

k. Where the parent of a company holding interest in an asset in Nigeria is taken over by or merged with another company overseas, the veil of incorporation shall be lifted in such circumstance to determine if such transaction constitutes an assignment under the Petroleum Act.

l. Pursuant to Nigerian Oil and Gas Industry Content Development Act, 2010, Indigenous companies shall be given first consideration in any assignment and this provision shall be taken into consideration by the DPR in granting
the approval for the commencement of any divestment of interest in asset in the country.

m. Upon meeting all the required conditions set out in this Guideline and a transaction is consummated leading to the execution of a Sales Purchase Agreement (SPA) between the assignor and assignee, all proceeds from the interest being transferred must from the date of the SPA be paid into an Escrow Account to be opened by the assignor pending the procurement of the consent of the Minister on the transfer.

Majority of these procedures and steps have hitherto been applicable to the assignment of interests in licences and leases in the petroleum industry. However a couple of these procedures and steps require consideration hereunder. The first issue is the seeming confusion created by the guidelines with respect to first consideration being given to indigenous companies in any assignment of interests or rights in a lease or a licence. The Nigerian Content Development Act does not provide for the assignment of rights and interests in oil and gas assets but rather provides for first consideration being given to Nigerian Independent Operators in the award of oil blocks and oilfield licences.

Secondly the guideline introduces a new lower threshold of interests assignable to foreign entities under the marginal field programme. The threshold has been reduced from 49% to 40%.

In conclusion, the introduction of the guidelines has gone to great lengths in clarifying hitherto grey areas. This would ensure the expeditious conclusion of assignment of interests in leases and licences particularly with the ongoing divestment of petroleum assets by the International oil companies (IOC’s).