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Outsourcing

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Contributed by Addison Bright Sloane

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Addison Bright Sloane is a full-service premium business law firm based in Ghana with deep industry knowledge across all key industry sectors both in Ghana and the rest of Africa. Our managing partner is a recognised outsourcing expert and led some of the largest outsourcing transactions while practising as a partner in a global law firm in the City of London. Our sourcing and technology lawyers advise on the full range of sourcing transactions including IT out-

sourcing, business process outsourcing, cloud computing, nearshore, onshore and offshore outsourcing, litigation, alternative dispute resolution and arbitration. We also advise on sourcing structures such as multi-sourcing, offshoring, co-sourcing and insourcing. Our sourcing clients range from multinationals, including software companies, banks and financial institutions, to governments, to public sector organisations and SMEs.

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1. Outsourcing Market

1.1 IT Outsourcing

Ghana is experiencing an increase in outsourcing trends within some of its key industry sectors, particularly telecommunications, banking, insurance, healthcare and energy. The objective for these businesses is to lower costs, increase efficiency and provide a better focus on their core competencies with increased flexibility to respond to dynamic business conditions in their industry sectors. Outsourcing is providing businesses in Ghana with the opportunity to take advantage of state-of-the-art technology without the commensurate investment in IT infrastructure and IT specialists. The increase in the automation of business processes and security risks have contributed significantly to the development of the outsourcing industry in Ghana. As a result of these developments there is greater awareness by government, businesses and individuals of data privacy, cybersecurity and compliance.

In Ghana, the most commonly outsourced IT functions are:

- telecommunications;
- website development, management and maintenance;
- software and application development;
- database development;
- technical support/help desk;
- infrastructure; and
- cybersecurity.

1.2 BP Outsourcing

Africa is becoming a favoured international location for business process outsourcing (“BPO”). Leading industry reports place Ghana as the top outsourcing destination in West Africa as a result of strong government support for companies that outsource their services to the country and attractive tax incentives. Ghana has strong public institutions and a developed financial industry. Further, low labour costs, geopolitical stability, major investment in telecommunications infrastructure, a large pool of an English-speaking labour force and a favourable time zone as well as a zero-tax policy for companies for ten years and only 8% tax following the initial ten-year tax free period have contributed to its position.

The BPO industry is part of the government’s transformational agenda to develop the services sector of the economy. The Accra Digital Centre is a BPO hub created by government with an expectation that it will create about 10,000 direct and indirect jobs. Ghana’s recent selection as the host country for the African Continental Free Trade Area (“AfCFTA”) should also be a major factor in encouraging BPOs by foreign companies to use Ghana as a base for expansion into the AfCFTA.

The most common BPOs in Ghana are;

- knowledge Process Outsourcing;
- legal Process Outsourcing;
- research Process Outsourcing;
- recruitment Process Outsourcing;
- account Process Outsourcing;
- payroll Process Outsourcing;
- disaster Recovery; and
- transportation/Fleet Management.

1.3 New Technology

In Ghana, new technologies such as Artificial Intelligence (AI), Robotic Process Automation (RPA), Block chain Technology and Smart Contracts are gradually evolving. As with other countries, new technologies are being explored in areas such as data storage, financial transactions, telecommunications, real estate, and asset management. The telecommunications sector for example utilises Robotic Process Automation (RPA) and Business Process Automation (BPA) to gather customer data or customer credit usage and generate a package for each customer according to his or her monitored data usage. The technology giant Google opened its first AI Research Centre on the African continent in Ghana in April 2019. Google has partnered with universities, government and local institutions to help develop a new generation of AI developers in Ghana and the rest of Africa and ensure that the right education and opportunities are in place. With these developments it is expected that machine learning technology and AI will take off in Ghana, particularly in the agriculture, healthcare and education sectors. There is also an emerging market in Ghana for bitcoin and cryptocurrencies under the blockchain technology.

1.4 Other Key Market Trends

IT and BPO outsourcing continue to dominate the market in Ghana. However, businesses in the financial services, energy, telecommunications and other sectors are demonstrating an increased willingness to outsource certain key business activities to third parties. A key example of this is within the banking sector where key functions such as online payment services, credit scoring and clients’ verification of identity applications are outsourced to fintech companies. Most of the major telecommunications companies in Ghana have also set up mobile money platforms which essentially operate as mobile banks for the unbanked, which form a large part of the population. Such companies outsource the banking aspects of running the mobile banking business to the traditional banks. Similarly, insurance companies are increasingly collaborating with banks and telecommunications companies for collection of their premiums such that customers of the insurance companies can pay for renewal of their policies at the partner banking institution by use of the mobile money platform instead of visiting the insurance companies, which has traditionally been the case in Ghana. Organisations are increasingly relying more on digitisation

and less on manual processing. In the telecommunications sector, there are now virtual servers which can run several applications at the same time, an innovation which was previously not utilised by that sector. Cloud technology is also being gradually embraced by large organisations.

2. Regulatory and Legal Environment

2.1 Legal and Regulatory Restrictions on Outsourcing

Generally, there is no specific legislation in Ghana that regulates outsourcing, however, the Labour Act, 2003 (Act 651) and Labour Regulations, 2007 contain provisions which provide legal and regulatory restrictions on outsourcing. The legislation permits an employer to employ a worker through a centre or a private employment centre. However, there is a comprehensive outline of the guidelines to be followed in running such a centre or agency. Further, any person who contravenes any of the provisions relating to outsourcing commits an offence and is liable on summary conviction to a fine of 25 penalty units.

One penalty unit is equivalent to GHS12 (USD2.19 as at 21 September 2019).

Companies should note the following:

- there is legislation which may impact on outsourcing in certain industry specific sectors as listed below (see **2.2 Industry Specific Restrictions**); and
- all public sector outsourcing is regulated by the Public Procurement Act 2003 (Act 663), regardless of the industry sector under which the services to be outsourced falls (see **2.2 Industry Specific Restrictions**).

2.2 Industry Specific Restrictions

Outsourcing transactions in the financial services sector are regulated by a number of sector-specific legislations as follows:

- The Banks and Specialised Deposit-Taking Act, 2016 (Act 930);
- Ghana Deposit Protection Act, 2016 (Act 931);
- Public Financial Management Act, 2016 (Act 921);
- Securities Industry Act, 2016 (Act 929); and
- Unit Trusts and Mutual Funds Regulations 2001.

The cumulative effect of the above legislation is as follows:

- a bank, specialised deposit-taking institution or financial holding company shall not outsource a function to any other person without the written approval of the Ghana's central bank, namely Bank of Ghana. Further, the Bank of Ghana has the right to appoint such competent persons as advisors for the bank or specialised deposit-tak-

ing institution or financial institution where it considers it necessary;

- the board of the relevant institution reserves the right to appoint persons who may be able to give assistance to it;
- the Minister of Finance has the power to appoint issuing agents, registration agents, primary dealers and other agents to facilitate primary and secondary market transactions in government debt securities;
- public officials may be transferred or seconded to give assistance to the Securities Exchange Commission. The Securities Exchange Commission also has the power to engage the services of advisors and consultants on the recommendation of its board; and
- with regard to unit trusts and mutual funds the board of directors of a company may:
 - (a) enter into underwriting or sub-underwriting contracts in relation to the subscription or purchase of any investment;
 - (b) appoint a custodian to discharge the obligations laid on the custodian by law and related regulations; and
 - (c) appoint a manager to manage a mutual fund established under the Unit Trusts and Mutual Funds Regulations 2001.

The underwriter, custodian or manager of the relevant fund to which the services are outsourced must comply with strict rules set out by the Securities Exchange Commission.

A bank, specialised deposit-taking institution or financial holding company which outsources a function to any other person without the written approval of the Bank of Ghana shall pay to the Bank of Ghana an administrative penalty of 1,000 penalty units.

Public Sector Outsourcing

The key legislation that regulates and governs public procurement in Ghana is the Public Procurement Act 2003 (Act No. 663) (the Act) as amended by the Public Procurement (Amendment) Act 2016 (Act 914) (the Amendment Act). The Act regulates the procurement of all goods, works and services financed, in whole or in part, from public funds and the disposal of government stores. Every government agency, institution and establishment in which the government has a majority interest must comply with the Act. Public universities, public schools, colleges and hospitals are included.

The Public Procurement Authority (Authority) must ensure that public procurement is carried out in a fair, transparent and non-discriminatory manner and is vested with administrative powers to ensure that procuring entities comply with the Act. There are prescribed threshold values set out in the schedules to the act.

The Authority is also mandated to:

- monitor the processes employed by procuring entities;

- review procurement decisions made by procuring entities;
- investigate procurement malpractices; and
- sanction offenders.

Oil and Gas Services Outsourcing

Local Content and Local Participation Regulations L.I 2204 (L.I. 2204) promotes maximisation of value-addition and job creation through the use of local expertise, goods and services business, financing in the petroleum industry value chain and their retention in Ghana. The Petroleum Commission has a mandate to ensure companies comply with LI2204.

Every contractor, sub-contractor and any other allied entity engaged in petroleum activities is required by Local Content L.I.2204 to incorporate local content as an important element in their project execution and management philosophy. Every petroleum project, activity or transaction must have a Long-Term and Annual Local Content Plan which would be assessed and approved by the Petroleum Commission. Local Content refers to the quantum/percentage of locally produced materials, personnel, financing, goods and services rendered to the oil industry and which can be measured in monetary terms. Businesses in the upstream oil and gas sector must comply with L.I. 2204 when outsourcing services.

Other Sectors

It is important that the parties to an outsourcing contract comply with any relevant sector-specific laws, such as requirements for licences, permits or approvals which regulate activities which are the subject matter of outsourcing. Examples of regulated sectors in Ghana include Mining (Minerals Commission), Pharmaceuticals (Foods and Drugs Agency/Ghana Standards Authority), Telecommunications (Ministry of Communications), Banks (Bank of Ghana) and Insurance (National Insurance Commission).

2.3 Legal or Regulatory Restrictions on Data Processing or Data Security

Anyone processing the personal data of Ghanaian citizens must comply with Ghana's data protection laws. The legal and regulatory restrictions on data processing or data security are governed by the Data Protection Act, 2012 (Act 843) (Act). This means any provider of outsourced services must process personal data in accordance with prescribed data protection principles set out in the Act. Personal data is defined as "data about an individual who can be identified from the compiled data or other information in the possession of, or likely to come into the possession of the data controller". The Act requires a data processor to take into consideration the privacy rights of the data subject in the processing of personal data. A data subject is the individual who is the subject of the personal data. It is compulsory for all processors and/or controllers of personal data to register with the Data Protection Commission.

A data controller who is not resident in Ghana must register as an external company with the Data Protection Commissioner. If the outsourcing services company appoints a third party to process data on its behalf, that appointment must be governed by a contract. The contract must be in writing and shall require the third-party data processor to establish and maintain the confidentiality and security measures necessary to ensure the integrity of the personal data. Where the third-party data processor is not domiciled in Ghana, the data controller shall ensure that the processor complies with all relevant laws of Ghana.

Most IT and BPO outsourcing activities involve the processing of personal data. The data controller is usually the person procuring the outsourcing services with the data processor being the outsourcing service provider. The data controller must undertake extensive due diligence to ensure that the data processor has put in place proper measures to comply with the requirements of the Act.

There are no specific provisions in the Act on the transfer of personal data from Ghana to offshore jurisdictions. The Act is silent on the mechanisms which a business may typically utilise to transfer personal data offshore in compliance with applicable transfer restrictions. However, the sale, purchase, knowing or reckless disclosure of personal data or information is prohibited under the Act. The Act does however, specify exceptions to the grant of consent by a data subject to the processing of his personal data. Logically, these exceptions should be equally applicable in the case of foreign transfers of personal data. Thus, businesses may transfer personal data abroad with the prior consent of the data subject, or where the purpose for which the personal data is processed is necessary for the purpose of a contract to which the data subject is a party, or to protect a legitimate interest of the data subject, or the transfer is necessary for the proper performance of a statutory duty, or is necessary to pursue the legitimate interest of the data controller, or a third party to whom the data is supplied.

Conversely, there are legal restrictions on cross border data flows from an offshore jurisdiction into Ghana. The Act provides that a data controller or processor shall in respect of foreign data subjects ensure that personal data is processed in compliance with data protection legislation of the foreign jurisdiction of that subject where personal data originating from that jurisdiction is sent to Ghana for processing.

In either case, the individual may object to the processing of their personal data at any time.

In relation to data security, there is a legal requirement that a data processor or controller must treat the personal data of a data subject as confidential and must also comply with security measures in processing such data. This requirement applies to both local and foreign data subjects. All personal

data which is collected must be only be used for its stated purpose.

A data controller has a duty to prevent the loss of, damage to, or unauthorised destruction of personal data, and the unlawful access to or unauthorised processing of personal data. The data controller must therefore adopt appropriate, reasonable, technical, and organisational means to take necessary steps to ensure the security of personal data in its possession or control.

Additionally, a data controller is required to take reasonable measures to identify and forestall any reasonably foreseeable risks and ensure that any safeguards put in place are effectively implemented and updated continually.

A data controller is mandated to observe generally accepted and industry specific best practices in securing data and ensure that data processors comply with security measures.

There are additional specific requirements for the processing of sensitive personal data. Sensitive personal data is defined as personal data consisting of information related to:

- a child who is under parental control according to the law; or
- the religious or philosophical beliefs, ethnic or tribal origin, colour, race, trade union membership, political opinions, physical or mental health, mental condition, DNA, sexual life, criminal behaviour of the data subject or details of court proceedings relating to the individual.

2.4 Penalties for Breach of Such Laws

There are various offences under the Act and each carries different penalties.

- A person who fails to register as a data controller but processes personal data is liable on summary conviction to a fine of not more than 250 penalty units or a term of imprisonment of not more than two years, or both.
- A person who fails to comply with an enforcement notice or an information notice from the Data Protection Commission is committing an offence and is liable on summary conviction to a fine of not more than 150 penalty units or a term of imprisonment of not more than a year, or to both.
- A person who, in compliance with an information notice, knowingly or recklessly makes a statement which is false in a material respect, commits an offence and is liable on summary conviction to a fine of not more than 150 penalty units or a term of imprisonment of not more than one year, or to both.
- A person shall not purchase the personal data, or the information contained in the personal data, of another person, knowingly obtain or knowingly or recklessly disclose the personal data or the information contained in

the personal data of another person or disclose or cause to be disclosed to another person the information contained in such personal data. A person who contravenes the foregoing provision commits an offence punishable on summary conviction by a fine of not more than 250 penalty units or a term of imprisonment of not more than two years, or to both. A person who sells or offers to sell personal data of another person commits an offence punishable on summary conviction by a fine of not more than 2,500 penalty units or a term of imprisonment of not more than five years, or to both.

There is a general penalty where a person who commits an offence under the Act in respect of which a penalty is not specified is liable on summary conviction to a fine of not more than 5,000 penalty units or a term of imprisonment of not more than ten years, or both.

Note: One penalty unit is equivalent to GHS12 (USD2.19 as at 21 September 2019).

2.5 Contractual Protections on Data and Security

The Act does not specify any contractual provisions to be included in contracts, however, in order to comply with the act certain provisions must be included in the contract. Examples of these are:

- detailed definitions including the definition of the purpose for which the data is being transferred;
- detailed description of each party's responsibilities;
- liability and consequences of breach of contract;
- confidentiality;
- security measures;
- termination; and
- post-termination obligations of each party.

3. Contract Models

3.1 Standard Supplier Customer Model

There is no standard contract model in Ghana. Different businesses use different types of contracts for their outsourcing services.

However, simple outsourcing contract models are preferred by businesses. A company would usually enter into a direct outsourcing relationship with a service provider. Where a parent company is procuring services for itself and other companies within the group the contract model may be different. The parent company may negotiate standard terms directly with the service provider but require companies within the group to sign their contracts directly with the service provider. The service provider may insist on a parent company guarantee with respect to subsidiary companies which do not have substantial balance sheets. Alternatively, the parties may agree an agency-type agreement.

In the telecommunications industry purchase orders are used for procurement services. Data protection clauses, security protection clauses and confidentiality clauses are included in the purchase orders and are fundamental clauses to be observed in the agreements.

3.2 Alternative Contract Models

Other contractual models commonly used for outsourcing in Ghana include joint ventures, partnerships, build-operate-transfer structures, managed services agreements, PPP arrangements and framework agreements.

In certain cases, the type of contract model is specified by legislation. For example, L.I. 2204 provides that a non-indigenous company which intends to provide goods and services to a contractor, a subcontractor, licensee, the corporation or other allied entity within Ghana must incorporate a joint venture company with an indigenous Ghanaian and afford that indigenous Ghanaian company an equity participation of at least 10%.

The Ghana Investment Promotion Centre Act, 2013 (Act 865), also provides that a person who is not a citizen may participate in an enterprise in Ghana if that individual enters into a joint enterprise with a citizen, in which case the foreigner must invest foreign capital of not less than USD200,000 in cash or capital goods relevant to the investment or a combination of both by way of equity participation and the partner who is a citizen must have at least 10% equity participation in the joint enterprise.

PPPs in Ghana are currently regulated by the National Policy for PPPs in Ghana (the PPP Policy). Except for unsolicited bids, the selection of private sector parties in PPP transactions shall be carried out through competitive bidding methods. The PPP Policy, however, requires that the selection and procurement of a transaction adviser to assist and advise a contracting authority on the PPP project must comply with the procurement procedures under the Public Procurement Act 2003, Act No. 663. There are currently efforts being made to prepare a specific law to regulate PPPs in Ghana, including regulating the procurement process for a private partner.

3.3 Captives and Shared Services Centres

Captive Centres are wholly-owned subsidiaries of parent companies which are located in a jurisdiction other than that of its parent company but provides outsourced services to the parent company.

Shared Services refers to the centralisation of several functions from various departments of an organisation formally performed in different divisions or locations. The first shared services centre in Ghana was opened by World Vision in 2017. The Shared services Centre provides centralised transactions in the areas of finance, procurement and information technology to 15 national offices and other World Vision

offices across the world from a central location. The reason for taking this initiative was to improve the effectiveness of World Vision by executing business processes with greater scale and efficiency.

These are both slowly evolving trends in Ghana.

4. Contract Terms

4.1 Customer Protections

- The parties should agree a well-structured approach to transition planning. The transition arrangements could either be set out in the body of the main contract or in a separate agreement attached as a schedule to the main agreement.
- Scope of Work and Service Levels - these are either incorporated in the main body of the agreement or in a separate service level agreement which is attached as a schedule to the main agreement. Service levels are monitored at regular intervals agreed between the parties, usually on a monthly basis. They are linked to service credits which is essentially financial compensation in the event of non-performance by the service provider. Some service providers may wish to include claw back provisions in the form of “service debits” where they exceed the service levels specified in the contract. There must also be clear reporting and escalation mechanisms built into the outsourcing contract. The service levels and service credit regime should not be used as punishment or a way to claw back money. It should encourage good behaviour by the service provider and align the objectives of the parties.
- Customer’s Audit Rights – the customer must have audit rights under the contracts.
- Warranties, Indemnities and Liabilities – there are standard warranties and indemnities from the supplier mainly relating to its commitment, compliance with certain codes of conduct, standard of work and performance. These would be linked to breach and liability for failure on the part of the supplier. Any heads of claim for which liability is excluded must be clearly set out. Liability caps with respect to actionable claims should be carefully negotiated.
- There must be comprehensive provisions with respect to disaster recovery, escrow and business continuity in relation to the outsourced services.
- Insurance – it is usual for the customer to require the service provider to hold a certain type of insurance with an agreed value threshold.
- Intellectual Property Rights – the customer would seek to retain its intellectual property rights in and to all information, data and/or other materials it provides to the supplier for the purposes of providing the services. The supplier usually retains all the intellectual property rights it uses to provide the services. Any bespoke intellectual

property rights created by the supplier in the course of providing the services are typically owned by the customer.

- The contract must include provisions on benchmarking, data protection compliance and security.
- Subcontractors must be subject to the prior approval in writing by the customer.
- Dispute Resolution.
- Termination Provisions – termination must include an exit plan for an orderly handover following termination of the outsourcing relationship. It is important that the exit plan is regularly updated throughout the duration of the contract. Each party's rights and obligations at breach and on termination must be clearly set out in the contract. The events of termination, consequences of termination and the rights and duties of each party following termination must be clear.

4.2 Termination

The general rule under the law of contract in Ghana is that a party to an agreement will have the right to terminate where there has been a breach of a fundamental or material term of the agreement by the other party.

Parties are generally free under Ghanaian law to specify grounds of termination of contracts. In an outsourcing relationship, the risk to the supplier and the risk to the customer upon termination are different. While they both stand to lose revenue, there are additional potential losses for the customer such as significant disruption to its business and loss of reputation, depending on the type of services which had been outsourced. This difference should be recognised in negotiation of the termination arrangements between the parties.

Examples of provisions that may be set out as grounds for termination by either party in an outsourcing contract are as follows:

- material breach by a party which is not capable of remedy or is capable of remedy but is not remedied after a certain period;
- a non-material breach which is not remedied after an agreed period of time to enable the offender to cure the breach;
- insolvency event affecting one party or threatened insolvency of one of the parties; and
- force majeure.

The customer may include the following additional termination rights:

- non-retention by the supplier of certain key employees prior to the minimum agreed period;
- change of control of the supplier; and

- termination for convenience. This is usually accompanied by a pre-determined financial compensation to the supplier which varies in accordance with how far into the contract the customer wishes to exercise such right.

4.3 Liability

An injured party to a contract (one who has suffered a breach) is entitled to recover any loss which results from the breach as long as the loss is not remote or is not one which could have been avoided by taking reasonable steps in mitigation.

A direct loss occurs as a natural result of a breach, and in the usual course of things. It is a loss which is foreseeable as the natural result of a breach. Examples are loss of profit or goodwill. Direct losses are recoverable under Ghanaian law.

An indirect or consequential loss is a loss that is attributable to a special or extraordinary circumstance and which is not in the usual course of things. Indirect losses are only recoverable if they were foreseeable or could have been mitigated.

Where the loss of profit is as a result of a breach of contract, then the court will compensate a plaintiff where it establishes that the loss was occasioned as a result of certain expenses incurred by the plaintiff in anticipation of the defendant's performance of the contract.

In relation to loss of goodwill, the Protection Against Unfair Competition Act, 2000 (Act 589) provides that any act or practice in the course of industrial or commercial activities that damages or is likely to damage the goodwill or reputation of another person's enterprise or its activities constitutes an act of unfair competition whether or not the act or practice causes confusion.

Examples of what constitutes damage to another person's goodwill or reputation include damage resulting from the dilution of the goodwill or reputation attached to:

- a trademark, whether registered or not;
- a trade name;
- a business identifier other than a trademark or a trade name;
- the appearance of a product; and
- the presentation of a product or service.

A person damaged by an act of unfair competition may bring an action for:

- an order for injunction to prevent further acts of unfair competition;
- a provisional order to prevent unlawful acts or to preserve relevant evidence; and
- any other remedy that the court may consider fit to order.

4.4 Implied Terms

There is no legislation or legal framework with respect to the above however there are terms in the Sale of Goods Act, 1962 (Act 137) that are implied into every contract for the sale of goods. Therefore, where the outsourcing contract relates to the sale of goods, these implied terms would apply.

Ghanaian courts do recognise both express and implied terms in a contract. According to the courts, implied terms may include custom and practice and statutory rights of the parties. Therefore, these would also apply in an outsourcing relationship. Generally, the common law remedy of damages and equitable remedies such as injunction and specific performance are also applicable. Implied terms tend to be relevant where the express terms either do not adequately address the relevant matter or fail to address the matter.

5. HR

5.1 Rules Governing Employee Transfers

There is no legislation or legal framework in Ghana which specifically governs employee transfers with respect to outsourcing. However, the Labour Act, 2003 (Act 651) (Labour Act) contains some provisions which may be applicable in certain specified circumstances.

The Labour Act grants an employer the right to transfer an employee in their employment.

Where the outsourcing transaction involves the introduction of major changes in production, programme, organisation, structure or technology of an undertaking that are likely to entail terminations of employment of the customer's workers, the customer is required to notify the Chief Labour Officer in writing with certain specified information and where applicable, the employee's trade union no later than three months before the changes. There is also a requirement to have consultations with the trade union with the objective of taking measures to mitigate the effects of the termination on the relevant employees, eg, finding them alternative employment. This may prolong the outsourcing process.

Compensation provisions apply where the outsourcing results in an employee's redundancy or the "diminution" in the terms and conditions of their employment. In determining whether an employee has suffered any diminution in his or her terms and conditions of employment, account shall be taken of the past services and accumulated benefits, if any, of the employee in respect of the employment with the customer prior to the changes. Redundancy disputes may be referred to the National Labour Commission for settlement. The decision of the National Labour Commission shall, subject to any other applicable law, be final. These provisions do not apply to casual employees, employees on fixed time contracts and employees serving a period of probation or

qualifying period of employment of reasonable duration determined in advance.

There are specific provisions in the Labour Act relating to public sector employees.

5.2 Trade Union or Workers Council Consultation

Please see 5.1 Rules Governing Employee Transfers.

5.3 Market Practice on Employee Transfers

There is no automatic transfer of employees by operation of law in an outsourcing contract. In practice employee transfers within the context of outsourcing are a matter of negotiation between the customer and the supplier of the services. It is a risk allocation and balancing exercise whereby each party signs up to representations, conditions, warranties and indemnities in favour of the other party. The customer would, for instance, usually require key employees who transfer to the supplier by reason of the outsourcing to continue to be employed by the supplier for an agreed minimum term. Risk allocation provisions cover the commencement, duration and termination of the contract.

6. Asset Transfer

6.1 Asset Transfer Terms

In an outsourcing contract, the assets which are necessary for delivery of the services may be transferred to the supplier. These assets fall into two categories: movable and immovable assets. Different formalities apply to each category of asset in order to make it valid. A supplier will require various warranties and indemnities from the customer regarding ownership of the assets including the right to transfer the asset and the state of repair of the asset. It is important that the supplier conducts due diligence on all assets to be transferred and the contracts relating to the assets in order to identify risks and potential future costs. Provision must be made for selling to the customer equipment purchased in its name for its sole use upon expiry or earlier termination of the outsourcing contract.

The provisions dealing with asset transfer can be embodied in the outsourcing agreement in cases where there is a simple and limited transfer of assets. Where the assets are significant it is easier to enter into a separate agreement.

Movable Assets (eg, Hardware)

The parties are generally free to agree the mode of transfer of such assets as well as their value. However, it is recommended that the parties enter into a formal assignment. The terms of lease agreements with respect to leased equipment will need to be reviewed by the supplier. The customer would need to obtain the consent of the lessor for the transfer, assignment or novation of the relevant contract.

Immovable Assets (Premises)

Due diligence must be done on the title to prove ownership before land can be transferred. A deed of conveyance is then executed between the parties. The parties must ensure that stamp duty is paid to the Ghana Revenue Authority and the document is duly stamped prior to its submission for registration at the Lands Commission's office in the region in which the land is situated. Stamping is a condition precedent for registration. The Stamp Duty Act, 2005 (Act 689) requires that the instrument is stamped within two months of its execution. With regard to leasehold property, a supplier that is foreign can only be given a maximum leasehold term of 50 years, which is usually renewable. The same processes apply with respect to leasehold property. However, the consent of the landlord must be obtained.

Intellectual Property

In most cases the customer would lease (and not transfer) its licence to the supplier. Where the customer agrees to transfer its intellectual property, the transfer should be documented in writing in the form of a licence agreement.

Key Contracts

Key contracts entered into by the customer may be assigned once all the parties agree to it. Where prior consent is not needed the other party to the contract must be given notice of the assignment.

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