

ICLG

The International Comparative Legal Guide to:

Outsourcing 2019

4th Edition

A practical cross-border insight into outsourcing

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Nigeria

Nduka Ikeyi



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1 Regulatory Framework

1.1 Are there any national laws or regulations that specifically regulate outsourcing transactions, either generally or in relation to particular types of outsourcing transactions (e.g. business process outsourcings, IT outsourcings, telecommunications outsourcings)?

There are no national laws generally regulating outsourcing. However, the “Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector” (“O&G Guidelines”), issued by the Federal Ministry of Labour and Productivity in 2011, regulate outsourcing in the oil and gas sector. The O&G Guidelines, amongst others, provide that the jobs on the organogram of companies in the sector must be occupied by permanent employees of the companies and restricts outsourcing to non-core business of the companies, except for proven short-term projects. There also exists a “Code of Conduct for Private Employment Agencies 2012”, which was developed jointly by the Human Capital Providers Association of Nigeria, an association of private employment agencies in Nigeria, Nigeria Employers’ Consultative Association, Federal Ministry of Labour and Productivity and the International Labour Organisation.

In addition, the National Industrial Court, which has exclusive jurisdiction to hear and determine labour- and employment-related disputes, has in recent case law begun to develop some principles of law applicable to outsourcing and other “disguised employment relationships”.

1.2 Are there any additional legal or regulatory requirements for outsourcing transactions undertaken by government or public sector bodies?

No. However, outsourcing transactions by government or public sector bodies will be subject to the Public Procurement Act 2007, which applies to procurement by the federal government and its agencies and similar legislation as applicable in the various states of the federation.

1.3 Are there any additional legal or regulatory requirements for outsourcing transactions undertaken in particular industry sectors, such as for example the financial services sector?

Yes. The “Guidelines for the Regulation of Agent Banking and

Agent Banking Relationships in Nigeria” issued by the Central Bank of Nigeria (“CBN Guidelines”) in 2013 require financial institutions that wish to engage in agent banking to submit an application for approval to the CBN (section 2 of the CBN Guidelines), and for the financial institution to assess the adequacy of controls of outsourcing activities through regular audits (section 6 of the CBN Guidelines). The CBN Guidelines define agent banking as “the provision of financial services to customers by a third party (agent) on behalf of a licensed deposit taking financial institution and/or mobile money operator (principal)”. Although the CBN Guidelines, unlike the O&G Guidelines, do not directly regulate outsourcing, they nevertheless touch upon outsourcing.

1.4 Is there a requirement for an outsourcing transaction to be governed by local law? If it is not to be local law, is there any generally accepted norm relating to the choice of governing law?

There is no requirement for an outsourcing transaction to be governed by national law, so parties to an outsourcing transaction are entitled to choose the law applicable to the transaction; a Nigerian court will enforce such a choice unless there is strong reason for the court to refuse to enforce it [*Nika Fishing Company Limited v. Lavina Corp.* (2008) 16 NWLR (Pt. 1114) 509; *Sonnar (Nig) Ltd & anor v. Partenreedri M.S Nordwind & anor* (1987) 4 NWLR (Pt. 66) 520]. However, such choice of law will (a) be limited by mandatory rules of the forum (i.e. Nigeria), and (b) will not affect the determination of the nature of the relationship between any of the parties to the transaction and an “employee”, which will be determined by reference to Nigerian law.

2 Legal Structure

2.1 What are the most common types of legal structure used for an outsourcing transaction?

The most common structure in Nigeria is direct outsourcing in which the customer directly engages the supplier under a services agreement. Such services agreements usually have elaborate schedules detailing the scope of the business outsourced, standards against which performances will be assessed, prices, transfer of personnel and equipment, etc.

3 Procurement Process

3.1 What is the most common type of procurement process that is used to select a supplier?

The most common process is that the customer would define the scope of what is to be outsourced according to its business requirement. (In some cases, the customer would engage a consultant for this piece of work.) Thereafter, the customer would send out a request for proposal to likely suppliers. Shortlisted suppliers then bid for the engagement, and the customer eventually selects its preferred supplier according to predetermined standards.

4 Term of an Outsourcing Agreement

4.1 Does national or local law impose any maximum or minimum term for an outsourcing contract?

No. Parties are at liberty to set the term of the contract for optimal benefit.

4.2 Does national or local law regulate the length of the notice period that is required to terminate an outsourcing contract?

No. Parties are free to negotiate and agree on notice periods according to their needs.

5 Charging

5.1 What are the most common charging methods used in outsourcing transactions?

Charging methods vary in accordance with the type of services being outsourced. If the level and volume of the service that would be required by the customer during the contract period is predictable and the customer wants to have certainty over its budget, the fixed charge approach is ideal. However, if the level and volume of service that would be required is not predictable, the cost-plus charging method (where the customer pays the actual cost of providing the service plus an agreed profit margin to the supplier) may be adopted. Where the deliverables under the contract have standard units, the parties may adopt the pay-as-you-go charging model whereby the customer pays a pre-agreed unit price for each deliverable received.

5.2 What other key terms are used in relation to costs in outsourcing transactions?

Other key cost-related-terms in outsourcing transactions include provisions for service-level credits, benchmarking, disputed charges, late payments, allocation of tax responsibility, adjustments based on variation in exchange rates and inflation, termination-related costs and change-management costs, etc.

6 Transfer of Assets

6.1 What formalities are required to transfer, lease or license assets on an outsourcing transaction?

The formalities required would vary according to the nature of the asset to be transferred, leased or licensed; and would generally follow usual rules applicable to transfer, lease or license of assets in Nigeria. Whilst execution of relevant documents of transfer and delivery of title documents would in most cases suffice to transfer personal property, including choses-in-action, transfer of interest and rights in land would in some cases involve registration and consent requirements. In all cases, stamp duty is payable on the instrument of transfer.

6.2 What are the formalities for the transfer of land?

The formalities include that the parties execute a deed (of assignment or of sublease as the case may be), after which the consent of the governor of the state where the land is situated is obtained, usually by presentation of the transfer instrument for registration at the appropriate land registry. In the course of obtaining the said consent, the relevant instrument is assessed and stamp duty, capital gains tax and other relevant state taxes are paid thereon.

6.3 What post-completion matters must be attended to?

In the case of assignment or exclusive licence of copyrights, it has to be registered with the Nigerian Copyrights Commission. It is necessary to obtain the consent from primary owners of any licensed copyright where the customer would be transferring such licence to the supplier under the terms of the contract. The same goes for any third parties with whom the customer had contracts (like leases), the terms of which may materially be affected by the outsourcing arrangement.

In a case involving the “transfer” of employees, it would also be necessary to pay special attention to matters arising from the cessation and transfer of employment, especially the terms upon which the employees will be disengaged by their current employer and hired by the new employer, if it so desires.

6.4 How is the transfer registered?

See questions 6.2 and 6.3 in regard to the registration of the transfer of interests in land and copyright.

7 Employment Law

7.1 When are employees transferred by operation of law?

Nigerian law does not recognise the transfer of employees by operation of law [*Re Bendel Line Co. Ltd.* (1979) 5 FRCLR 19]. Specifically, for employments governed by the Labour Act, section 10 thereof subjects the transfer of employment from one employer to another to the consent of the worker and the endorsement of the transfer by an authorised labour officer. Thus, a transfer of an employee’s employment will only be effective when the employee consents to it.

However, notwithstanding that Nigerian law does not recognise the transfer of employees by operation of law, termination payment obligations of a previous employer may pass to a person who succeeds to the business of the previous employer, which transfers the undertaking for which the employees were engaged to another, for instance in acquisitions, takeover, privatisation, outsourcing, etc.

7.2 On what terms would a transfer by operation of law take place?

As we indicated above, Nigerian law does not recognise transfer of employment by operation of law. The consent of each employee will have to be obtained in each case.

7.3 What employee information should the parties provide to each other?

There is no statute providing for specific information to be provided by the parties to an outsourcing contract about an employee (a) to be sent by the supplier to the customer, or (b) to be transferred by the customer to the supplier. Generally, either party would require sufficient information on the relevant employee to enable them to determine the suitability of the employee. Thus, (a) the customer would, in roles requiring specified qualification and skill, request for the curriculum vitae of the relevant employee, and (b) the supplier would be entitled to receive the employee's employment file and records as well as a compensation arrangement. The supplier will also be entitled to receive information relating to unionisation of the relevant employees.

7.4 Is a customer/supplier allowed to dismiss an employee for a reason connected to the outsourcing?

Yes, but legal rules applicable to termination of employment must be observed. For instance, where it is intended to terminate the employment of an employee due to redundancy occasioned by an outsourcing arrangement, the employer, in case of an employment governed by the Labour Act, will comply with the requirements for laying off a worker for redundancy under section 20 of the Labour Act. For employment not governed by the Labour Act, the employer is required to comply with any redundancy provision in the employee's contract of employment or applicable collective bargaining agreement.

7.5 Is a supplier allowed to harmonise the employment terms of a transferring employee with those of its existing workforce?

Yes. The requirement to obtain an employee's consent to a transfer of employment in Nigeria provides the employee the chance to negotiate the terms upon which the transfer will be implemented, which would include harmonisation of the employment terms of the transferring employee with those of the employer's existing workforce.

7.6 Are there any pensions considerations?

Yes. Generally, Nigeria operates a mandatory contributory pension scheme in which monthly contributions of the employer and employee are remitted to a pension fund administrator ("PFA") chosen by the employee. The mandatory scheme came into force in 2004 pursuant to the Pension Reform Act. Although the PRA sets

minimum rates of contribution for both the employee and the employer, the law nevertheless permits the employer to assume a higher percentage of the total contribution. It would therefore be necessary to confirm (a) the rate of contribution assumed by the previous employer, and (b) the previous employer's compliance with its deduction and remittance obligations.

7.7 Are there any offshore outsourcing considerations?

Yes. Parties should pay attention to local laws and the laws of the foreign party before, during and after the outsourcing contract to ensure that the outsourced business is not subject to any legal restriction in any of the jurisdictions. Special consideration should also be given to local law relating to employment of, and remittance of monies paid to, expatriate staff where the transaction contemplates the engagement of expatriate personnel.

It is also possible that an outsourcing transaction, which involves an offshore supplier and a Nigerian resident customer, may create a business activity in Nigeria for the offshore supplier to the extent that the offshore supplier might be considered to be carrying on business in Nigeria. The offshore supplier would in such circumstance be required to establish a local subsidiary in Nigeria as prescribed by section 54 of the Companies and Allied Matters Act.

8 Data Protection Issues and Information Security

8.1 What are the most material legal or regulatory requirements and issues concerning data security and data protection that may arise on an outsourcing transaction?

The most material legal or regulatory requirements concerning data security and data protection that may arise is how personal data will be collected and protected by a party to the contract or a third party engaged in respect of the contract. The National Information Technology Development Agency ("NITDA" or the "Agency"), has issued the "Nigeria Data Protection Regulation, 2019" (the "Regulation"). The Regulation applies to all transactions intended for the processing of personal data and the actual processing of personal data in respect of natural persons residing in Nigeria, or residing outside Nigeria but of Nigerian descent.

The Regulation, among other things, (a) prescribes that data collection and processing shall be for specific, legitimate and lawful purpose and must be with the consent of the data subject, (b) imposes a duty of care in favour of a data subject on anyone who is entrusted with personal data of a data subject, (c) forbids the obtaining of data without the specific purpose of collection disclosed to the data subject, (d) makes it compulsory for mediums of data collection and processing to have a privacy policy that the class of the data subjects being targeted can understand, (e) imposes the burden of developing security measures to protect the data of any person who is involved in data processing, (f) makes provision for contracts between a third party and the data controller for third party data processing, which applies in the case of an outsourcing contract, and (g) subjects the transfer of data to a foreign country to the provisions of the Regulation and the supervision of the Honourable Attorney General of the Federation (with exceptions).

The Constitution of the Federal Republic of Nigeria, 1999, in section 37, provides for the protection of the rights of citizens to privacy and the privacy of their homes, correspondence, telephone conversations and telegraphic communication. There are also other

sector-specific legislation and regulations on the right of the individual to the privacy and security of his personal transactions and telephone conversations.

8.2 Are there independent legal and/or regulatory requirements concerning information security?

No; other than as explained in question 8.1 above.

9 Tax Issues

9.1 What are the tax issues on transferring the outsourced business – either on entering into or terminating the contract?

In an outsourcing transaction, the supplier will be concerned about its income tax exposure, especially given that the supplier will be subject to a withholding tax at the rate of 10% on the gross amount of all payments made to it by the customer (with the exception of reimbursable expenses). The customer will be subject to VAT at the rate of 5% of all amounts billed to it by the supplier (with the exception of reimbursable expenses), which figure will have the effect of marking up the actual amount billed. It will also be important for the parties to discuss whose duty it is to deduct and remit pay-as-you-earn income tax and all statutory payroll deductions to be made on monies payable to the employees providing services to the customer in cases where the outsourced service involves the outsourcing of employees.

9.2 Is there any VAT leakage on the supply of services under the outsourcing contract?

Yes. Input VAT paid on the procurement of services is not recoverable in Nigeria. It rather operates as plain sales tax.

9.3 What other tax issues may arise?

An outsourcing transaction, which involves the transfer of assets, may implicate capital gains tax issues. It may also raise the issue of the value at which the transferred assets are brought into the books of the supplier to whom the assets have been transferred. Transfer pricing issues may also arise where the parties to the transaction are related entities.

Furthermore, an outsourcing transaction between a Nigerian resident and a non-resident may raise issues of “double taxation” of the income of the non-resident supplier from the transaction.

10 Service Levels

10.1 What is the usual approach with regard to service levels and service credits?

The usual approach in an outsourcing contract is to include in the contract in sufficient detail and clarity the standard of performance or service level standards expected from the supplier. The contract should also require that the service level report should be given by the supplier at agreed intervals. Where the supplier fails to meet the contracted service level standards, the customer is entitled to deduct an amount (either already agreed or calculated at an agreed rate) from the amount to be paid under the contract as service credits.

11 Customer Remedies

11.1 What remedies are available to the customer under general law if the supplier breaches the contract?

The remedies depend on the nature of the breach. They may include compensatory damages, injunctions and/or rescission of the contract.

11.2 What additional protections could be included in the contract documentation to protect the customer?

There should be a right to step in and take over the performance or management of the performance of the service or to appoint a third party to so do at the expense of the supplier. There should be a requirement for the supplier to take out an insurance for due performance and to endorse the customer’s interest on the policy.

11.3 What are the typical warranties and/or indemnities that are included in an outsourcing contract?

There is usually a warranty as to the supplier’s qualification and capacity to perform up to the service level; an undertaking to remedy substandard deliverables (where possible) within an agreed period from time of notification. Terms on the indemnity of the customer by the supplier for a successful claim of a third party, for example for a breach of data protection regulations, infringement of intellectual property rights, breach of sanitary and environmental protection regulations, etc., are also typically included. Further, in contracts for the outsourcing of employees, indemnity regarding claims by, and claims arising from any act or omission of, the outsourced employees, are not unusual.

12 Insurance

12.1 What types of insurance should be considered in order to cover the risks involved in an outsourcing transaction?

The type of insurance to be considered will be largely determined by the outsourced business. For instance, where the outsourced business has the potential of posing any danger to the public, public liability insurance for negligence resulting in bodily injury or death, loss or damage to property, etc. should be considered. Cyber-liability insurance should be considered where the outsourced business may lead to breaches of data or any risk related to the use of information technology. Where the outsourcing transaction is for the provision of outsourced personnel, employee-related insurance should be put in place.

13 Termination

13.1 How can a party to an outsourcing agreement terminate the agreement without giving rise to a claim for damages from the terminated party?

Ordinarily, outsourcing contracts have termination provisions. Once a party terminates the contract in accordance with any of the termination provisions, it is unlikely that the counter party would maintain a successful claim for damages.

13.2 Can the parties exclude or agree additional termination rights?

Yes. Parties can exclude or agree additional termination rights based on the principle of freedom of contract.

13.3 Are there any mandatory local laws that might override the termination rights that one might expect to see in an outsourcing contract?

No, there are not.

14 Intellectual Property

14.1 How are the intellectual property rights of each party protected in an outsourcing transaction?

Existing intellectual property (“IP”) of either party is usually declared to belong to the relevant party though made available to the other party in the course of or for the purpose of the contract. Accordingly, the other party is licensed to use such received IP to the extent necessary for the performance – or receipt as the case may be – of the services. Also, in contemplation of improvements to the existing IPs, parties provide that developments to their respective existing IPs would belong to them; save that the supplier has to agree to transfer to the customer rights in new developments to the supplier’s IP created exclusively for the particular customer, provided that the supplier can continue to perform similar services for other customers after such transfer. Where absolute transfer of such rights would impede the continued performance of similar services by the supplier to other customers, then it would insist on merely licensing the customer to use the development non-exclusively. Permission by suppliers to customers for continued use of suppliers’ IP at the end of the contract term is usually to the extent that such IP is incorporated in the deliverables to the customer under the contract, and only in connection with the customer’s normal use of the deliverables.

14.2 Are know-how, trade secrets and other business critical confidential information protected by local law?

There are no statutory protections for them in Nigeria. They are protected under the general principles of common law – under contracts, torts and other basic legal principles.

14.3 Are there any implied rights for the supplier to continue to use licensed IP rights post-termination and can these be excluded from the agreement?

No, there are no such implied rights.

14.4 To what extent can the customer gain access to the supplier’s know-how post-termination and what use can it make of it?

The customer can gain access and use the supplier’s know-how post-termination only to the extent and for the purpose prescribed in the contract.

15 Liability

15.1 To what extent can a party limit or exclude liability under national law?

Generally, parties are allowed to limit or exclude their liability contractually. However, neither party is allowed to contract out of a mandatory statutory duty or obligation, though it may transfer the burden of its performance of such obligation on the other party by contract. Also, exclusion or limitation of liability for fraud or fraudulent misrepresentation is usually unenforceable. A Nigerian court will also not enforce an exclusion of liability clause if the effect of the exclusion is to defeat the essence of the contract.

15.2 Are the parties free to agree a financial cap on liability?

Yes, subject to what we have said in question 15.1 above.

16 Dispute Resolution

16.1 What are the main methods of dispute resolution used?

Business contracts like outsourcing contracts usually provide for confidential consultations by the parties’ management to resolve any dispute, failing which they resort to mediation, failing which the dispute is to be resolved by arbitration. Although the choice of arbitration would preclude the courts from determining a dispute which parties have agreed to arbitrate, the choice of arbitration would operate without prejudice to the parties’ right to apply to the court for urgent interim reliefs.

17 Good Faith

17.1 Is there any overriding requirement for a customer and supplier to act in good faith and to act fairly according to some objective test of fairness or reasonableness under general law?

Save for terms (like trade customs, usual course of dealing, etc.) usually implied into contracts by common law principles in the absence of express provisions on pertinent matters, parties are usually held to the express terms of their contract. There is no overriding requirement for either party to act in good faith and to act fairly, unless the circumstance is such that a party may be said to have come under a fiduciary relationship to the other in the specific matter.

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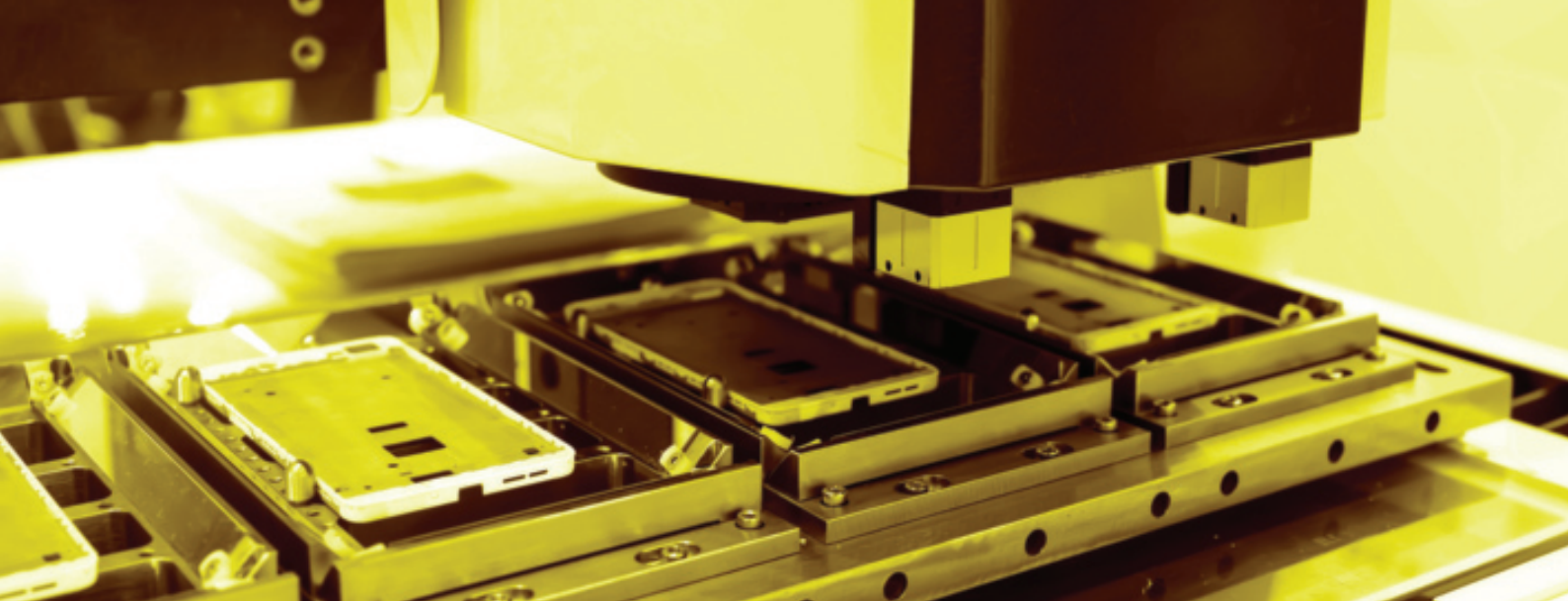
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