

DRAFTING COMMERCIAL AGREEMENTS AND BANKING DOCUMENTATION

Telecommunications Contracts

General Comments on Communications

- Communications basically means the convergence of
 - Telecommunications
 - Information Technology; and
 - Broadcasting
- The public face of communications in Nigeria is telecommunications because of telephony
- Internet is enhancing information technology appreciation but the convergence with broadcasting is yet to be achieved in Nigeria.
- Communications attorneys must study and understand the technology and language of communications not just the law thereof.

Common Agreements

- There are at least 2 common contracts to the 3 communications arm and these are equipment purchase and software license agreements.
- 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.
 - Equipment purchase for the 3 communications arms share some common characteristics:

Equipment Purchase Agreement

- 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 e.g. fax test
- 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 and NITEL [SS7 for example] 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

Interconnectivity Agreement

- Interconnectivity facilitates the connection of the systems of 2 telephone companies to enable their respective subscribers access each other.
- In the Nigerian circumstance, it particularly allows NITEL carry the trunk and long-distance calls of the private network operators.
- Used to be between NITEL and the other Operators, but now there are Agreements between Operators, without NITEL as a party, particularly with the advent of GSM service.
- Crucial commercial and technical issues in interconnectivity include
 - Sharing of tariffs
 - Billing arrangement – must avoid conflicts
 - Points of interconnectivity
 - Disconnection/discontinuance/suspension of service
 - Dispute resolution processes – NCC Decree
 - Third party interconnectivity
 - Liabilities of parties
 - E1 channels – availability
 - Co-location of equipment
 - Entry into each party's premises by the other

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.
- 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 NITEL, NCC and/or NBC standards

Service provision agreements

- Definition and pervasive use as far as service provision is concerned.
- Consideration when representing service provider
 - 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 – NCC Decree
 - Disconnection/discontinuance of service consequent upon non-payment of bills
 - Processes for payment; maintenance of minimum credit balance

NITEL Commercial Agreements

- These are Agreements between NITEL and some other service providers for provision of services which facilitate the commercial provision of service by the service providers.
- There are 3 broad and immediate categories

- Payphone companies
- Value-added service providers
- V-Sat services
- These Agreements are a cross between Interconnectivity Subscriber Agreements and they share the characteristics of these 2 genre of Agreements.

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 specialised field and adapt the agreement format to fit these.
- Knowledge is key always.