



# BUSINESS UNUSUAL

## COVID-19: FREQUENTLY ASKED QUESTIONS ABOUT MANAGING COMMERCIAL TRANSACTIONS IN NIGERIA

Across the globe, the novel coronavirus disease termed ‘COVID-19’ continues to take a heavy toll on human and material resources. It has also thrown the world and its population into a state of uncertainty. The economic fallout of COVID-19, coupled with the fall in global oil and commodities prices, foretell the likelihood of a global economic recession.

At Templars, a good number of our clients’ concerns border around how to mitigate the potential legal and commercial risks arising from their commercial arrangements and contracts as a result of the COVID-19 pandemic. This thought leadership discusses some of the frequently asked questions.

### **Can COVID-19 Excuse A Party From Performing Its Obligation Under A Contract?**

As a general rule under Nigerian law, the performance of contractual obligations is

mandatory. The non-performance of a contract is considered a breach for which the non-performing party may be liable.

However, there are instances where a party may be excused from the performance of its obligation under a contract. Where applicable, a party may rely on **Force Majeure** or **Material Adverse Change (MAC)** clause in a contract or the common law principle of **Frustration**, to, among other reliefs, exempt itself from liability for non-performance of the contract.

### What Exactly Is A Force Majeure Clause?

A Force Majeure clause is a term of a contract that entitles one or all of the parties to the contract to, upon the happening of a specified event or events beyond the control of the parties to the contract, cancel the contract, or be excused from performance of the contract in whole or in part, or to suspend performance, or to claim for an extension of time within which to perform their obligations under the contract.

Because Force Majeure is based on contract rather than operation of law, it must be specifically provided for in parties' contract before it can avail any party as a defence for the non-performance of the contract under Nigerian law.

### Is COVID-19 A Force Majeure Event?

This will depend on the specific wording or drafting of the Force Majeure clause in a contract. Some clauses may, for example, expressly reference 'pandemic' or 'epidemic' as trigger events. In that event, COVID-19 could constitute a Force Majeure event. For others which do not expressly reference 'pandemics' or 'epidemics', or like terms, whether COVID-19 should count as Force Majeure would depend on how broadly the Force Majeure clause is drafted.

Most Force Majeure clauses will specify several events, and then conclude with a broad, omnibus phrase such as "*or any other causes or events beyond the control of the parties*". These omnibus phrases are usually

construed as having a wider meaning which is not limited to the class of events earlier specified. For example, if a Force Majeure clause specifies events such as war, fire, tsunami, earthquakes, natural disasters "*or any other causes or events beyond the control of the parties*", the latter phrase may be interpreted to include a pandemic (such as COVID-19) even though it is not within the class of the events specified.

Narrowly drafted Force Majeure Clauses usually limit the events of Force Majeure to what has been expressly specified by the clause. In such cases, only the expressly-mentioned events may trigger Force Majeure.

### Is A Force Majeure Clause The Same As An Exclusion Of Liability Clause?

A Force Majeure clause is quite different from an exclusion of liability clause, even though, in a sense, the effect of both terms is to relieve a contracting party of an obligation or liability that it would otherwise have been subject to under the contract.

Under Nigerian law, an exclusion clause may be struck down for being unfairly prejudicial, ambiguous or even obnoxious. However, Force Majeure clauses, even where one sided, may be upheld by Nigerian courts.

### Will Force Majeure Clauses Always Relieve A Party of Liability For Non-Performance Of A Contract?

A Force Majeure event would ordinarily excuse a party from liability for non-performance of the contract if that party has complied with any Force Majeure procedure prescribed in the contract. Most Force Majeure clauses usually require a party to take certain steps before it can rely on Force Majeure to excuse or suspend performance of its obligation under the contract.

For example, some Force Majeure clauses require the party seeking to invoke Force Majeure to declare a Force Majeure by notifying its counter-party that an event or

events of Force Majeure specified, or contemplated, under the contract has occurred. Depending on the terms of the Force Majeure clause, failure to comply with such notice requirements may cause a party to lose the right to invoke the Force Majeure, or be liable to damages for failure to give timely notice.

The party invoking Force Majeure bears the general burden of demonstrating that the event or events being relied upon, e.g. the outbreak of COVID-19, falls within the express provision or contemplation of the Force Majeure clause.

In addition, the party invoking Force Majeure must further prove that:

- i) non-performance was due to circumstances beyond its control, i.e., the party's failure to perform its obligation under the contract is as a result of the Force Majeure event it seeks to rely upon; and
- ii) there were no reasonable steps that it could have taken, or which it has not taken, to prevent, the occurrence of the event or to mitigate against its consequences. In this regard, events brought about by the negligence or wilful default of a party are usually not regarded as Force Majeure events.

### **What Is the Effect of DPR Circular Declaring COVID-19 A Force Majeure Event on Oil and Gas Contracts?**

The Department of Petroleum Resources (DPR), the regulator of the Nigerian oil and gas industry, recently issued three circulars and directives<sup>1</sup> in response to the COVID-19 pandemic. Specifically, in its circular dated 30 March 2020, the DPR stated that: *“the current situation [COVID-19 pandemic] is considered “Force Majeure” to ensure the safety and*

*welfare of all personnel and to contain the spread of COVID-19”.*

Force Majeure is contract-specific. It appears very doubtful, therefore, that a regulator or any third party could validly use regulatory fiat or other means to declare Force Majeure in relation to contracts to which they are not parties. In effect, under the principles of privity of contract and freedom of contract applicable in Nigeria, it appears difficult to find a strong basis upon which the DPR could purport to dictate Force Majeure events to parties outside of the express provisions of their contracts. Accordingly, in order to avoid a risk of potential liability for wrongful termination / suspension of its contracts, an oil and gas company, a service company or any other player in the Nigerian oil and gas industry should certainly consider matters carefully before relying on the DPR circular to invoke Force Majeure if it has no Force Majeure clause in its contract. A similar caution is also advised for a party whose contract contains a Force Majeure clause, but omits relevant wording that allow for pandemics to fall within the scope of Force Majeure events.

It should be noted that some Force Majeure clauses specify a change in law or policy as an event of Force Majeure, where such change in law or policy impairs the ability of the parties to continue to perform their obligations under the contract. The DPR circular, even if it were to be regarded as a new policy, does not, in and of itself, entitle a party to declare Force Majeure in circumstances where: (i) the contract does not contain a Force Majeure clause; and (ii) even where the contract contains a Force Majeure clause, a change in law or policy is not specified as a Force Majeure event under the contract.

However, where a contract expressly provides that a change in law or policy qualifies as a Force Majeure event, it is the provision of that contract itself, i.e. the Force

<sup>1</sup> The first was issued on 20 March 2020, the second as issued on 30 March 2020, and the third was issued on 2 April 2020.

Majeure clause (rather than the policy), that entitles a party to declare a Force Majeure. In effect, a party's entitlement to remedy will depend on the scope of the Force Majeure clause.

**What Are The Options Available To Parties Besides Force Majeure Clause In Their Contract?**

There are other contractual remedies which, like Force Majeure, must be expressly provided for in a contract, such as Material Adverse Change (or Effect) clauses. These clauses which are common in finance and investment related contracts, allow for the termination, suspension or revision of obligations in the event of a 'material adverse change'.

Also, some Engineering, Procurement and Construction (EPC) contracts contain provisions on variation of key contractual obligations particularly during unavoidable downtimes. EPC contract terms such as fixed completion dates, may be varied by a contractor under the contract variation clauses, where a party is unable to perform the contract within the stipulated timeframe due to unforeseen events beyond its control such as the outbreak of COVID-19.

**What Are The Options Available To Parties Where The Contract Is Silent On The Means Of Relieving Them Of Their Obligations?**

Force Majeure and Material Adverse Change (or Effect) clauses need to be included in a contract before a party can rely on them. However, they are not the only means through which a party may be relieved of the obligation to perform a contract or liability for non-performance of same.

In instances where the contract is silent on such matters, a party whose performance of its contractual obligation has been rendered impossible due to unforeseen circumstances beyond its control, such as COVID-19, may rely on the common law principle of frustration. A contract is considered frustrated where

events occur which make performance of the contract impossible, illegal, or something radically different from that which was in contemplation of the parties at the time they entered into the contract.

Unlike Force Majeure, frustration is a common law remedy which is not required to be expressly provided for in a contract before it can be relied upon by a party. As such, where applicable, a party with no express contractual provision that excuses performance, may fall back on the common law doctrine of frustration, to the extent possible.

**If The Contract Becomes Too Expensive Or Difficult To Perform, Would That Constitute A Force Majeure Or Frustration Event?**

Adverse economic conditions which make the performance of a contract more expensive do not necessarily qualify as an event of Force Majeure. Similarly, a contract is not frustrated merely because its execution becomes more difficult or more expensive than either party originally anticipated or has to be carried out in a manner not envisaged at the time of its negotiation.

Thus, the doctrines of Force Majeure and Frustration will not ordinarily operate to excuse a party from continuing to perform its obligations under a contract, simply because the contract has become more expensive to perform or is now a bad bargain.

**Does Force Majeure Or Material Adverse Change Apply To Excuse A Borrower Of Its Obligation To Make Principal Or Interest Payments Under A Loan Agreement?**

This would depend on whether the loan agreement provides for such. However, most loan agreements will typically not contain Force Majeure provisions, and the Material Adverse Change clauses will usually be written in favour of the lender and not to excuse the borrower of its loan repayment obligations.



**What Is The Likely Attitude Of Nigerian Courts To Commercial Contracts Affected / Disrupted By The Outbreak Of COVID-19?**

The attitude of Nigerian courts to commercial contracts affected by the outbreak of COVID-19 is unlikely to be different from the way it has always interpreted contractual terms, i.e. in accordance with the express provisions of parties' contracts, together with any relevant rules of common law, equity, and any applicable statute.

Nigerian courts are usually reluctant, if not unwilling, to re-write parties' contracts or to import into their contracts terms which have not been agreed by the parties. As such, Nigerian courts will enforce relevant contractual remedies such as Force Majeure provisions, as stipulated in the contract of parties, and apply common law principles, such as frustration of contract, in deserving cases where the contract does not expressly contain a Force Majeure clause. Where none of these remedies are available, Nigerian courts are unlikely to grant the parties any remedy that the law or their contract does not provide or contemplate.

**What Practical Steps Can Be Taken In Relation To Present Or Future Commercial Contracts?**

Although most parties may want to maintain their commercial contracts as is at this time, it is inevitable that the disruptions arising from the outbreak of COVID-19 may necessitate the need for changes. A number of practical steps are therefore recommended, including:

**1. Contract review and renegotiation**

It is vital that parties review their contracts in order to understand their own and their counter-parties' contractual entitlements, rights and obligations, and to make correct and informed commercial decisions. Some other key terms that parties may choose to review, renegotiate or pay more attention to

include: (i) flexibility on payment terms; (ii) timelines for completion or performance; (iii) electronic issuance of notices and formal communications between parties; and (iv) the allocation of risks.

Such review or renegotiation will, in our view, help cushion the effect of the pandemic on contractual obligations going forward.

**2. Negotiating price reopener / review clauses**

Certain long-term contracts often contain price review or price reopener clauses in the event of changes in market prices which make the contract either too expensive to perform or unprofitable. It is important that parties to such contracts commence the process of price review, where due to the present economic situation, it has become difficult to continue to perform the contract at the agreed price.

Price reopening triggers, like Force Majeure events, require the party seeking to reopen the contract price to notify its counterparty that owing to events outside of its control, it is no longer feasible or profitable to continue to perform the contract at the agreed contract price. Successful negotiation of a contract price could cushion the effect COVID-19 has on the ability of a party to continue to perform the contract at the agreed price.

With the benefit of hindsight, parties may consider including price reopener clauses in their future commercial arrangements. It is advisable that these clauses should be carefully drafted to avoid possible disputes that could arise over the appropriate mechanism for reviewing the contract price thus negating the intent of the clause in the first place.

## Conclusion

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COVID-19 has indeed occasioned daunting challenges for businesses all over the world. Managing commercial contracts is no more business as usual. Disruption is inevitable and there are no certain or clear-cut answers on how to manage the challenges that are arising in these unpredictable times.

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### QUALIFICATION

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