

Understanding Clauses in Specific Contracts

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Introduction

I would like to thank Marcus-Okoko & Co for inviting me to share my thoughts with you on this topic.

Law of Contract is taught in the University but no student is exposed to any such contract other than knowing the elements/principles of a contract - intention to enter into legal relationship, offer, acceptance, consideration, mistake, vitiating elements, among others.

A contract is an agreement but not every agreement is a contract. Contracts are legally enforceable agreement that represent a vehicle for planned exchanges.

These exchanges are regulated by the principles of the law of contract. To say that an agreement is legally enforceable is merely a shorthand way of saying that it is an agreement to which the law gives its sanction, as opposed to a mere social arrangement, which exists outside the framework of the law and which is binding only in the sense of moral obligation or social convention.

Liability for breach of contract is therefore failure to keep to the terms of such an agreement.

Contractual liability is different from tortious liability though the same factual situation may give rise to both contractual and tortious liability. Contractual obligations are negotiated by the parties and then enforced by law because the performance of contracts is vital to the functioning of society. Tortious duties are imposed by law (without any need for agreement by the parties) because society demands certain standards of conduct.¹

Basic Structure of a Contract

A typical structure of a contract is as follows:

- ✓ The type of contract - concession, lease, agreement, share sale agreement, etc
- ✓ Commencement/Execution Date
- ✓ Parties - Successors and assigns
- ✓ Recitals - Recitals
- ✓ Linking Words eg IT IS AGREED AS FOLLOWS
- ✓ Operative Provisions starting with the definitions followed by commercial provisions and boiler plates.
 - Definitions - Interpretation, Completion, Affiliates, Intellectual property, sub-contracting, Commencement date
 - Main Commercial Provisions - Acknowledgment, Best and reasonable endeavor, Commencement Date, Conditions Precedent or Subsequent, Consent, Currency, Commercial Obligations
 - Secondary Commercial Provisions - Cumulative remedies, Disclaimers, Force majeure, Indemnities, Warranties, etc

¹ See generally Robert Merkin & Severine Saintier, *Poole's Textbook on Contract Law* (14 edn, Oxford University Press, 2019)

- Boilerplate provisions - Agency and Partnership, Force majeure, Indemnification, Amendments, Announcements, Dispute Resolution, Assignment and Novation, Entire Agreement, Joint and Several liability, etc (this generally overlaps with secondary commercial provisions).

Note: Before adopting any boilerplate clause you must understand the following:

- ✓ Purpose of the clause in the contract
 - ✓ Drafting issues
 - ✓ Location of such clauses
 - ✓ Linkage and use²
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- ✓ Schedules - can be before or after execution but must be stated clearly to be part of the contract.
 - ✓ Execution

Understanding Clauses in Specific Contracts

There are several types of contracts all having unique features and specific clauses. They include:

- a) Share Sale & Purchase Contracts
- b) Power Purchase Agreement
- c) Gas Sale & Purchase Agreement
- d) Concession Agreement
- e) Non-Disclosure & Confidentiality Agreement
- f) Escrow Agreement
- g) Service Level Agreement

² Mark Anderson & Victor Warner, *A-Z Guide to Boilerplate and Commercial Clauses*, (3rd edn, Bloombury Professional Ltd, 2012) 9

- h) Asset Sale Agreement
- i) Memorandum of Understanding
- j) Deed of Release
- k) Disclosure Letter
- l) Side Letter
- m) Shareholders' Agreement

We will now consider them in some detail.

a) Share Purchase & Sale Contracts

As the name implies, this is a contract for the sale and purchase of shares. It is a vehicle used for the transfer of shares. Is such a contract a total sale or conditional sale? It is a conditional sale because there is usually a Post Acquisition Plan (PAP) that must be complied with. There are also remedies provided in the contract for any breach of the conditions and warranties. This is in addition to other legal remedies. To ensure that this happens, include a 'Cumulative Remedies Clause'

At the moment, the Bureau of Public Enterprises (BPE) has done more of this than any other agency in Nigeria. The specific clauses include:

PURCHASE CONSIDERATION

The purchase consideration for the Shares is the sum of NGN ₦[]. The purchase consideration shall be paid by wire transfer to the following account:

[]% of the purchase consideration shall be paid into a designated **escrow/above** account 5 (five) days after the completion of the confirmatory due diligence by the Purchaser. The balance shall be

paid within working days after completion of the confirmatory due diligence by the Purchaser

In the event that the full purchase consideration is not paid as provided in xxxx (state the clause), the Seller shall be entitled to the remedies stipulated in Clause xxx of this Agreement.

COMPLETION

Completion shall take place at the offices of Seller immediately following the Full Payment of the purchase consideration and transfer of shares to the purchaser.

Subject to the Purchaser's compliance with its obligations in clause xxxx on Completion, the Seller shall:

- (A) Deliver or procure the delivery to the Purchaser of:
- a) Instruments of transfer duly executed by Seller in favour of the Purchaser together with the related share certificates;
 - b) A waiver in the agreed terms by the shareholders of Seller of any pre-emption or other rights which they have in respect of shares in Seller
 - c) The incorporation documents, seals and all record books of the Seller.
- (B) Procure that a board meeting of the Company/Seller is held, at which, conditional on Completion occurring there shall be:
- a) Passed a resolution to approve the transfers of the Shares and to register in the register of members of company the Purchaser as the holder of the Shares;
 - b) Removal of directors and the company secretary.

©Both Parties agree that until the Completion Date, Seller shall carry on its business in the ordinary and proper course and on the basis that the business is to continue; and shall not without the prior written approval of the Purchaser:

- i. Enter into any contracts, arrangements or commitments other than of a bona fide commercial nature and in the ordinary course of business
- ii. Incur any liability or obligation nor enter into any contract obligation or commitment except in the ordinary course of business;
- iii. Make any payments except payments of a routine nature;
- iv. Alter the terms of employment of any of its employees;
- v. Alter the terms of trading with any suppliers or customers;
- vi. Cancel or alter any of its existing insurance cover nor do anything which will affect its validity;
- vii. Issue any shares or change its share capital

POST COMPLETION MATTERS

Immediately after completion, the Seller shall call a meeting of its directors at which the following shall be resolved:

- i. That transfers of the Sale Shares made under this agreement are approved for immediate transfer
- ii. The appointment of additional directors as nominated by the Purchaser

- iii. The appointment of a new secretary and auditor as nominated by the Purchaser
- iv. The alteration of all bank mandates in such manner as directed by the Purchaser
- v. The Seller shall produce all tax clearance certificates and submit same to The Purchaser

INDEMNITY/INDEMNIFICATION

For a period of 30 days hereafter, Seller shall indemnify and hold the Purchaser free from and against any and all demands, claims, losses, costs, suits, or causes of action (including, but not limited to, any judgments, losses, liabilities, expenses, interest, legal fees, costs of suit, and damages, whether in law or equity, whether general or special) that may be raised by third parties (including creditors of the company) against the Purchaser relating to causes of actions **arising before** the Completion Date and which arise from the breach by the Company of any environmental law, convention, protocol or regulation with respect to or affecting any of the facilities or any other property and assets of the Company PROVIDED that the total liabilities shall not exceed ₦..... (Remember 'de minimis rule - you can provide for a minimum sum that can be claimed)

GOVERNING LAW

This Agreement shall be governed by and construed in all respects in accordance with Nigerian Law. (Nowadays you can provide for a law governing the substantive contract and another covering the arbitration clause because of the principle of separability - See **P & ID Arbitration**).

DISPUTE RESOLUTION

Any dispute or claim between the Parties arising out of or relating to this Agreement or the breach, termination or invalidity of this Agreement (hereinafter a "dispute") shall be attempted to be settled by a meeting in person of at least one senior executive officer of each Party. If such meeting does not resolve a dispute within 15 days of the notifying Party's calling of the meeting, either Party may refer the matter to mediation/conciliation in accordance with the provisions of the Arbitration and Conciliation Act, 2004. In the event that the dispute is not resolved within 30 days of the reference, the matter shall be referred to binding arbitration.

Arbitration shall be conducted under the Arbitration Rules, Schedule 1, Arbitration and Conciliation Act, 2004. An arbitral tribunal of three arbitrators shall conduct the arbitration; one each appointed by each party and the third appointed by both arbitrators as a presiding arbitration. If any Party shall fail to appoint an arbitrator, such arbitrator shall be appointed by the Appointing Authority who shall be the Chairman for the time being of the Chartered Institute of Arbitrators, UK, Nigeria Branch.

The seat of arbitration is Abuja, Nigeria (note: this is different from venue for hearing)

The Arbitrators' award shall be final and binding on the Parties.

The Parties shall share evenly the cost of the arbitration except for their own respective individual costs, which they shall bear individually.

The language of arbitration shall be in English.

b) Power Purchase Agreement (PPA)³

A PPA is the central contract for an Independent Power Producer (IPP) and is used for power generation projects, especially in emerging markets. It sets out the key issues in the contract. It is the agreement that governs the sale and purchase of power. It is a contract between two parties, one who produces or generates power for sale and one who seeks to purchase power. The contract is sometimes referred to as an Offtake Agreement

Electricity may be generated by renewable resources (such as wind, solar, hydroelectric and geothermal resources) or from non-renewal resources (such as petroleum, natural gas, coal and nuclear)

A typical clause is that of **Force Majeure (note: different from frustration - one contractual and other by implication of law)**. It is important to have a clear provision dealing with force majeure in a PPA, which will set out the meaning and consequences of force majeure. It may also specifically describe what is not covered within the scope of force majeure in the PPA. The clause should have the following defining features:

- The event has material adverse impact on a party's ability to discharge contractual obligations
- The event is not the fault of the party seeking relief and is beyond the reasonable control of the party
- The event could not have been reasonably foreseen by the party, and reasonable measures could not have been

³ Understanding Power Purchase Agreements available at https://cldp.doc.gov/sites/default/files/Understanding_Power_Purchase_Agreements.pdf accessed 1 August, 2021

implemented by a diligent party to avoid it or mitigate its impact.

Force majeure can be of three types - local political force majeure, foreign political force majeure and natural force majeure.

The parties should state the reliefs/remedies available in the circumstances eg suspension of certain contractual obligations or extension of time.

A PPA will normally have provisions on limitation of liability, indemnification, **notice and cure periods, step-in rights, and choice of law.**

c) Gas Sale & Purchase Agreement

This is used for the sale and purchase of gas (Recall the P & ID Dispute. Consider the sale of ALSCON). The clauses include:

SCOPE OF AGREEMENT

Subject to the provisions of this Agreement, Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase take and/or pay for the Natural Gas in the quantities, at the prices and on the terms and conditions herein specified.

TERM

The Term of this Agreement shall begin on the **Effective Date/Commencement Date/Execution Date**, and shall, subject to the provisions of this Agreement, be composed of the period before the Date of First Gas Delivery, the Commissioning Period, the Build-Up Period and shall continue in effect for a **period of twenty (20) years** from the Date of First Regular Gas Supply

including any extension, and ending on permanent cessation of delivery of Gas under this Agreement.

Upon written request by either party made within thirty-six (36) months prior to the end of the Twentieth (20th) Contract Year, **both Parties may meet, discuss and mutually agree upon the period, terms, and conditions for the renewal of this Agreement following the expiration of the Twentieth (20th) Contract Year.** Such agreement to renew shall be in writing and signed by both Parties.

Notwithstanding anything contained in this Agreement, the provisions of this Agreement shall be conditional upon the Seller's ability to secure Gas required under this Agreement from Gas producers in Nigeria.(Consider P & ID)

d) Concession Agreements

This is used for the grant of a right over a particular infrastructure, eg roads, rail, hospitals. **It is the owner of the infrastructure that grants the concession or enters into the contract for that purpose. (Consider the concession of Abuja Airport)** See section 1 of the Infrastructure Concession Regulatory Commission Act, 2005 which provides thus:

...as from 10 November, 2005 any Federal Government Ministry, Agency, Corporation or body involved in the financing, construction, operation or maintenance of infrastructure, by whatever name called, may enter into a contract with or grant concession to any duly pre-qualified project proponent in the private sector for financing, construction, operation or maintenance of any infrastructure that is financially viable or any

development facility of the Federal Government in accordance with the provisions of the Act.

(Consider the provisions of the Constitution and other laws in relation to the infrastructure to determine whether the infrastructure is in the Exclusive or Concurrent Legislative List)

Note that concession is different from privatization. See also the Public Enterprises (Privatization & Commercialization) Act, 2004. A concession is usually a partnership between the public sector and private sector hence the acronym - Public-Private-Partnership (PPP).⁴ It is not a PPP if it involves two private or public entities.

The nature of the partnership is also determined by the type of infrastructure - **hard economic infrastructure** (roads, motorways, bridges, ports, railways, airport, power, telecommunications) or **social economic infrastructure** (export assistance, technology transfer and vocation training). It can also be **hard social infrastructure** (hospitals, schools, water supply, housing, sewerage, prisons) or **soft social infrastructure** (social security, community services and environmental agencies). **Another classification is between 'green field' (new infrastructure) and 'brown field' (existing infrastructure - consider the lease of the ports in Lagos, Warri, Calabar and PH).** Whereas economic infrastructure generally provide intermediate services to business and industry, the social infrastructure provide basic services to households. Sometimes the categories overlap. For example, some forms of

⁴ In Nigeria, the legal and regulatory framework for Public-Private Partnership transactions include, the Constitution of the Federal Republic of Nigeria 1999 (as amended); the Infrastructure Concession Regulatory Commission (Establishment, Etc) Act 2005; the Public Procurement Act, 2007 and; the Fiscal Responsibility Act, 2007 must be borne in mind. Other laws which are of relevance include, Sectoral Laws such as Federal Highways Act, Cap F13 LFN 2004; Nigerian Railway Corporation Act, Cap N129, LFN 2004; Nigerian Ports Authority Act, Cap N126, LFN 2004, Nigerian Communications Commission Act, Cap N97, 2004; Electric Power Sector Reform Act, 2005; Investment and Securities Act 2007; Companies and Allied Matters Act, 2020; Land Use Act Cap L5, 2004; Utilities Charges Commission Act, Cap U17, LFN 2004; Public Enterprises (Privatisation & Commercialisation) Act, Cap P38 LFN 2004.

social infrastructure such as those that enhance the skills, health, productivity and morale of the work force may have a bearing on the productivity of industries.⁵

The basic elements or mechanisms of a PPP are as follows (consider Lagos/Ibadan Highway Concession):

- The public sector defines the services it requires over a long term period (typically 15-30 years) by reference to an output specific and closely specified performance criteria, without being too prescriptive about the means of delivery;
- No payments are made until the asset is delivered and working, and subsequently payments are subject to reduction if service performance standards are not met;
- Design risk, in terms of the decision on the type of assets needed to deliver the services to the required standard, is left to the private sector entity and the assets are effectively managed and operated by the private sector;
- The public sector provides no funding during the construction phase, and the risk of cost overruns, delays, etc rests with the private sector unless the public sector takes equity in the SPV;
- The public sector has to devolve control to the private sector over the assets and resources needed to deliver the service to such an extent that the private sector bears the risks and receives the rewards of effective ownership; and

⁵ Grimsey D and Lewis, M K *Public Private Partnerships* (Cheltenham, UK: Edward Edgar, 2007) page 21

- At the end of the concession period, the facility reverts to the public entity if there is no extension. (Note however that in models like Build, Operate, Own [BOO], there is no reversionary right.)

Based on this mechanics, PPPs can take many different forms, the most usual being a Build, Operate, Transfer (BOT), Build, Operate, Own (BOO), Design, Build, Operate (DBO) arrangements, joint ventures (JV), leasing, contracting out or management contracts, service contracts, concession and various forms of public-private cooperation. These examples constitute some of the more common types of partnership.

In addition, in terms of the 'alphabet soup' of acronyms, there are also BLT (Build, Lease, Transfer), BLTM (Build, Lease, Transfer, Maintain), BOOR (Build, Own, Operate, Remove), LROT (Lease, Renovate, Operate, Transfer), DCMF (Design, Construct, Manage, Finance) and DBFOM (Design, Build, Finance, Operate, Manage).

Each type of PPP differs in terms of government participation levels, risk allocations, investment responsibilities, operational requirements and incentives for operators.

There is usually the main Concession Agreement and other agreements including Construction Agreement, Funding Agreement, Operation & Maintenance Agreement, Insurance Agreement, Direct Agreement, Shareholders' Agreement, etc. It is important that all the agreements are consistent, eg, the dispute resolution clause should be the same otherwise there will be a contract mismatch.

Concession contracts typically provides for the following:

- Relationship between public and private sectors
- Conditions Precedent
- Defined term though renewable - exclusive use of assets
- Investment decisions stated in the contract,
- Reversionary right -ownership resides with public sector;
- Step-in Clauses
- Financial Close (consider Reclamation of FESTAC)⁶
- provision for compensation/remedies
- Events of default, cure period
- Remuneration of concessionaire and concession fee

SCOPE OF PROJECT

The Project shall be executed on the Site, which is described in Schedule xxxx of this Agreement. The scope of the Project shall include performance and execution by the Concessionaire of all design, engineering, financing, procurement, construction, completion, operation and maintenance of the Project Highway as described in Schedule xxxx of this Agreement. It shall include constructing x lanes from A to B, in accordance with the Specifications and Standards set forth in Schedule xxxx and operation and maintenance thereof in accordance with Schedule xxxx. It shall also include the performance and fulfillment of other obligations by the Concessionaire under this Agreement. The Concessionaire shall undertake its obligations at its own cost and risk.

GRANT OF CONCESSION

Subject to and in accordance with the terms and conditions set forth in this Agreement, X hereby grants to the Concessionaire

⁶ Financial Close' means the execution and delivery of the Financial Agreement and the satisfaction or waiver by the Finance Parties of the conditions precedent for the initial availability of funds under the Financial Agreement (other than the satisfaction of the Conditions Precedent under the Agreement). In other words, financial close refers to that stage in the transaction when the Concessionaire will have access to the funds under the Financial Agreement.

and the Concessionaire hereby accepts the Concession for a period of [25] (twenty five) years commencing from the Appointed Date, including the exclusive right, licence and authority during the subsistence of this Agreement to implement the Project and the Concession in respect of the Project Highway.

Subject to and in accordance with the terms and conditions set forth in this Agreement, the Concession hereby granted shall entitle the Concessionaire to enjoy, and oblige the Concessionaire to undertake the following in accordance with the provisions of this Agreement, the Laws and the Permits:

i to develop, design, engineer, finance, procure, construct, operate and maintain the Project Highway during the Concession Period;

ii upon completion of the Project Highway and during the Operations Period to manage, operate & maintain the Project Highway and regulate the use thereof by third parties;

iii levy, demand, collect and appropriate the Fees from vehicles and persons liable to payment of Fees for using the Project Highway or any part thereof and refuse entry of any vehicle to the Project Highway if the due Fee is not paid;

iv perform and fulfill all of the Concessionaire's obligations under this Agreement;

v bear and pay all expenses, costs and charges incurred in the fulfillment of all the Concessionaire's obligations under this Agreement ;and

vi not assign or create any lien or Encumbrance on the Concession hereby granted or on the whole or any part of the Project Highway nor transfer, lease or part possession therewith save and except

as expressly permitted by this Agreement or the Substitution Agreement.

The Concession Period shall commence on the Appointed Date/Executive Date and shall end on the Termination Date.

CONDITIONS PRECEDENT

Save and except as provided in Articles/Clauses xxxx, the rights and obligations of the Concessionaire under this Agreement are subject to the satisfaction in full of the following conditions precedent to be fulfilled on or before Financial Close unless any such condition has been waived as provided in Clause xxxx:

(a) Concessionaire shall have obtained all such Applicable Permits as listed in Schedule xxxx unconditionally or if subject to conditions then all such conditions have been satisfied in full and such Applicable Permits are and shall be kept in full force and effect for the relevant period during the term of this Agreement;

(b) the Concessionaire shall have been granted way leaves required in connection with the Project including:

(i) rights of way for the alignment of the Project Highway free from all Encumbrances;

(ii) rights of way from public roads to the Site; and

(iii) permission/licence to enter upon and utilise the Site for the construction pursuant to and in accordance with this Agreement.

(c) the Concessionaire shall have been granted all Government clearances and permits under Laws relating to environmental protection etc. [state relevant laws]

(d) certified true copies of all Project Agreements, in particular, the Financing Documents, the EPC Contract, O&M Contract, if any

and the Tolling Contract, if any, as well as the shareholders funding agreement have been delivered by the Concessionaire to X;

(e) the Performance Bond in full has been provided by the Concessionaire to X in accordance with Clause xxxx;

(f) all of the representations and warranties of the Concessionaire set forth in Clause xxxx are true and correct as on date of this Agreement and as on the Appointed Date/Executive Date;

(g) X shall have received from the Concessionaire copies (certified as true copies by an authorised officer of the Concessionaire) of the constitutional documents of the Concessionaire;

(h) X shall have received copies (certified as true copies by a Director of the Concessionaire) of all resolutions adopted by the Board of Directors of the Concessionaire authorising the execution, delivery and performance by the Concessionaire of this Agreement and each of the Project Agreements; and

(i) X shall have received from the legal counsel of the Concessionaire a legal opinion with respect to the authority of the Concessionaire to enter into this Agreement and the Project Agreements and the Financing Documents and the enforceability of the provisions thereof.

e) Non-Disclosure & Confidentiality Agreement (NDCA)

In a transaction, the parties are likely to exchange confidential information that should be known to the parties only and not third parties. Such information should be protected and should not be disclosed to third parties except as provided in the NDCA). The Recital can read thus:

WHEREAS:

- (i) The Company is in the business of, *inter alia*, provision of mass transport; international transport agent; manufacturers' representatives; distributors; dealer in mass transport services; construction services of every description, including the planning, design, erection, improvement, repair, alteration, maintenance and demolition of construction works; construction of buildings, Projects, roads, highways, bridges, waterways, wharves, marine works, railways; and tendering for, negotiate, enter into, take up, take over, let out, grant, and otherwise deal in construction contracts of all description, including build-operate-transfer (BOT), design-construct contracts, construction management contracts, joint venture contracts, leases, franchising and all other forms of public-public partnerships (PPP).
- (ii) The Recipient is in the business of, *inter alia*,
- (iii) The Recipient has the expertise, experience, know how in
- (iv) The Recipient has been appointed by Company to provide services as in respect of the business of the Company
- (v) The role of the Recipient and scope of work/service to be provided to the Company has been agreed and specified in a contract dated ("the Contract") made between the Company and the Recipient.
- (vi) The Parties understand that from time to time they shall meet and exchange Confidential Information amongst themselves.

(vii) The Parties have agreed that, subject to the terms of this Agreement, **none of the Parties shall in any way or by any person (including their employees, officers, agents, partners, subsidiaries, holding companies, associates and whosoever) make any unauthorised disclosure of CONFIDENTIAL INFORMATION contained in this Agreement.**

f) Escrow Agreement

This is where something of value, such as a deed, stock, money, or written instrument, that is put into the custody of a third person by its owner, a grantor, an obligor, or a promisor, to be retained until the occurrence of a contingency or performance of a condition.

There are usually three parties, the depositor, the beneficiary and escrow agent (consider sale of ALSCON and Le Meridien Hotel).

The directions given to the person who accepts delivery of the document are called the *escrow agreement* and are binding between the person who promises and the person to whom the promise is made.

The writing is held *in escrow* by a third person until the purpose of the underlying agreement is accomplished. **In a sense, escrows are useful for transactions eg privatization where a large amount of money is involved, and several obligations must be fulfilled before payment is released.**

When the condition specified in the escrow agreement is performed, the escrow agent performs its role under the escrow agreement eg delivery of money to the beneficiary.

A Recital in an Escrow Agreement can be drafted thus:

WHEREAS

(A) Seller and the Purchaser have entered into an Share Sale & Purchase Agreement dated xxxx in respect of the purchase of xxxxx shares (the **Shares**) representing xxx% of the total authorised, issued and paid up share capital of xxxxxx (the **Company**) by the Purchaser from the Seller (the **Sale and Purchase Agreement**).

(B) Pursuant to the Sale and Purchase Agreement, Seller is required to transfer the duly executed and signed transfer forms in favour of the Escrow Agent together with the share certificates evidencing title to the Shares (the **Share Certificates**) into escrow, within five (5) Business Days after the date when certain conditions precedent set out in the Sale and Purchase Agreement are satisfied or waived.

(C) Further, pursuant to the Sale and Purchase Agreement, the Seller and the Purchaser are required to appoint escrow agents for the purposes of (a) providing certain escrow agency services in relation to the sale and purchase of the Shares for the purpose of receiving the Purchase Price. The Parties have agreed to engage the Escrow Agent and the Escrow Agent has agreed to perform such services strictly in accordance with the terms as set forth in this Agreement.

g) Service Level Agreements⁷

A Service Level Agreement (SLA) defines the level of service you expect from a vendor, **laying out the metrics by which service is measured, as well as remedies or penalties should agreed-on**

⁷ See generally 'What is Service Legal Agreement' available at <<https://www.cio.com/article/2438284/outsourcing-sla-definitions-and-solutions.html>> accessed 1 August, 2021

service levels not be achieved. It is a critical component of any technology vendor contract.

SLAs are a critical component of any outsourcing and technology vendor contract. Beyond listing expectations of service type and quality, an SLA provides remedies when requirements are not met.

A telecom company's SLA, for example, may promise network availability of 99.999 percent (for the mathematically disinclined, that works out to about five and a quarter minutes of downtime per year, which, believe it or not, can still be too long for some businesses), and allow the customer to reduce their payment by a given percentage if that is not achieved, usually on a sliding scale based on the magnitude of the breach

SLAs are an integral part of an IT vendor contract. An SLA pulls together information on all of the contracted services and their agreed-upon expected reliability into a single document. They clearly state metrics, responsibilities and expectations so that, in the event of issues with the service, neither party can plead ignorance. It ensures both sides have the same understanding of requirements.

Any significant contract without an associated SLA (reviewed by legal counsel) is open to deliberate or inadvertent misinterpretation. The SLA protects both parties in the agreement

Ideally, SLAs should be aligned to the technology or business objectives of the engagement. Misalignment can have a negative impact on deal pricing, quality of service delivery, and customer experience

The SLA should include not only a description of the services to be provided and their expected service levels, but also metrics by which the services are measured, the duties and responsibilities of each party, the remedies or penalties for breach, and a protocol for adding and removing metrics.

Metrics should be designed so bad behavior by either party is not rewarded. For example, if a service level is breached because the client did not provide information in a timely manner, the supplier should not be penalized

The SLA should include components in two areas: services and management.

Service elements include specifics of services provided (and what's excluded, if there's room for doubt), conditions of service availability, standards such as time window for each level of service (prime time and non-prime time may have different service levels, for example), responsibilities of each party, escalation procedures, and cost/service tradeoffs.

Management elements should include definitions of measurement standards and methods, reporting processes, contents and frequency, a dispute resolution process, an indemnification clause protecting the customer from third-party litigation resulting from service level breaches (this should already be covered in the contract, however), and a mechanism for updating the agreement as required.

This last item is critical; service requirements and vendor capabilities change, so there must be a way to make sure the SLA is kept up-to-date.

h) Asset Sale Agreement

This is used for the sale of an asset. The Sale & Purchase clause can be drafted thus:

Subject to the terms and conditions of this Agreement and in consideration of the payment of the Purchase Price by the Purchaser, the Seller agrees to sell and the Purchaser agrees to purchase the Asset more particularly described in the Schedule to this Deed ("the Property")

- *free from any Encumbrance and to hold the property unto and to the use of the Purchaser for the unexpired residue of the term of years and to exercise the following rights among others namely,*
- enter into and take possession of the property, Lease, assign, charge, mortgage, sell or otherwise dispose of the Asset to any person or persons in its absolute discretion and to exercise therein all rights of ownership.

i) Memorandum of Understanding (MOU)

This is generally a pre-contractual document spelling out the understandings reached by the parties before drawing up a formal agreement. Is it binding or non-binding? This depends on how it is drafted and whether it is qualified - eg subject to contract, or draft only.

I prefer Heads of Agreements to an MOU because of the contentious nature of an MOU. From the Heads of Agreements, I can then draft the main agreement.

j) Deed of Release

When a debenture is executed charging particular assets on the condition that the assets are the security for a loan, on the repayment of the loan, a Deed of Release is usually entered into. The Recital of such Deed is as follows:

WHEREAS

- (a) By the Loan Agreement executed between the Lender and the Borrower dated xxxx (The Loan Agreement) whereby the Lender agreed to borrow the sum of xxxx to the Lender for the development of xxxx at xxxx
- (b) A Composite Debenture dated xxxxx in which the fixed and floating assets of the Borrower were charged unto the Lender to secure various loans granted by the Lender to the Borrower.
- (c) The Composite Debenture was made between xxxx and xxx (name of Bank) and registered at the Corporate Affairs Commission (CAC), Abuja on xxxx
- (d) As at, , the Debt due to xxxxx in respect of the Composite Debenture is.....
- (e) The Parties entered into negotiations and agreed that the sum of xxxx shall be the full and final payment due to xxxx as settlement for the Debt due on the Composite Debenture.
- (f) On xxxx, the Borrower made the last and final payment of the Negotiated Sum xxxx to the Lender.
- (g) The Borrower has now requested the "Lender" and the Lender has agreed to release the Borrower under the Composite Debenture to the extent of the Lender's exposure only and as secured by the Deed of Composite Debenture dated xxxx.
- (h) Without admission of liability, the Parties have agreed to fully and finally settle all matters arising out of and in connection with the Composite Debenture on the terms set out in this Deed of Release.

k) Disclosure Letter⁸

A disclosure letter is a key document in many transactions, particularly business, asset and share sales. **The seller provides this letter to assist with the buyer's due diligence. It does this by outlining specific information which the buyer should know about the business, which will help inform their decision about whether they wish to proceed with the purchase.**

This information can include background to the transaction and often supplements other documents the purchaser may have received. These other documents can include:

- profit and loss statements;
- key business contracts, including leases and employment agreements; and

Disclosure letters also provide the seller with an opportunity to update the purchaser. For example, the seller may want to disclose any changes to documents or previous information that requires updating.

A disclosure letter also serves the essential purpose of minimising the seller's liability in the transaction. Accordingly, it can limit any warranties that the seller provides in the main sale contract. Examples of warranties that disclosures can impact are:

- share ownership in the company, including plans to issue options under an Employee Share Scheme;
- contracts that the business is a party to which may impact the buyer;

⁸ See 'What is Disclosure Letter and When is it Used' available at <<https://legalvision.com.au/what-is-a-disclosure-letter/>> accessed 1 August, 2021.

- employment obligations and employee entitlements for existing staff;
- loans that the company may be the guarantor of; and
- whether the entity is the only company in a group or if there are subsidiaries.

These are typical examples, and the disclosures made will vary greatly depending on the circumstances of the transaction. Accordingly, disclosure letters should set out any information about the sale asset that is inconsistent with warranties in the sale agreement. Therefore, if a seller's warranty is incorrect or untrue, the purchaser will not be able to make a claim against the seller.

Disclosure letters typically take the form of a letter which comprises of four main parts:

- a) introduction;
- b) general disclosures;
- c) specific disclosures; and
- d) annexures (if applicable).

However, each transaction is different, meaning the seller can draft disclosure letters in several ways.

1. Introduction

The introduction of the disclosure letter will clarify the letter's purpose and identify the relevant sale agreement and the parties involved. It will also provide any necessary background information to the transaction and terms which need to be defined. **Likewise, it is common to include a clause in the introduction which states that if there is any inconsistency between the disclosure letter and master sale agreement, the disclosure letter will prevail.**

2. General Disclosures

Additionally, general disclosures are usually standard disclosures that could apply to any transaction. An example of one such disclosure is the assumption that the purchaser has knowledge of all available matters if they had conducted searches of public records. **Thus, a seller assumes that the purchaser has conducted a detailed due diligence.**

The parties' lawyers will generally ensure that matters included in the general disclosures section do not overlap with matters already included in the sale agreement to prevent inconsistency and avoid confusion.

It is in the seller's best interests to make these general disclosures as wide as possible to ensure their liability is reduced as much as possible and the purchaser's interest to ensure that they are carefully scrutinized.

3. Specific Disclosures

The selling party usually provides specific disclosures that they tailor to the relevant transaction. **For example, they may disclose specific warranties in the sale agreement by outlining how the disclosures relate to the warranties.** This ensures that the buyer is aware of inconsistencies between disclosures in the disclosure letter and warranties in the sale agreement. The result is that the seller cannot claim a breach later on. Likewise, it is common to include these disclosures in a tabular form.

4. Annexure

Sometimes (but not always), a seller may want to refer to certain documents when making a specific disclosure. They can do this by annexing those documents, referred to as the disclosure bundle, to the disclosure letter. Doing so ensures the seller has provided full and frank disclosure. Likewise, the buyer is aware of any

relevant documentation associated with the disclosures. Again, this helps avoid disputes later.

Once both parties finalise the form and content of their letter, they will attach it to the sale agreement. The seller must sign the letter and provide it to the buyer at completion. The buyer must also sign to acknowledge receipt of the letter and its disclosures.

l) Side Letter

This is used to amend or modify an existing instrument/contract (can also be called an Addendum) eg

Pursuant to the Memorandum of Understanding ("the MOU") made and entered into on the day of 2xxx XXXL between xxxx and xxxx (the Parties), the Parties had agreed to enter into a definitive Joint Venture Agreement (JVA) that will replace the MOU regarding the implementation of the Project within a period of three (3) months of the date of the MOU.

The Parties agreed in the MOU that the commencement and duration of the MOU shall be from ("the Effective Date") and shall terminate twelve (12) months after the Effective Date or such other extended period as the Parties shall mutually agree in writing.

The Parties, by mutual consent, have agreed to extend the time up to and inclusive of for entering into the Joint Venture Agreement (JVA) and that the MOU shall be terminated unless mutually extended for another period.

The Parties further agree that after the execution of the JVA, a Special Purpose Vehicle (SPV) will be incorporated and/or adopted

for the Project and a Shareholders' Agreement prepared and entered into.

m) Shareholders' Agreement

In strict legal theory, the relationships amongst the shareholders and those between the shareholders and the company are regulated by the constitutional documents of the company - the memorandum and articles of association.⁹

Chapter 13 of CAMA 2020 (sections 341-373) deals with the protection of minority against illegal and oppressive conduct by or against the company or irregular acts committed by the company. The reliefs available to the minority are court-based - recall the *Rule in Foss v Harbottle* [(1843) 2 Hare 461]!! A Shareholders' Agreement offers the minority more protection than CAMA.

- A shareholders' agreement is an arrangement among a company's shareholders that describes how the company should be operated and outlines shareholders' rights and obligations.
- The shareholders' agreement is intended to make sure that shareholders are treated fairly and that their rights are protected.
- It also allows shareholders to make decisions about what outside parties may become future shareholders and provides safeguards for minority positions.
- The agreement includes sections outlining the fair and legitimate pricing of shares (particularly when sold). It also allows shareholders to make decisions about what outside

⁹ See section 46(1) of CAMA 2020 (effect of memart) that provides that the memorandum and articles, when registered, shall have the effect of a deed between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles, as altered in so far as they relate to the company, its members or officers.

parties may become future shareholders and provides safeguards for minority positions.

- A shareholders' agreement includes a date; often the number of shares issued; a [capitalization table](#) that outlines shareholders and their percentage ownership; any restrictions on transferring shares; [pre-emptive rights](#) for current shareholders to purchase shares to maintain ownership percentages (for example, in the event of a new issue); and details on payments in the event of a company sale.
- Shareholder agreements differ from company's constitutional documents. A shareholder agreement, on the other hand, is optional. This document is often by and for shareholders, outlining certain rights and obligations. It can be most helpful when a corporation has a small number of active shareholders.
- As with all shareholder agreements, an agreement for a startup will often include the following sections:
 - ✓ A preamble, identifying the parties (e.g. a company and its shareholders)
 - ✓ A list of recitals (rationale and goals for the agreement)
 - ✓ Details of optional versus mandatory buying-back of shares by the company in the event that a shareholder gives theirs up
 - ✓ A right of first refusal clause, detailing how the company has the right to purchase a selling shareholder's securities prior to them selling to an outside party
 - ✓ Notation of a fair price for shares, either re-calculated annually or via a formula
 - ✓ A potential description of an insurance policy.¹⁰
 - ✓ Matters requiring unanimous decisions.

¹⁰ 'Shareholders' Agreement' available at <<https://www.investopedia.com/terms/s/shareholdersagreement.asp>> accessed 1 August, 2021

Concluding Remarks

In this presentation, we have attempted to examine the unique provisions in the specialized contracts. This list is not exhaustive but indicative of what to expect in practice.

Remember Cases like

SOUTH TRUST BANK & ORS v. PHERANZY GAS LTD & ORS
(2014) LPELR-22340(CA)

CONTRACT - BINDING CONTRACT- Binding effect of a contract; whether a court can make or re-write a contract for the parties

"Once terms of a contract are embodied in documents, the parties are presumed to intend what they have written down. The words used are given their ordinary and plain meaning. Neither the Court nor the parties can rewrite the contract or import words to vary the intentions of the parties as written. *Union Bank of Nigeria Ltd V. Nwaokolo* (1995) LPELR-3385(SC)."

Per IYIZOBA ,J.C.A (Pp. 45-46 , paras. F-A)

Thank you for your attention.

**Being a Presentation at the Marcus-Okoko & Co. Associate
Development Program, Abuja: 4 AUGUST, 2021**

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