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FAQs regarding *Force Majeure*

With the declaration by the World Health Organization (WHO) of the Corona Virus (COVID 19) outbreak as a pandemic, many businesses are confronting circumstances which may affect the performance of their obligations under existing agreements.

These FAQs provide an overview of the important considerations in reviewing contractual obligations and assessing the ability of parties to excuse or delay the performance of their obligations due to the occurrence of a Force Majeure event. It also considers the instances and processes by which the COVID 19 pandemic can trigger such provisions.

What is a Force Majeure Clause?

A **Force Majeure** clause (French for "superior force") is a contractual provision that allows parties to a contract suspend or terminate the performance of their obligations thereunder, due to circumstances (beyond their control) which render execution of the contract inadvisable, commercially impracticable, illegal, or even impossible. Usually, contracts containing force majeure clauses define what events can be considered *Force Majeure Events*, and these events include natural disasters, wars, riots, strikes, lockouts, and an omnibus provision known as "Acts of God". Some Force Majeure clauses also include the outbreak of diseases, epidemics, and pandemics; however, where same is not expressly mentioned, it can be argued that the omnibus clause subsumes such occurrences.¹

Is Covid-19 a Force Majeure event?

The outbreak of COVID 19 does not automatically translate to a Force Majeure event. It should be noted that the classification of a situation as triggering the invocation of Force Majeure is largely dependent on the specific wordings and provisions in the contract.

The question then is, what are the situations contemplated in a contract which can be relied on to trigger the invocation of Force Majeure?

As earlier indicated, most contracts designate various situations as *Force Majeure Events* with the use of words like 'Acts of God', 'epidemic', 'pandemic', 'war', 'government policies', or any situation making it impossible to conduct business. The use of the above generic clauses will qualify the outbreak of the COVID-19 pandemic as an event triggering the invocation of Force Majeure clause.

Please note that the Nigerian courts are likely to give narrow interpretation to Force Majeure clauses because of its effects in suspension of a contract or allowing for non-performance of same.

How does COVID 19 affect contractual obligations?

Upon declaration of COVID 19 as a pandemic which raised public health of international concerns by WHO, businesses and governments have implemented various measures to limit the spread of the virus with the closure of borders, imposition of travel bans, closure of non-essential businesses and restriction of public gatherings.

The Federal Government of Nigeria passed a Covid-19 Regulation, 2020ⁱⁱ closing the nation's borders and imposing a 'lockdown' in certain states within the Country, preventing free movement of persons which will in some circumstances hinder parties from meeting their contractual obligations. These movement restrictions have a significant impact on contracts execution.

In the short-term business supply contracts have been disrupted, pre-agreed employment obligations are in abeyance, transaction milestones and contractual delivery timelines may have been impacted. In the long term, businesses will have to consider the inability to fulfil contractual obligations to employees, financiers, suppliers and other contract stakeholders due to changing revenue dynamics.

If COVID 19 qualifies as a Force Majeure event in my contract, am I exempt from its performance?

If after assessing the contract, it is established that the wording qualifies COVID 19 as a force majeure event, the performance of obligations under the agreement are automatically suspended.

In order for an event to be considered Force Majeure, the following elements must be present:

- The event must be beyond the reasonable control of a party.
- It must materially affect a party's ability to perform its obligations under the contract (the event must make performance of a party's obligations near impossible and not merely inconvenient); and
- The event must not have been reasonably foreseen or provided against by the parties.

Consequently, a party pleading Force Majeure must be able to prove that the inability to perform or execute its contractual obligations is as a direct result of the COVID-19 pandemic and/or the public health regulations enforced to curb the spread of the virus.

What if the performance of my obligations under my contract has become less financially attractive as a result of COVID 19?

Under Nigerian Law, parties are bound by the terms of their contractsⁱⁱⁱ. Nigerian courts will be hard pressed to intervene in the enforcement of binding contracts on the basis of changing economic dynamics, lower profit margins or adequacy of consideration as parties are deemed to have entered the contract freely.^{iv} Thus, market fluctuations (by whatever means caused) which make a contract financially undesirable contract cannot be classified as *Force Majeure Events*. To succeed, the party relying on a force Majeure clause must prove that the intervening event made the execution of the contract factually or legally impossible.

Does the restriction/cessation of movement, trade embargoes etc. pursuant to Covid 19 Regulation 2020 justify the inability of a party to perform his/her obligations under a contract?

Although the movement and trade restrictions may negatively impact the execution of some contracts, due to the disruptive effects highlighted above, it is important to review each contract on its merits.

While the fulfilment of certain obligations may prove to be impossible, the regulations enacted by the Nigerian government have allowed exemptions to certain essential service providers. These include medical personnel, food and necessities suppliers, security personnel, technological infrastructure, and telecommunications companies. These organisations will be expected to continue to meet their service obligations. The same applies to service or employment obligations which can be fulfilled remotely.

Each contract must thus be considered in line with the obligations it imposes and the possibly or impossibility of meeting those obligations in the present circumstance.

What Procedure do I need to follow to invoke Force Majeure where it is applicable to my contract?

The procedure for declaration of Force Majeure is often outlined in the contract. It is this important to review the contract to determine the specific stipulations set out in the contract in terms of the notice to be given to counter parties under the contract.

Depending on the specific provisions of the contract, parties will likely be required to issue a written notice to the counterparties invoking the Force Majeure clause; detailing the events which prevent the further performance of the contractual obligations, and notifying of the suspension of its obligations.

Some contracts might also require the party giving the Force Majeure notice to outline a plan to mitigate the loss caused to the counterparty. It is thus important to read the contract and follow the protocol stipulated therein

What is the effect of my application of a Force Majeure Clause?

The application of a Force Majeure clause under an agreement relieves the party relying on it from the performance of its obligation under the agreement by either suspension of the contract, delay performance or the discontinuance of its obligation under the contract without any liability for breach of contract. It is imperative to note that steps to mitigate losses should be adopted (where available), as failure to do so may open parties to breach of the loss mitigation obligations under the contract.

Where my contract is silent on Force Majeure, can the concept be implied by the court given the circumstances poised with corona virus?

Kindly note that Force Majeure provisions cannot be implied into a contract. For a party to rely on a right provided by the concept of Force Majeure, such party must rely on an express Force Majeure clause in the contract.

However, such party can rely on the application of the doctrine of frustration of contract.^v The effect of this concept is that the contract will immediately become void if a party can prove that its performance is rendered impossible or unlawful.

Frustration of a contract renders same void with immediate effect and the concept does not accommodate suspension of the contract or remedy to either party to the contract.

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ⁱ SPDC Nigeria Ltd V. FBIR (1996) LPELR-3049(SC), on the ejusdem generis rule of interpretación.

ⁱⁱ The Federal Government of Nigeria issued the COVID-19 Regulations, 2020 dated 30th of March 2020 under which The President directed the cessation of movements in Lagos, Ogun and Federal Capital Territory for an initial period of 14 days with effect from 11pm on Monday, 30 March 2020. To view the COVID 2019 - <https://bit.ly/2JQ8eIy>

ⁱⁱⁱ ABBA v. Shell Petroleum Development Company of Nigeria Limited (2013) LPELR-20338(SC), Colonial Development Board v. Kamson (1955) 21 NLR 206.

^{iv} S.P.D.C. (Nig.) ltd V. Allaputa (2005) 9 NWLR (Pt. 931) 475 at 500 Paras.C-D(CA).

^v Standard (Nigeria) Engineering Company Ltd & ANOR. v. NBCI (2006) LPELR-3111(SC).