**Title: Negotiating, Drafting, and Understanding Contracts**

**Training Body: Alpha Partners**

**Venue: 200, Muritala Mohammed Way Yaba, Lagos**

**Date: 17th – 20th August 2021**

**TRAINING OVERVIEW**

The training was a 4-day course focusing on Negotiating, Drafting, and Understanding Contracts. The training comprised of seven intensive and interactive sessions, which were delivered by an experienced facilitator.

***DAY 1. 17th August 2021.***

**FIRST TRAINING SESSION**

**Principles of Contract Drafting**

Contract drafting process-

* What parts the contract must include
* What situations the contract must cover.
* Know what the parties in fact want

Overview of Contract Standard Provisions-

**Usual terms include:**

* Title
* Preamble/Recitals
* Consideration
* Covenants
* Representations and warranties
* Indemnification

Overview of Contract Standard Provisions-

* Breach and cure
* Termination
* Remedies

Additional important contract provisions-

* Assignment
* Choice of Law
* Amendment and Waiver
* Arbitration
* Integration and Severability
* Notice
* Authority to Sign
* Currency clause

Planning Ahead for Problems; Interpreting Contracts-

* **Termination Provisions**

1. Special attention: “exit provisions”,
2. Valuable contractual protection.

* Termination for cause- Refers to material breach not cured within a specified period.
* Opportunity to cure- Right to terminate contract if breach not cured in specified time.
* **Impracticality of Performance and Frustration of Purpose**

Understanding limitations of impracticability- Risk allocation- e.g. Negatively affected party assumed risk of event.

**Clauses that Address the Possibility of Future Litigation**

* Specify place for filing lawsuits.
* Specific jurisdiction and venue.
* Consider: Cost
* Choice of law
* Alternative dispute resolution (ADR)

**Understanding General Clauses**

Integration (entire agreement clause)

* “The agreement constitutes the entire agreement between the parties.”
* Clarifies: no conditions other than in the agreement.
* Purpose: to prevent related dealings being used to vary or interpret

**Waiver**

* Parties may want to waive violation once.
* Waiver clause clarifies that:
* once means once only;
* delay or omission in exercising right does not mean waiver.

**Amendments**

* Normally, any changes must be: agreed in writing and signed by parties.

**Contract Interpretation Issues**

Problems arise where parties-

* fail to express their agreement adequately,
* leave a material aspect of agreement vague or ambiguous, or
* fail to resolve a material aspect,
* fail to provide for a material aspect at all.
* Such problems arise when not enough attention to detail in:
* negotiating the contract
* drafting the contract
* Poor drafting = contract fails to reflect expectations.

**SECOND TRAINING SESSION**

**Negotiation Skills**

Negotiation involves two or more parties with competing or conflicting interests or needs, working towards an agreement on how they will cooperate**.**

Braham’s Negotiation Tips-

* Know Thyself
* Do Your Homework
* Practice Double and Triple Think
* Build Trust
* Develop External Listening
* Move Beyond Positions
* Own Your Power
* Know Your BATNA (Best Alternative To a Negotiated Agreement)
* Know What a Win Is
* Enjoy the Process

Mediation Strategies-

* Clarify (the facts, the players, the positions, the issues)
* Explore Options (developed by all the players as they unfold the whole picture)
* Move to the Positive (ask questions like: “What would it take to solve this problem?” “What is it that you want?” “What would make it better?” “What would make you willing?”
* Go Back to Legitimate Needs and Concerns (ask: “What do you need?” “Why is it important to you?” “Tell me why that seems the best option to you?” “Are there alternatives that would also satisfy you?”)
* Design options using clarifying tools, negotiating tools, and generating tools

***DAY 2. 18th August 2021***

**THIRD TRAINING SESSION:**

**Interpreting Contract Terms**

In interpreting contracts, ordinary words are to be inter­preted according to their ordinary meaning.  Trade terms and technical terms are to be interpreted according to their trade or technical meaning. For instance, Software, when referring to a computer, does not mean something that is soft, but it means the actual programme. The way parties have used terms in their prior relationships can also be used to determine what the parties meant by the words they used in a contract. In interpreting contracts, ordinary words are to be inter­preted according to their ordinary meaning.  Trade terms and technical terms are to be interpreted according to their trade or technical meaning. For instance, Software, when referring to a computer, does not mean something that is soft, but it means the actual programme. The way parties have used terms in their prior relationships can also be used to determine what the parties meant by the words they used in a contract. The provisions of a contract must be construed as a whole.  Provi­sions are not to be read out of context and interpreted out of context.

If an occurrence or a nonoccur­rence of an event has an effect on the existence of a contract, the event is called a condition. A condition precedent is the occurrence of an event that precedes the existence of an obligation to perform or the existence of a contract.  For example, in a fire insurance policy, there is no obligation on the insurance company to make a payment until there is a fire loss.  The occurrence of such a loss is therefore a condition precedent to the duty of the insurer to make payment.

**Termination of A Contract**

The parties may agree that the contract will terminate if a particular event occurs or does not occur.  Such a provision is called a condition subsequent.  For example, in a contract for the purchase of land, the contract may contain a condition subsequent that cancels the contract if the zoning board turns down a buyer’s application to obtain a zoning permit to use a building for a particular purpose.

**Resolution of Conflicts in Contracts**

In some cases, a conflict can be solved by considering the form of the conflicting terms.  If a contract is partly printed or typewritten and partly handwritten, the handwritten part would prevail if it conflicted with the typewritten or printed part.  If there is a conflict between the printed part and a typewritten part, the typewritten part would prevail.  If there is a conflict between an amount or quantity expressed both in words and figures, as on a cheque, the amount or quantity expressed in words prevails.

**The seven principles for contract interpretation**

1. the reliance placed on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed;
2. the less clear the relevant words are, or the worse their drafting, the more ready the court can properly be to depart from their natural meaning;
3. commercial common sense is not to be invoked retrospectively;
4. a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight;
5. when interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties;
6. in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention; and
7. service charges are not subject to any special rules of interpretation.

Interpreting Contractual terms correctly is achievable through elegant drafting of the Contract document itself. When words are drafted in clear terms and ambiguity are avoided as much as possible, coupled with clear expression of terms used, the job becomes clear for the court to easily interpret the contract in case of any dispute. There is a limit to court’s discretion in reading into the contract what the parties did not intend, because of the principle of freedom of contract (pacta sunct servanda). Even in standard form contracts, the practice of the trade or subject matter is usually considered in interpreting such contracts.

**FOURTH TRAINING SESSION**

**LEGAL ISSUES IN CONTRACT AND NEGOTIATION LAWS**

Classification of negotiation instances by reference to legal status of interests involved

**Pre-contractual negotiations: (no legal interest).**

The significant factor about pre-contractual negotiations is that there is no necessity for an agreement beyond the personal needs and interests of the parties. In the absence of legal interests, there is no role for third party determination before the courts or other non-judicial mechanisms such as expert determination or quasi-judicial mechanisms such as arbitration or adjudication. Such negotiations amount to bargaining or haggling. There is however, scope for assistance from intermediaries, including mediators.   
(1) Mutual but different interests: For example, seller and buyer wishing to trade where both are prepared to compromise. The obvious example is the seller and buyer of goods and/or services where both are prepared to compromise. Here (a) the seller wants or needs the business and (b) the buyer strongly desires or better still, because of a commitment to a project, needs the product or a comparable product.

(2) Unilateral difference: For example, buyer looking for a reduction in price but seller indifferent to sale and not interested in compromise or alternatively, seller looking to a potential but currently indifferent buyer. The first task for the seller is to get the buyer interested. Standard form contracts inhibit negotiation and have ethical and legal implications.

**Negotiations to amend pre-existing contracts (no legal interest).**

(1) Mutual but different interests: Both parties know that the existing contract is no longer satisfactory or sustainable – but each wants different things out of the new agreement and both are prepared to compromise to get some of what they want.

(2) Unilateral difference: Where one party finds that the pre-existing arrangement is no longer satisfactory but where the other party is happy to stick with the status quo and sees no reason to compromise.

**Negotiations to allocate responsibility for breach of contract or tort (legal interest).**

(1) Mutual but different interests: Both parties know that the dispute must be settled and that both parties have some legal rights which must be met but there is a disagreement as to how to move forward and both are prepared to compromise to reach a settlement.

(2) Unilateral difference: Where one party claims a legal right but the other party denies all liability and feels there is no reason to compromise.

**Negotiations to manage ongoing relationships (reciprocal rights/duties/interests).**

The parties share mutual interests but these may be outweighed by unilateral objectives :-

(1) Workplace negotiations: Job satisfaction and career development versus Productivity and creativity.

(2) Landlord & tenant: Quiet enjoyment and maintenance versus Respect of property and community.

( 3) Project management contract negotiations: Internal association negotiations.

**Multi-Party Negotiations concerning any of the above (legal and non legal interests).**

The problem with the mutual / unilateral interest distinction here is that it is unlikely that all partners will have a mutual interest, though two of them may have shared interests. A good example is the Triangular contractual relationships of mutual inter-dependence e.g. guarantees and trusts.

**Some Legal Aspects of Negotiation**

Agreements to agree: The concept of the unenforceability of agreements to agree is clearly established in law. However, this does not prevent commercial people from engaging in such agreements on a regular basis. Letters of intent are common in the construction industry and the prevalence of good faith negotiation provisions is, if anything, increasing despite uncertainty about their legal enforceability.

Advertising and negotiation: The boundaries between advertising which has no legal consequences, inducement to contract and contractual terms which do have legal consequences, is highly technical. What is said during negotiations can have legal repercussions, particularly if inaccurate. Misrepresentations which are fraudulent give rise to actions in tort. Even innocent misrepresentation is not entirely without redress.

Intention to create legal relationships and quasi-business dealings: Negotiations may lead to intention to create legal relations in some but not all negotiation situations. The distinction between social and commercial relations and the intention to create legal relations is well known but frequently ignored as the boundary between social and commercial relations becomes blurred. The modes of and opportunities for social trading within the family, the neighbourhood, through car boot sales and now through the internet are constantly changing and increasing.

Negotiated dispute settlement and privilege: Dispute resolution negotiations are subject to confidentiality and privilege, so, it is important not to disclose details of settlement negotiations to unauthorised third parties and the material is not admissible in court. On the contrary, mere contractual negotiations are not privileged. Pre-trial negotiations are common place. Many cases are settled and they do not proceed to trial. It is clear therefore, that negotiation skills are as important for lawyers as they are for businessmen.

ADR and Negotiation: Mediation and conciliation are essentially third party assisted or facilitated negotiated dispute settlement processes. To be effective, the facilitator (mediator) needs to be an effective negotiator, but with a difference. Whilst the mediator does not negotiate either for him/herself or on behalf of the parties, the mediator can and will develop avenues for potential settlement based on the parties negotiable interests. The mediator’s role is not limited to dispute resolution. The go-between agreement facilitator, in social, commercial and public relations (both domestic and international) are long standing. However, a recent phenomena is the emergence of contract / project mediation, whereby an independent third party assists the parties to put the detailed flesh on the bones of a broad brush stroke commitment to a project.

The objective is to cut down the lead in time to a project and to mobilise financing at an earlier stage than would otherwise be possible. However, the concept is heavily reliant upon trust, good faith and the ability and willingness to subsequently negotiate details without prejudice to the interests of the parties. Negotiated problem solving, with or without the assistance of a mediator, is also increasingly being used on large commercial projects and particularly complex construction projects. Two of the latest business terminologies are “Teamworking” both within organisations and between/among organisations and “Partnering” which are founded on the concept of joint ownership of and mutual interest in the project. A key ingredient of these is the team and or partnering meeting to identify or pre-empt problems and negotiate solutions.

***DAY 3. 19th August 2021***

**FIFTH TRAINING SESSION**

**ANAGING THE LEGAL/COMPANY SECRETARIAL DEPARTMENT AND LIAISING WITH EXTERNAL COUNSEL**

A Company Secretary holds office based on the concepts of independence and trust and is a key participant in the enthronement of best practice in Corporate Governance.

Although ultimate responsibility for compliance with corporate governance rests with the board of directors, the Company Secretary is obliged to assist both the board and management to implement an enduring corporate governance culture.

In many companies, the Company Secretary also doubles as in-house-counsel (Chief Legal Officer, Legal Adviser, etc) and reports to the Managing Director. He is also a member of the Management team in some companies. These dual roles usually task the independence of the Company Secretary.

Companies seeking to adopt Corporate Governance best practice should ensure a clear separation between these two roles to ensure that the role of the Company Secretary as the “conscience of the company” is not jeopardized. To assure independence, it is not out of place to outsource the duties of either the Company Secretary or the Company Counsel.

**MANAGING THE CORPORATE LEGAL DEPARTMENT**

This is a sine qua non in every standard organisation as there are always legal implications to every activity of a company right from formation to winding up if applicable.

The company rely heavily on the professional advise coming from the legal department as non conformity with the law either deliberately or ignorantly can eat deep into the organisation’s profit or in the extreme cases, may lead to a requisition to wind up the company.

Managing corporate legal departments in today’s global environment requires a unique combination of legal, business, management, technical and soft skills.

What every good corporate legal department strives are 10 critical business objectives:

* Cost Certainties and Return on Investment (ROI)
* Greater Command and Control of Information and Data
* Enhanced Decision Making Abilities
* Greater Centralization and Efficiencies of Legal Operations
* Effective Tools, Reporting Systems and Metrics
* Secure Information and Data
* Technology Excellence
* Effective Human Capital Management
* Repeatable, Measurable and Defensible Processes – Legal Project Management
* Trusted Strategic Business Partners

**FUNCTIONS & DUTIES OF LEGAL DEPARTMENT**

1. Rendering effective legal assistance in the preparation of legal opinions, studies, reports and correspondence, as required from time to time by various Heads of Departments.
2. Ensuring the providing of appropriate legal advice on a diverse range of substantive and procedural questions of law arising in administrative functioning of the company including advice in arbitration matters, to firmly secure the interest of the company, as required by the operational departments.
3. Supervising and overseeing the review, negotiation and drafting of major contracts, tender documents and other legal documents, as required by the operational departments.
4. Supervising legal research and analysis, indentifying important issues and apprising the operational departments of emerging legal trends from court decision and tendering advice to avoid unnecessary litigation, etc.
5. Serving on various Standing Boards, Committees, ad-hoc working groups and task force, as required, to take care of legal niceties in framing of policies.
6. Monitoring the performance of the panel lawyers and rendering advice on formation of new panels.
7. Assigning court cases to different panel lawyers keeping in view the nature and importance of the cases.
8. Supervising and monitoring the contesting of the cases in various courts of law and to have interaction with Panel Lawyers, Courts, and other law officers of government for their assistance in the company matters in Revisions, Reviews, Service Level Agreements (SLAs). Etc.
9. Advising in the matter of preferring of appeals in superior courts and in the matter of taking recourse to other legal remedies.
10. Processing of various Fee Bills of advocates and settlements of fee etc., with other advocates.
11. Assisting the operational departments in preparing of reply to legal notices received.
12. Any other duty/task assigned by the Management of the company.

**Managing /liaising with external counsel**

1. Create Clear Outside Counsel Guidelines – And Follow Them
2. When Assigning New Work, Consider Alternative Firms And Stop Giving Work To Under-Performers.
3. Require Experienced Staffing Of Legal Projects And Pre-Approval Of Any Changes.
4. Confirm That Hourly Rates And Expenses Are (And Remain) Reasonable.
5. Put Project Plans In Place And Regularly Monitor Progress.
6. Require Detailed Legal Bills That Specifically Describe The Services Performed.
7. Obtain Project Budgets And Track Bills Against Them.
8. Obtain Electronic Copies Of Documents To Re-Use Work Product.
9. When Projects Are Completed, Track Results Achieved And Lessons Learned.
10. Put In Place A Legal Department Management System That Is Easy For Both In-House Counsel And External Law Firms To Use.

**Liaising With External Counsel**

* Make your objectives clear.
* State your budget expectations.
* Build trust–at all levels.
* Form a true partnership.
* Be frank.
* Remember: You’re the Customer.
* Hold a post-game conference.
* Reset expectations periodically.

***DAY 4. 20th August 2021***

**SIXTH TRAINING SESSION**

**ROLES AND RESPONSIBILITIES OF CONTRACT MANAGERS AND SERVICE LEVEL AGREEMENT**

Contract managers can work for a wide variety of organizations including government, non-profit, maritime, and the private sector. No matter the type of organization, they are the primary individuals responsible for creating and managing the contracts that those organizations use.

To oversee contracts from drafting to execution, contract managers need to be skilled in legal compliance, negotiation, and relationship management. Having an intimate knowledge of the contract management lifecycle is key.

Maintaining good records, even after the contract has been seen through to execution, is critical. Record management serves as an audit trail and evidence, and needs to be easily accessible for auditing.

**Key Actions of Strategic Contract Managers**

* Leverage Contracts to Improve Company's Bottom Line.
* Analyze Competitive Landscape.
* Advise Executives of Business Opportunities.
* Assist Leaders with Strategy Execution.
* Facilitate Company's Achievement of Goals.

**Effective Use Of Service Level Agreement**

A service level agreement is a formal negotiated agreement which helps to identify expectations, clarify responsibilities, and facilitate communication between two parties, typically a service provider and its customers." Therefore, the SLA serves an important purpose as a communication and conflict-reduction tool, as well as an overall expectation management document.

**Components of SLA**

* Agreement Overview.
* Goals and Objectives.
* Stakeholders.
* Periodic Review.
* Service Agreement.
* Service Management.

**Conclusion**

This training has added to my skills and it will enable me to perform my duties better.

**Take Away**

* Training materials
* Training Certificate

**Acknowledgement**

I sincerely appreciate the Nigeria Governors’ Forum Secretariat (NGFS) management for approving this training and giving me the opportunity to learn and update my skillset, which will enable me to further discharge my duties appropriately.