

Court of Appeal concludes that “an unregistered NOTAP agreement is not void”

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Background

The Court of Appeal has reversed the decision of the Federal High Court (“FHC”) in *Stanbic IBTC Holdings Plc (“Stanbic”) v Financial Reporting Council of Nigeria (FRCN) & Anor (2015)*, which had held that failure to obtain NOTAP approval (on a registrable contract) rendered the contract illegal and void; and payment could not be made on an unregistered contract.

The National Office for Technology Acquisition and Promotion (NOTAP) Act seeks to regulate transfer of foreign technology to Nigerian counterparties. The FHC proceedings arose following an investigation conducted by the FRCN. The investigation centred on the technology contract for software expensed by Stanbic IBTC Bank Plc (“the Bank”) in its audited financial statements for 2013 and 2014. The amounts were payable to the South African parent company. The banking software was procured from

abroad and customised by the Bank. The Bank sold the software to its parent and entered into a license agreement to use the software for an annual licence fee (like a sort of sale and lease back). NOTAP declined an application to register the contract for the use and payment for the software by the Bank. However, the Bank made yearly provisions and remittances to its parent for the software.

The Court of Appeal’s decision

Some relevant issues considered by the Court of Appeal and the conclusions reached are highlighted below:

Whether NOTAP applies to agreements for export of technology from Nigeria to a foreign country

The Court of Appeal held that NOTAP’s scope does not cover contracts for exporting technology out of Nigeria (i.e. technology originating from Nigeria and being sold to a foreign counter-party, in this case, the sale of the banking software to the Bank’s parent).

The effect of failure to register a registrable agreement

The Court of Appeal held that section 7 of the NOTAP Act does not deal with or provide for the validity or legality of unregistered or non-registration of contract(s) under Section 4(d). And the NOTAP Act does not render such contracts as invalid, illegal, null and void.

The Court held that failure to register a contract only prevents

payment through, or on the authority of the Central Bank of Nigeria, or a licensed bank in Nigeria.

Takeaway

After the 2015 FHC decision, statutory auditors challenged companies on recognising expenses on registrable contracts that were not approved by NOTAP. This was further reinforced when the FRCN issued Guidelines which prevented recognition of expenses (made in respect of unregistered contracts) in the financial statements. By implication the expenses were also disallowed for tax purposes.

The Court of Appeal did not make any declaration on the accounting or reporting implication of its decision. However, as the directive of the FRCN was issued after the 2015 FHC decision, the directive may now be challenged on the basis that the legal foundation it was predicated on has been overturned.

The Court of Appeal’s decision therefore clarifies that NOTAP approval does not apply to technology transfer from Nigeria to a foreign company (within or outside a Group). Hence a company can dispose of its technology or otherwise provide technology from Nigeria to users outside the country without NOTAP approval.

The Court’s decision also confirms that even where a registrable contract has not been registered by NOTAP, contracting parties can enforce the terms of their contract (notwithstanding that the contract is not registered with NOTAP).

