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**O**n 11<sup>th</sup> March 2020, the World Health Organization (WHO) declared COVID-19 to be a pandemic. The resultant effect of this declaration was the frantic attempt by nations to cut themselves off from the acclaimed global village. Nigeria's index case was recorded on 25<sup>th</sup> February 2020. However, this did not have any effect on businesses within the country, as it appeared to be properly handled and businesses carried on without interruptions.

However, after the index case and related contacts were discharged on 13<sup>th</sup> March 2020, it was the second wave of discoveries and the third identified case on 17<sup>th</sup> March 2020 that brought the reality of the COVID-19 pandemic to the fore and required the immediate implementation of regulations on self-isolation, social distancing and the closure of non-essential businesses by the Lagos State Government, following the governance pattern recently developed by nations as a reaction to the COVID-19 pandemic. This was followed by the announcement by President Muhammadu Buhari on 29<sup>th</sup> March 2020, restraining the operation of businesses classified as non-essential in certain states, for a period of 14 days in the first instance.

We intend to review the effect of these restrictions on the contracts entered into by businesses in Nigeria and the legal implications of their failure to perform their obligations in such contracts, due to the restrictions placed by the government's regulation of the operation of businesses in certain states, to enable them manage the outcome of this novel strain of the coronavirus.

## FORCE MAJEURE IN CONTRACTS

**N**igeria's legal system has its origin in the Common Law and force majeure has no provision in Common Law. Rather, it has its origin in the Civil Law but would be applicable in the Common Law jurisdictions if it is specifically provided for in the contract between parties. The reason for this position is that since it is not part of its legal system, the Common Law Courts would only enforce the terms that are clearly stated in the contract between parties. Therefore, if there is no force majeure provision in a contract, the performing party in a Common Law jurisdiction would be unable to declare a force majeure.

Clearly, the effects and disruptions of the COVID-19 pandemic, at least not in the scale of the present disruptions, were never remotely considered by any party to a contract. At this point in time, every party affected by the disruptions caused by COVID-19 needs to conduct a review of its existing contract to discover if it contains a force majeure provision and if broader terms were used to provision for a business disruption that would relieve the performing party of its obligation due to COVID-19.

It is important that this review is promptly conducted as the effect of a force majeure Clause in a contract when invoked is to allow a party the non-performance of its obligation under the contract, subject to the terms and provisions of the contract.

## **CAN COVID-19 BE AN EVENT FOR NON-PERFORMANCE?**

Since force majeure is not part of the Common Law legal system and businesses in such jurisdiction would upon external situations of non-performance be bound by the terms of their contract, we intend to discuss the status of contracts entered into before the COVID-19 pandemic to determine whether for those contracts with force majeure provisions, COVID-19 can relieve the performing party of its obligation.

For COVID-19 to operate as a force majeure, there must be a link between the pandemic and the ability of the performing party to perform its obligation under the contract. The fact that the pandemic affects the profitability of performance would not suffice in this regard, rather the test for whether COVID-19 qualifies as a force majeure event in a contract would be satisfied if;

- the inability to perform was beyond the control of the performing party;
- the party's performance of its contractual obligation was prevented, hindered or delayed as a result of COVID-19; and
- all reasonable steps were taken to avoid the consequences of COVID-19 from affecting the performance of the contract.

### **DISABLING EVENT**

Depending on the drafting, the force majeure events in contracts are either exhaustive or non-exhaustive. For non-exhaustive events, a broad criterion would be used to determine if they qualify as a force majeure event and would largely be left for interpretation by the Courts. Also, a contract might stipulate that upon the occurrence of certain events like earthquakes, riots, terrorism, war, acts of governments, plagues or epidemic, a force majeure can be called. This list which in most cases is reached by negotiation, is exhaustive and if the words "pandemic", "epidemic" and its likes are used, then the inability of the performing party to perform due to COVID-19 or the related government action, would qualify as a force majeure event.

## INABILITY TO PERFORM THE CONTRACT

The fact that COVID-19 can be a force majeure event does not on its own mean that because of its occurrence and the related government actions, the performing party is relieved from its obligation under the contract. For that to happen, COVID-19 must be shown to have prevented, hindered or delayed the performance of the contract.

The evidential threshold for each of these three situations would differ in establishing COVID-19 as the reason for the inability to perform the obligation stated in the contract. The proof that COVID-19 prevented the performance of the contract would have to be such that as a result of the pandemic or related government actions, the contract could not be performed or impossible to perform, and not that the performance of the contract would result in economic loss or loss of profit.

If the performance of the contract is hindered or impaired by COVID-19, as recently experienced due to the mandatory government regulation of the operation of businesses categorized as non-essential and the restriction of movements in Lagos, Ogun and the Federal Capital Territory, such that; businesses cannot move their goods, raw materials cannot be accessed and supplies for productions cannot be made, the event will qualify as a force majeure. However, if there is an option around this hindrance, though remote, the fact that it is an unprofitable option would not discharge the performing party from the obligations in the contract. It is suggested that in this situation, the performing party rather than make a force majeure claim, should request for a variation of the contract.

Most contracts, especially those for supply chain, logistics and building construction would have a duration for performance that would largely be integral to the core of the contract. The recent regulation of the Nigerian government, enforcing the non-operation of businesses and restriction of movements for 14 days in the first instance, would result in a delay in performance of such contracts. The threshold for proof of this delay in invoking a force majeure provision would not be too difficult. Once the performing party can show that the event or related government action that resulted in the delay in performance of the contract occurred within the stipulated duration for performance, the inability to perform due to the event would be established.

## **MITIGATION**

The public health effect of COVID-19 and the disruption of businesses by the related government actions cannot on its own result in the performing party declaring a force majeure on the contract without, that party first establishing that necessary reasonable steps were taken to avoid the event from affecting the performance of the contract. Regarding recent events, the party might be required to establish that it followed all the stipulated steps advised by WHO, considered conducting its operations remotely, operated social distancing specifications, provided PPE in its operations, tried to re-route its operations through other states not affected by the related government actions, yet there was no alternative to the non-performance of the contract.

## **NOTICE OF EVENT**

Any party that intends to rely the COVID-19 pandemic as its event to make a force majeure claim, would have to give notice of its inability to perform due to the occurrence of the event within the time stated in the contract. In most cases, such notice would be a condition precedent for any party that intends to rely on the force majeure provision of the contract, hence prompt attention should be given to this requirement of notice.

Also, it will be necessary for the notice to state in detail whether and how the event is preventing the performance of the contract. The agreed mode of receiving notice as stated in the contract would suffice as due and proper notice.

## **EFFECTS OF INVOKING THE FORCE MAJEURE PROVISION IN CONTRACT**

A contract is largely about the performance by one party of its obligations stated in the contract. The occurrence of any event that prevents, hinders or delays the performance of this obligation would mean that the obligation in the contract cannot be performed. Depending on the nature of the event, if a force majeure is invoked, time may be either extended or suspended to perform the obligation.

If the event is a continuous occurrence, as recently being experienced in the COVID-19 pandemic, it might be proper for the performing party to give regular update of the event but if time is of the essence in the performance of the contract, then the contract should be terminated, otherwise, the performance should be extended till the end of the pandemic or the related government action.



## PRACTICAL STEPS TO TAKE TO RESOLVE YOUR COVID-19 CONTRACTUAL ISSUES

- Businesses at this time will have to review their all contracts to determine if they carry a force majeure provision and if the wordings in those provisions avail them at these times. It is necessary that these contracts specifically provide for a force majeure, since the Common Law which is practiced in Nigeria would only give expression to the intention of parties as stated in their contract. Where the contract does not have a force majeure provision, the Common Law doctrine of Frustration might be able to offer some relief.

- **DOCTRINE OF FRUSTRATION**

This doctrine which requires a very high threshold to be fulfilled before it can be called in aid, would require the party relying on it to show that the event that occurred was not contemplated or anticipated by the parties to the contract, or that it has radically transformed the obligations under the contract such that it would be unfair to hold any party to their undertaken.

Unlike the effect of a force majeure provision in a contract, the automatic consequence of applying the Doctrine of Frustration to a contract is that the contract is immediately terminated, hence it is necessary to establish that; a) the event was not the fault of either party, b) was not envisaged by the contract, and c) the event occurred after the contract was entered and makes the performance impossible or radically different from what was contemplated.

The fact that the contract would become unprofitable or difficult to perform would not be enough to invoke the Common Law Doctrine of Frustration.

Though the threshold for proving the applicability of this doctrine might be high, for certain businesses that are in the entertainment and hospitality sector who had prior to the declaration of a restriction of movement and social gathering by President Muhammadu Buhari on the 29<sup>th</sup> of March 2020, entered into contracts for; events spaces for weddings or concert and hotel halls for Annual General Meetings, they should be able to call in aid the Doctrine of Frustration upon their inability to fulfil their obligations in this regard.

- Review your contract documents to determine if there is a force majeure provision and if it provides for an event like COVID-19, with words like "epidemic" or "pandemic:

- Keep a record of how COVID-19 affects your performance of the contract.
- Be satisfied that the COVID-19 pandemic is the sole reason why the contract cannot be performed.
- Determine whether there are other options that can be utilized to perform the contract, overcome the hindrance or reduce the delay affecting the performance.
- Determine early the effect of COVID-19 on the performance of the contract and once the conclusion is reached that the event does not prevent, hinder or delay the performance of the contract but would only make the performance unprofitable, promptly call for the variation of the contract.
- Immediately it is determined that the COVID-19 pandemic or the related government action is a force majeure event, promptly serve notice of a force majeure as stipulated under the contract.
- If your contract does not contain a force majeure provision seek advice on how the Doctrine of Frustration of Contract would apply to your situation.



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