EFFECT OF COVID-19 PANDEMIC AND EXISTING LEGAL AGREEMENTS.

That the world is in panic mode over the Covid-19 pandemic is no longer news. As at the 10th of April 2020, Nigeria has reported a total of 288 cases of the Coronavirus pandemic (Covid-19) with 51 discharged cases and seven deaths. Many speculate that these figures are on the conservative side given the low number of tests carried out, and only in some states (not all) of the federation of Nigeria.

However, the seriousness with which government is taking this crisis informed the release of the COVID-19 Regulations 2020 on the 30th day of March, 2020 made under the Quarantine Act, Cap Q2, Laws of the Federation, 2004. Under it in the first instance, two states of the federation, Lagos and Ogun States, and the Federal Capital Territory, Abuja (FCT) thought to be in the frontline of the pandemic have been in partial lockdown since the 30th of March 2020 for fourteen (14 days). For details of the regulation please see https://covid19.ncdc.gov.ng/resource/COVID-19_REGULATIONS_2020_20200330214102.pdf

For the business person how would the above restrictions, and the myriad restrictions now being imposed by state governors in the nation affect your business contracts? That is the focus of this Newsletter.

Quare: Can a party to a contract be released from the performance of contractual obligations as a result of this covid-19 pandemic and the attendant restriction of movement and work activities?
The answer to this question lies in an understanding of the doctrine of frustration of contracts, particularly what is called 'force majeure'.

What is frustration of contract?

A contract is said to be frustrated where subsequent to its creation, and without fault of the contracting parties, such contract is incapable of being performed due to an unforeseen event (or events), resulting in the obligations under the contract being radically different from those contemplated by the parties to the contract. See the Court of Appeal decision in TOTAL (NIGERIA) PLC. VS. MOSHOOD AKINPELU & ANOR. (2004) 17 NWLR (Pt. 903) 509.
Frustration will operate to discharge the contract and exculpate the parties from subsequent breach, whether or not there is a clause in the agreement that caters for this.

Are all contracts affected by the doctrine of frustration?

By the Law Reform (Contracts) Act and the Law Reform (Contracts) Law of Lagos State frustration does not apply to these contracts: (a) Charterparty except a time charter party or a charterparty by way of demise; (b) contract for the carriage of goods by sea; (c) contract for the sale of specific goods where the goods have perished before the risk passes to the buyer, or any other contract for the sale and delivery of specific goods where the contract is frustrated by reason of the fact that the goods have perished; and (d) Insurance contracts. This is not the forum to discuss the jurisprudence behind these exceptions, other than to say it is to stave off profiteering and undue advantage of the other contracting party.

What is the legal consequence of frustration on contracts?

Once a court decides that a contract has been discharged by frustration, the court also determines the state of affairs of the parties and who should retain, return or refund any money or property. The court also decides who is to bear the loss or how the loss is to be apportioned between the parties. See MESSRS WESTEC NIGERIA LIMITED VS. SOKOTO STATE GOVERNMENT & 2 ORS. (2001) 4 NWLR (Pt. 703) 304.

Statute also provide for the legal effect of frustration. See Law Reform (Contracts) Act and the Law Reform (Contracts) Law of Lagos State. These legislations permit the recovery of money prepaid towards the performance of the contract, and by abolishing any liability to pay, if in fact payment had not yet been made. They also provide for the recovery of the expenses of a party which were incurred towards the performance of the contract before the occurrence of the frustrating event; and also allow a party who had taken steps considered valuable to the other party (apart from payment of money) to recover a sum of money not exceeding the value of the benefit so conferred by him on the other party; and also provide for situations where only a part of the contract has been frustrated and the other parts are still in force. In such situations, severability of contract will be construed by the courts. This means that part that can still be performed will remain in force.

Alternative:

What of if there is a specific clause in the contract for such eventuality? It is called a force majeure clause, discussed below.

What is force majeure?

Force majeure is an event, effect or circumstance that can neither be anticipated, foreseeable nor controlled by the parties and which prevents a party from fulfilling his/her/its obligations under a contract, as such performance becomes impossible. For force majeure to be applicable to a particular transaction, there must have been a force majeure clause in the contract between the parties. This applies to all forms of contracts, including but not limited to employment contracts. A force majeure clause is basically a provision in the contract that allocates the risk if it is impossible or impracticable to perform an obligation under a contract as a result of an event or effect that the parties could not have anticipated or controlled during the term of the contract.

Different types of force majeure.

Force majeure may be acts of God/nature or acts of the people/government. Force majeure events may take the form of natural catastrophes such as hurricanes, typhoons, cyclones, floods, earthquakes and volcanic eruptions, or may be political events such as wars, riots, strikes and terror attacks. It may also take the form of epidemic or pandemic diseases such as Ebola, Covid-19 (also popularly known as coronavirus) and an act of a state or governmental prohibition.

Nigerian law recognise force majeure.

The law of contract in Nigeria recognises force majeure. See the Court of Appeal decision in MESSRS WESTEC NIGERIA LIMITED VS. SOKOTO STATE

GOVERNMENT & 2 ORS. (supra). Parties generally rely on the common law principles to enforce a force majeure clause in Nigeria. However, such parties must have expressly agreed to include such a clause in the contract itself, as it is elementary knowledge that parties are bound by the terms of their contract. The force majeure clause may as well lead to the contract being discharged by frustration.

Instances where the law recognises force majeure to have occurred include: (a) acts of God, including but not limited to fire, flood, earthquakes, windstorms or other natural disasters; (b) war, threat of or preparation for war, armed conflict, imposition of sanctions, embargos, or similar actions; (c) terrorist attacks, civil war, civil commotion or riots; (d) failure of any Governmental body to comply with any law (including a failure to grant, renew or maintain any licence or consent needed) or any change in law or interpretation of law; (e) fire, explosion(s) or accidental damage(s); (f) epidemics and pandemics (such as that caused by covid-19); (g) any labour dispute(s), including but not limited to strikes, industrial action or lockouts; and (h) without limitation, any other extreme or adverse conditions or situations, and the continuance of these would make it unlikely that the party would be able to perform its obligations under this Agreement.

Is COVID-19 a force majeure event?

Force majeure clauses usually adopt one of the following approaches to defining the type of event which may, depending on its impact, relieve a party from contractual liability:

1. By listing specific events.

These may include events such as war, terrorism, earthquakes, hurricanes, acts of government, plagues or epidemics. Where the term epidemic, or pandemic, has been used, that will clearly cover Covid-19. An act of government will have occurred where a government body has imposed travel restrictions, quarantines, or trade embargoes, or has closed buildings or borders.

Where no relevant event is specifically mentioned, it becomes a question of interpretation of the clause, whether the parties intended such an event to be covered. This involves considering whether the list of events included was intended to be exhaustive or non-exhaustive (here the skill of the drafter of the clause will play out). Unless specific words are used to suggest that a list is non-exhaustive, it may be difficult to argue that parties who set out a list of specific events but did not include a particular event, such as an epidemic, nonetheless intended that event to be covered.

2. By setting out broad criteria

Contracts might, for example, refer to events or circumstances "beyond the parties' reasonable control". Determining whether this covers issues arising from Covid-19 is a question of interpretation and will depend on the fact of each situation. In

unprecedented circumstances like the present, the courts may likely be generous in their interpretation of this sort of wording when faced with parties who have encountered genuine difficulties in performing the contract. Such parties however will still be required to show that their non-performance, or late performance, was truly outside their control and could not have been prevented or mitigated.

3. A combination of 1 and 2 above.

Clauses may give a list of specific criteria, such as fire, flood, war and so on, alongside wider, general wording, such as "or any other causes beyond our control". Although this will depend on interpretation of the particular words used, the general wording in this type of clause will usually be interpreted broadly, rather than narrowly like being limited to events that are similar to those specifically mentioned. As a result, such a clause may still be triggered even if a health event or other relevant event is not specifically listed.

Can it Be Argued that performance is more difficult or expensive as a result?

Even if the Covid-19 pandemic or a related consequence such as government action is a type of event covered by the force majeure clause in question, the next question fit for consideration what impact, if any, occurrence has on the affected party's ability to perform its contractual obligations?

It is common for force majeure clauses to specify the impact that the event or circumstances in question must have in order for the clause to be triggered. Reference may be made, for example, to the event or circumstances having "prevented", "hindered" or "delayed" performance. These terms require different levels of impact on performance before a party will be relieved from liability. Let me consider each term, to highlight this point.

1. Prevented

"Prevented" means that it must be physically or legally impossible to perform. This is a very high bar. It is not enough that performance is more difficult, more expensive, or less profitable. Even where the word "prevented" has not specifically been used, English courts have interpreted force majeure clauses as only applying where performance is impossible in circumstances where such clauses state that a party is to be excused on the occurrence of causes beyond their control, and where a contract provided for delivery "unforeseen contingencies excepted". See HIS MAJESTY'S PROCURATOR IN EGYPT VS. DEUTSCHE KOHLEN DEPOT GESELLSCHAFT (1919) AC 291. Similarly, it is common to see wording such as "unable to perform" and this is likely to be treated in a similar fashion by the courts.

2. Hindered

"Hindered" – or "impeded", "impaired" or "interfered with" is a lesser standard and may in appropriate circumstances be triggered by performance being made substantially more difficult. For example, a shortage of raw materials caused by a force majeure event may hinder the performance of a manufacturing contract if those materials can be obtained at a higher cost but performance would mean breaking other contracts.

It must be noted however, the fact that performing would simply be less profitable due to higher costs, for example in sourcing alternative supplies of materials or labour, is generally unlikely to be sufficient to absolve the party in question of liability to perform. See GREAT ELEPHANT CORPORATION VS. TRAFIGURA BEHEER B.V. & 2 ORS. (2013) 2 ALL ER (Comm) 992.

3. Delayed

Proving that performance has been "delayed" should be less onerous than proving it is legally or physically impossible: it is not necessary to show that obligations have been "impossible" to perform or "prevented" for a period of time, just that complying as quickly as required under the contract is substantially more difficult.

What else should the non-performing party show?

A party who seeks to rely on a force majeure clause must also show that:

(a) the force majeure event was the cause of the inability to perform or delayed performance;
(b) their non-performance was due to circumstances beyond their control; and
(c) there were no reasonable steps that they could have taken to avoid or mitigate the event or its consequences.

As a result, where a party anticipates falling into difficulty with meeting its obligations, for example due to staff shortages through self-isolation in accordance with government guidelines or supply-chain issues regarding materials needed for the contract, it is crucial to explore whether alternatives, such as alternative sources of labour or materials, are reasonably available – including at higher cost, unless this involves breaching existing contracts, as explained above.

Declaration of force majeure.

Please be advised that force majeure is not automatically invoked. Once a force majeure event occurs which is provided in the contract between the parties, the party who will be unable to perform his obligations under the contract must give written notice of the force majeure event within a reasonable time (or within the time as provided in the contract) to the other party, informing that party of the force majeure event and of the expected outcome of the force majeure event. Such party is duty bound to reasonably mitigate the force majeure event and its consequences and prove that there are no alternative means of performing the contract. See “What Else Should the Non-performing Party Show” segment supra.

So, when there is a temporary impossibility, created by a force majeure event in the performance of a contract, the contract will be suspended for the duration of that event. When there is a permanent impossibility to performance, the contract will generally be terminated retrospectively.

Applicability of Force majeure is not absolute.
Where contracting parties should have foreseen the occurrence of an event referred to as force majeure, the principle will not apply. This is primarily to avoid collusion by parties who wish to take advantage of a situation to profit withal. Force majeure would also not apply where a force majeure clause may be premature, such as the possibility of a circumstance which would change shortly, and which would not affect performance of the obligations of the party under the contract.

Conclusion.
In this climate of uncertainty as a result of the covid-19 pandemic, any organisation that finds itself in this bind will do to consult with counsel to explore its options vis-à-vis contracts that cannot be performed, or what remedy, if any, it could get from its defaulting contracting partner. It is wiser to consult before that first step in the process.

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