




UUBO COVID-19
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THE IMPACT OF THE CORONAVIRUS (COVID-19) PANDEMIC ON CONTRACTUAL OBLIGATIONS UNDER NIGERIAN LAW




Introduction




The ongoing coronavirus (Covid-19) pandemic has caused governments around the world to put in place a raft of public health guidelines and measures to contain the spread of the virus. In Nigeria, the federal and various state governments have also taken measures to contain the spread of the virus. For instance, attendance at schools and places of worship, as well as other public gatherings have been restricted in several states of the federation.



The President of the Federal Republic of Nigeria, acting pursuant to the powers conferred on him under the Quarantine Act, Chapter Q2, Laws of the Federation of Nigeria, 2004 issued the Covid-19 Regulations, 2020 and imposed a lock down on and restriction of movement in the Federal Capital Territory (Abuja), the commercial capital (Lagos) and Ogun State for an initial period of 14 days with effect from 30th March 2020.



The pandemic and the various containment measures taken by governments around the world have, undoubtedly, caused unprecedented disruptions to commercial, economic and social activities globally, and Nigeria is not excluded. In many cases, the ability of counterparties to fulfil their contractual obligations has been affected. In some of these cases, the impact has caused delays or resulted in one or more parties being unable to proceed with their obligations. In other cases, it has made the contract impossible to perform or, where the performance is time-sensitive, the delay is such that the contract can no longer serve the purpose for which it was entered into.



In this guidance note, we have discussed how or in what circumstances the twin doctrines of force majeure and frustration of contract can be relied on to excuse a party's failure to perform its contractual obligation as a result of the Covid-19 pandemic and/ or the various measures put in place by the government to curtail its spread

1

What constitutes an event of force majeure under Nigerian law?

1

A force majeure event is the occurrence of an event which is beyond the reasonable control of either party and which renders that party incapable of performing its contractual obligations. For a party to rely on force majeure, the contract must specifically contain a force majeure clause, and the specific event on which the party wishes to rely must be covered by or come within the force majeure events listed in the contract.

2

Usually, a force majeure clause in a contract will seek to excuse either non-performance or delay in the performance of a contractual obligation if the non-performance or delay in performance is caused by circumstances (either natural or human acts) which are beyond the parties' reasonable contemplation and control. A typical force majeure clause would cover events such as acts of war, "acts of God", riots, strikes, natural disasters including floods and extreme weather conditions, outbreak of diseases, governmental actions etc.

2

When is a contract said to be frustrated?

1

Frustration, on the other hand, is not specified in the contract but applies where the performance of the contract becomes impossible by reason of an act which occurs after the formation of the contract. This act will automatically bring the contract to an end and relieve the parties of all obligations under the contract. This means that where a contract is held by the court as having been discharged by frustration, none of the contracting persons will be held liable for what has happened, nor will they be obliged to perform the contract.

2

Nigerian courts have held that "Frustration [of a contract] occurs wherever the law recognises that without [the] default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it radically different from what was undertaken by the contract." The courts have recognised the following circumstances as capable of frustrating a contract:

- Subsequent legal changes or statutory impossibility
- Outbreak of war
- Destruction of the subject matter of the contract or literal impossibility
- Government acquisition of the subject matter of the contract.



3

What is the effect of a successful plea or invocation of an event of force majeure?

The effect of a successful plea or declaration of force majeure would depend on the construction of the exact terms of the force majeure clause contained in a contract. As already indicated above, the purpose of a force majeure clause is to excuse the non-performing party from his failure or inability to perform his contractual obligation as a result of the occurrence of a force majeure event. Generally, force majeure clauses in addition to excusing the failure of performance, will also provide for the deferral or postponement of contractual obligations until such a time as the force majeure event has abated or ceased. Some force majeure clauses also provide that if the event of force majeure persists beyond a specified period, either party may terminate the contract.

4

What is the effect of a successful plea of the doctrine of frustration of a contract?

The effect of a successful defence of frustration is to bring the contract to an end and to discharge the parties from further obligations or liabilities under the contract. However, the law recognises that financial commitments might have been made before the occurrence of the event that caused the contract to be frustrated. Certain statutes have made provisions for the adjustment of the rights of the parties where a contract is frustrated. For instance, Section 8 (2) of the Law Reform (Contracts) Law of Lagos State provides that where a contract has become frustrated, and the parties have for that reason been discharged from further performance of the contract, all sums paid or payable to a party in accordance with the provisions of the contract before the contract became frustrated will in the case of sums so paid, be recoverable by the person who paid the sums, and sums payable shall no longer be paid. Under Section 8 (3) of the Law, the court may not order the recovery or refund of any portion of the contract sum that had been expended for the purpose of performance of the contract before the contract became frustrated.


5

Would the outbreak of Covid-19 pandemic and/ or the various disruptive public health measures put in place by the government qualify as events of force majeure under Nigerian law?


The outbreak of the coronavirus pandemic together with the various public health measures imposed by governments around the world has, undoubtedly, caused unprecedented disruptions to commercial and other activities and impacted the ability of businesses and individuals to perform their contractual obligations. However, whether a party can legally plead or rely on Covid-19 as an event of force majeure in these circumstances would depend on whether the contract contains a force majeure clause. Where the contract contains a force majeure clause, it will be necessary to construe the clause in order to determine whether Covid-19 and/ or the various measures put in place by the government to contain its spread qualify as force majeure events. Where the force majeure events stated in the contract include such events as: 'outbreak of diseases', 'pandemics', 'epidemic', or 'governmental actions', a party who has been prevented from performing his contractual obligations as a result of any of the Covid-19 containment measures imposed by the government, such as movement or travel restrictions, border closure, etc., may be able to successfully plead and rely on force majeure.

6

What if the contract does not contain a force majeure clause?



Where a contract does not contain a force majeure clause, a contracting party who is unable to perform his contractual obligations as a result of any of the measures put in place by the government and public health authorities to contain the Covid-19 outbreak cannot rely on force majeure. However, such a party may be able to rely on the common law doctrine of frustration, if as a result of the Covid-19 outbreak or any of the containment measures imposed by the government, that party has been prevented from performing its obligations under the contract or performance of the contract has been rendered impossible or radically different from what the parties had contemplated.



It is to be noted, however, that the mere fact that the performance of a contract has become difficult, inconvenient or onerous does not mean that the contract has become frustrated. Nigerian courts have held that a contract is not frustrated merely because its execution has become more difficult or more expensive than either party originally anticipated and has to be carried out in a manner not envisaged by the parties at the time of its negotiation.



Conclusion

Contractual parties whose obligations have been adversely impacted by the Covid-19 pandemic should seek early legal advice regarding the options available to them and how to manage the situation with a view to minimising litigation risks. Where a contract contains a force majeure clause, the party who will be potentially exposed to liability for non-performance needs to confirm that the terms of the clause cover the current crisis, and if so, take immediate steps in accordance with the contract to trigger the force majeure provisions of the contract by issuing the appropriate notice of force majeure. Where the contract does not contain a force majeure clause, the affected party should seek legal advice on whether the factual matrix of its case is such that the contract can be deemed to have been frustrated.



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