



Africa Regional webinar

COVID-19 and the test of resilience: Contract management and enforcement

Governments across Africa have implemented various relief measures in response to the COVID-19 pandemic, with different alert levels and prescribed rules that apply at each alert level. For Africa in particular, the COVID-19 pandemic is a test of resilience.

During this morning's webinar we looked at the impact of the coronavirus (COVID-19) pandemic on contracts (force *majeure* and material adverse change clauses) and the implications of the pandemic as well as resultant economic restrictions for commercial transactions.



General relief measures implemented by government

The relief measures provided by government are aimed to ease the impact of the COVID-19 pandemic on citizens. At the forefront and having the largest impact are the fiscal measures put in place by government.

The Nigerian and Ghanaian governments provided an extension on periods to file tax returns. There is also opportunity for waiver of interest and penalties on outstanding tax payments, provided the companies make payment within requisite timelines.

Nigerian government, through the Central Bank of Nigeria (CBN) announced, amongst other things, temporary forbearance on loans granted and targeted credit facility for households, small and medium sized enterprises significantly affected by COVID-19.

Additionally, the Nigerian government proposed the Emergency Economic Stimulus Bill, 2020 (Bill). The Bill provides for both fiscal and non-fiscal measures to assist Nigerian citizens with the impact of the COVID-19 pandemic, and seeks to provide an incentive to businesses at large regarding the retention of employees.

The South African government has put together a ZAR500 billion budget for social relief and economic support packages. This includes the cutting of the repo rate, structuring of a loan guarantee scheme introduced in partnership with the major banks, National Treasury and the South African Reserve Bank, food parcels, child support grants, and municipal support. Furthermore, additional non-fiscal measures have been set up to help support businesses and the general public.

In Uganda, the government has deferred tax payments to September (in respect of specific sectors and with an annual turnover requirement), together with an extension of waiver of interest on voluntary disclosure of any tax to 30 June, to name a few.

There have been substantive tax cuts in Kenya, including a reduction in the VAT rate from 16% to 14% with effect from 1 April 2020, a reduction in the turnover tax rate from 3% to 1% for micro, small and medium sized enterprises; a reduction in the corporate and personal income tax rates from 30% to 25%; and most notably 100% tax relief for individuals earning monthly income of up to KES24 000.



Contract management and enforcement

1. The contractual impact of a change in circumstances

The COVID-19 pandemic has brought about unforeseen changes in the conduct of business. As such, some businesses will be looking to invoke a change in circumstance as a defence to non-performance under a contract. Contractually, a change in circumstance may serve as a defence for a breach if such circumstance is classified as a force *majeure* event or a material adverse event.

Force *majeure* clauses specifically prescribe conditions/events which will excuse the performance of the contract, while material adverse clauses are more likely to be given as an undertaking (the occurrence of an event which has had a material adverse effect, often by reference to a financial criteria, on a business) the breach of which would give rise to a right of the counter party to terminate. If the event falls within the ambit of the force *majeure* clause, the affected party can exercise its rights in terms of the clause. If it does not, the clause finds no application to the relevant circumstances and the affected party would need to rely on its common law rights or other clauses in the contract for relief.

Material adverse events are generally found in financing agreements where the material adverse event/change clause typically gives a lender the right to accelerate repayment of a loan, or in acquisition agreements where the material adverse event/change clause often gives a party an option to terminate the agreement between the time of signing the transaction agreement and closing the transaction. While the effect of a force *majeure* clause and a material adverse event/change clause are similar, they serve different purposes and have different requirements. As both clauses are contractually agreed upon, they generally contain procedures that will apply when a party's ability to perform under the contract is negatively impacted.



2. Common law position

The common law positions in East, West and South Africa are very similar, notwithstanding the fact that the terms differ. If a contract does not have a clause that deals with non-performance and the events that will fall within the ambit of that clause, a party retains its rights provided under the common law. The common law defence of frustration can be utilised in Nigeria as it provides for the premature termination of a valid agreement or contract, owing to the occurrence of an intervening event, or change of circumstances fundamental to the basis of the agreement and entirely beyond what was contemplated at the time of signature of the agreement. This focuses on impossibility or inability of the party to perform under the contract. Mere delay, hardship or inconvenience may not serve as a good defence unless they go to the root of the contract.

From a South African law perspective, in the event of such a situation arising that prevents performance, the breaching party would have to rely on the common law principle of supervening impossibility to defend its non-performance. The usual consequence of supervening impossibility is that the obligations of both parties are extinguished and the contract terminates. This is typically the position where the supervening impossibility is permanent.

The position in Uganda is slightly different and a party can invoke a change in circumstances as a defence for a breach of contract where this amounts to force *majeure* or frustration. Frustration (similar to the common law remedy in Nigeria) is a common law doctrine that enables parties to set aside contracts where an unforeseen event renders the performance of the contract impossible or changes the principal purpose that the parties had for entering into the contract. This doctrine is narrow in scope and has only been recognised in specific circumstances.



3. Mergers and Acquisitions (M&A) Transactions during the COVID-19 pandemic

The COVID-19 pandemic has not only delayed the implementation and closing of M&A transactions, but has also slowed down the conclusion of new M&A transactions. This has been influenced by various factors including uncertainty regarding business valuation and future prospects, regulatory restrictions, setting up and accessing data rooms to conduct a due diligence investigation and the uncertainty around foreign exchange value. These factors have brought about some trends in the M&A market, with parties now looking to invest in technology in order to ensure that they remain connected to their systems and their business, as well as taking additional time to negotiate their contracts, with a particular focus on clauses previously considered 'boiler-plates' (force *majeure* clauses, material adverse event clauses, dispute resolution clauses and governing law).



4. Workplace remuneration and taxes

The contract of employment is the foundation of the relationship between an employee and employer. While the right to remuneration is dependent on the delivery of the contracted service, employers are encouraged to support their staff to the extent reasonably possible. Employers are generally in the position of power and as such have various options available to them during these extraordinary times, before considering termination of employment. These options include applying paid annual leave, advancing bonuses, or reducing pay where a full salary is not feasible. Where none of these are viable options, the business (or parts thereof) may temporarily shutdown, effectively suspending affected employment contracts.

Careful consideration should also be given to foreign nationals, especially the requisite tax considerations. It is unlikely that the country in which the foreign national is based, will be willing to forfeit tax revenue due to it, as a result of the foreign national exceeding the relevant residency tax rules.



5. With power comes responsibility

Employers are obliged to ensure that their employees have a safe working environment. With governments across Africa easing lockdown restrictions and reopening economies, there is some room to believe that things are finally back to normal. This is not the case, in fact the reopening of the businesses increases the burden of responsibility on employers. It is imperative for employers to ensure that they are adequately prepared to have their staff safely return to the work premises. Employers should be realistic and open to learning new ways of working in order to reduce the risk of infection and the resultant continued spread of the coronavirus.



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