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LEGAL PRACTITIONERS

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**NIALS 22<sup>nd</sup> WORKSHOP IN DRAFTING COMMERCIAL  
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**Telecommunications Agreements**

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## **Introduction**

- The term ‘telecommunications’ is gradually disappearing and being replaced by Communications. Communications embraces all forms of infrastructure, services and equipment supplied for the transmission of voice, data and information over telecommunications, Information technology and broadcasting networks.
- In today’s business environment, telecommunications is an essential component of any technology infrastructure. Lawyers involved in communications practice must study and understand the technology and language of communications not just the law thereof.



## **Types of Telecommunications Agreements**

- Equipment Purchase
- Software
- Service Provision
- Credit Facilities
- Outsourcing of business operations



## **Equipment Purchase Agreements**

- Equipment purchase and software license agreements are common to the three communications industries.
  
- In regard to equipment purchase:
  - A tripod makes up the negotiating team – technical, legal and financial. As much as possible, the lawyer must be very comfortable with the 3 arms of the negotiation team.
  - Always wise to visit and see where the system works.



## **Types of Telecommunications Agreements**

- Features of Equipment Purchase Agreements:
  - Obsolescence of equipment – software upgrades
  - Training, maintenance and support – in-country and 24-hour support
  - Spare parts – during warranty period and after
  - Warranty terms
  - Acceptance of equipment – substantial compliance; test processes, SOW; test must meet Nigerian standards



## **Equipment Purchase Agreements Contd.**

- Features – fundamental and routine
- Damages for loss of income and time – license term
- Warranty that equipment would be good for purpose for which it was intended – performance bond
- Must meet Nigerian standards – NCC and NBC specifications
- Protection from copyright claims by third parties – global or regional protection?



## Software Agreements

- Software license agreement may sometimes be a part of the equipment agreement but in some other instances, it is distinct and separate e.g. billing software.
- Negotiation shares common characteristics with equipment purchase
- Crucial issues to consider include
  - Software upgrades
  - Crucial features – international calls
  - Most if not all the issues applicable to equipment purchase
  - Tenure of licence – could be a critical issue if equipment is to be passed on to third party



## **Interconnection Agreements**

- Interconnection involves the physical means of linking two different networks for the exchange of traffic, so that users on one network may communicate with users on the other. In the Nigerian circumstance, it particularly allows the Long Distance Carriers to carry the national and international long-distance traffic of the private network operators.
- Formerly entered into between NITEL (as regulator) and the other operators. With the establishment of an independent regulator, agreements are concluded between operators.
- Necessity for competing network and service providers to access each other facilities, it is to be expected that numerous agreements will be entered into – a prominent example interconnection agreements



## Interconnection Agreements Contd

- In many countries like Nigeria, Interconnection is left in the first instance to commercial negotiation between operators concerned. Where no commercial agreement is possible, the regulator steps in. There is considerable scope for variation in this, both in time that is allowed to elapse before the regulator becomes involved and in the actions taken thereafter.
- Interconnectivity is compulsory under NCA and cannot be suspended without NCC prior approval. [Section 100]
- Interconnection agreements are regulated by Sections 96 – 100 of the Nigerian Communications Act 2003. NCC is empowered to intervene and make binding rulings at its instance or both parties to the agreement –

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## **Interconnection Agreements Contd**

- Where the agreement is inconsistent with the provisions of the NCA and its subsidiary legislations;
  - Where parties fail to reach a consensus between the parties on specific issues or delay in reaching such a consensus;
  - Where NCC intervenes in public interest, without invitation from either parties
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- Interconnection Agreements are also registered with the NCC
  - There are subsisting Interconnection Agreements between various service providers.



## Interconnection Agreements Contd

- Crucial commercial and technical issues in interconnectivity include
  - Sharing of tariffs
  - Billing arrangement – must avoid conflicts
  - Points of Interconnection
  - Disconnection, Discontinuance, Suspension of service[S.100 NCA creates significant problems and issues now given massive indebtedness by some service providers.]
  - Dispute resolution processes
  - Third party interconnectivity
  - Liabilities of parties
  - E1 channels – availability
  - Co-location of equipment
  - Entry into each party's premises
  - Forecasting of E1 requirements



## Interconnection Agreements Contd

- Billing arrangements and reconciliation of accounts and conflicts
- Degradation of network or services
- Service Levels – competition issues (must provide as much quality as carrying own traffic)
- Dispute resolution processes
- Third party interconnectivity
- Liabilities of parties



## **Credit facilities Agreements**

- There has been considerable upsurge lately in credit advancement to telecommunications investors and companies and so, there is the need for a thorough understanding of the issues thereof.
- Terms are generally not different from other credit facilities agreements e.g. interest rates, repayment tenure, etc.
- However, considering the peculiarities of communications business – broadcasting, IT and telecommunications – the negotiation and drafting of the credit facilities agreements thereof must take account of certain peculiarities.



## Credit facilities Agreements Contd

- Crucial issues to consider however include the following:
  - Recovery in event of default where there is a charge on equipment
  - Obsolescence of equipment is a major issue
  - Very specialized equipment and not easily transferable
  - Hardly have second-hand value
  - Problems are the same even if Bank decides to strip and sell
  - License term and possibility of revocation
  - What are the license terms and exactly what service is the applicant licensed to perform – due diligence on legal requirements e.g. on international access
  - Technical specifications of equipment must meet NCC and/or NBC standards



## Service Provision Agreements

- Definition and pervasive use as far as service provision is concerned.
- Considerations when representing service providers
  - Possibility of failure in service provisioning and being sued for it – radio systems
  - Responsibility for payment of bills whether or not used by subscriber
  - Legal use of system/equipment
  - Consumer protection
  - Disconnection/discontinuance of service consequent upon non-payment of bills
  - Processes for payment; maintenance of minimum credit balance



## **Service Provision Agreements Contd**

- Most End Users in Nigeria are unaware that they are subject to pre-set terms and conditions when they subscribe to certain telecommunications services. (e.g mobile services – check the leaflets in your SIM-packs) They are not required to sign these pre-set agreements, but are bound by the terms and conditions by the act of buying the service.
- In other countries, the Law prescribes Standard Form of Agreements (SFOA) between Service Providers and End Users.



## **Standard Clauses in Telecommunications Agreements**

- Term of Agreement – duration
- Products, Services (service description) and Standards
- Costs and Charges – [complex charging mechanisms]
- Title – Scope or restrictions of transferred title
- Software
- Modifications
- Site Environment and Facilities
- Warranties/Limitation of Liability
- Indemnities
- Products Maintenance
- Force Majeure
- Termination
- Waiver



## **Clauses in Telecommunications Agreements Contd.**

- Assignment
- Notices
- Agreement
- Headings
- Severability
- Law
- Schedules



## Conclusion

- Drafting generally requires art and talent.
- There are several other Communications contracts which have common characteristics with similar general commercial contracts, e.g.
  - Joint Venture Agreements;
  - Management Agreements; and
  - Site acquisitions for infrastructure development
- In all of these and other cases, the Solicitor must understand the peculiarities of the specialized field and adapt the agreement format to fit these.
- Knowledge is key always.



**Thank you for your attention**