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IMPACT OF THE NOVEL COVID-19 PANDEMIC ON COMMERCIAL TRASACTIONS

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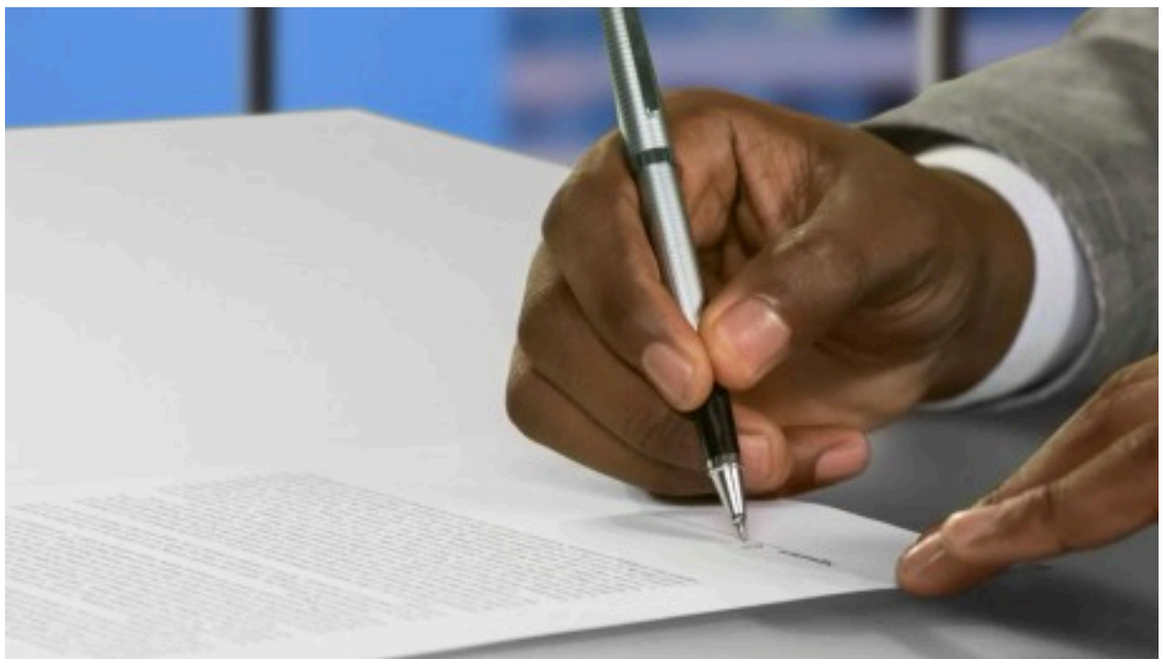
INTRODUCTION

The outbreak of the coronavirus disease which has been tagged 'Covid-19' is one that nobody saw coming. The outbreak is undoubtedly having an unprecedented impact on trade and commerce and has posed a great challenge to many commercial transactions because performances and discharge of contractual obligations have been delayed, interrupted and/or cancelled.

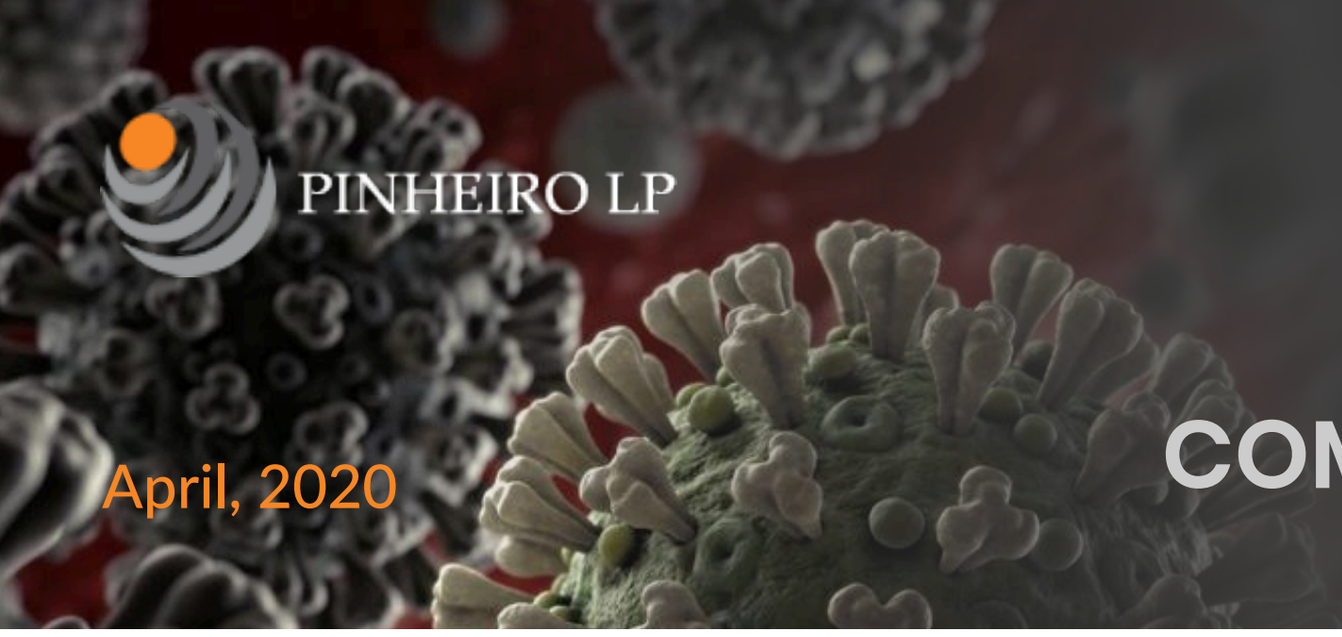
In light of the above, this article seeks to examine the overall impact of the covid-19 pandemic on commercial transactions and defences available to a party who is unable to perform their contractual obligations as a result of the pandemic.

COMMERCIAL IMPLICATIONS OF THE COVID-19 DISEASE

The ongoing coronavirus (COVID-19) pandemic is no doubt among the most devastating and disruptive forces in recent history with thousands of confirmed cases worldwide. In an effort to curb the spread, many governments have introduced various emergency measures to combat the huge threat the pandemic poses. Such measures include full lockdowns, total shut down of airports and travel restrictions, sealing of borders, curfews, bans on public gatherings, and mandatory quarantines. All these actions are being implemented with a view to suppressing the huge threat the virus poses. These actions while being necessary have had devastating effects on contracts and commercial transactions.



For instance, Xerox has dropped its bid to acquire HP, citing the need to prioritize the health and safety of its employees, customers, partners and affiliates. The threat of insolvency and bankruptcy also looms in the aviation sector.



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This is as a result of the sharp decrease in revenue or an inability to meet debt obligations as a result of the outbreak. For example, Europe's largest regional airline, Flybe, entered administration and, although it was facing a wide-range of well publicized challenges, the coronavirus was cited as playing a key role. Other airlines in the world are not left out of the negative effect of the covid-19 disease.

Bewildered by the mounting demands for refunds following cancellation of flights, European airlines are seeking to suspend European Union Rules requiring refunds for cancellation of flights and instead issue vouchers to clients. According to Reuters, refund claims, if honoured, would be a big additional cash drain on many airlines already in need of government aid to survive a sustained travel slump. To worsen matters, according to Bloomberg, the European Union and the United States Transportation Department have ordered airlines to fully refund airfare to passengers whose flights were cancelled due to the outbreak of covid-19.

Similarly, TV broadcasters are warming up for a legal battle with the English Premier League if the current 2019/2020 season which was suspended due to the covid-19 is not completed. It has been estimated that all the English Premier League clubs combined could be forced to pay back as much as £762 million if the broadcasters succeed in a legal action.

Perhaps, in Africa, the economies worst hit by the impact of the virus are those of East Africa. Already ravaged by locust attacks which poses a threat to a region which relies majorly on agriculture for its GDP, the covid-19 pandemic has only worsened the situation of the region as countries such as Kenya and Ethiopia which are tourist destinations are stifled by measures such as flight restrictions taken to curb the spread of the virus and faced with demands for refunds flowing from accommodation bookings and tour fees which had been paid ahead of the outbreak.

In Nigeria the fluctuating price of oil coupled with the covid-19 pandemic has placed the country on a brink of a recession. The IMF estimates that Nigeria's cumulative loss to global GDP could be $9 trillion as a result of the pandemic and

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last until 2021. The country's over reliance on imported goods has been gravely affected by the imposition of flight restrictions. The global supply chain has also been disrupted as China who is a major supplier of raw materials to manufacturing companies in the country has closed its borders and restricted the movement of its labour force. According to the Financial Times, multiple Chinese copper traders have asked miners from Chile, Nigeria and Somalia to cancel or delay shipments, citing force majeure due to the epidemic's impact on demand. Similarly, small businesses who rely on goods from other parts of the countries are affected as their suppliers cannot deliver such goods due to the lockdown order.

Analysts have argued that the impact will be felt more strongly in some industries as opposed to others.

So far, it appears the manufacturing, retail, travel, and tourism have been the biggest casualties. These sectors seem to be particularly affected in those countries that have the largest number of cases of the coronavirus.

THE LEGAL IMPACT OF COVID-19 ON COMMERCIAL DISPUTES

Due to the emergency measures imposed by various governments and other impeding consequences of the pandemic, parties to commercial transactions cannot help but wonder the extent of labilities they would incur where they are unable to perform their contractual obligations owing to the attendant effects of the pandemic.

What if the cost of performing your contractual duties has increased due to a sudden hike in prices of goods? What if a party is unable to deliver the goods for which they have been paid due to government regulations restricting movement? What if a party is unable to perform their contractual obligations within the time frame stipulated by the contract?

There is no one size fits all response for this concern as a valid response will depend on

certain factors, especially the terms of such contract, the facts surrounding the non-performance, and of course the legal regime of the jurisdictions involved.

In many cases, as a result of the existing commercial relationship between contracting parties, they could consider the present difficult time in reaching an understanding. Where they are unable to settle their differences amicably and they end up in court, the first point of reference would be the contract entered into by the parties. Usually, parties would insert a "force majeure" clause in their contract. Where the clause is successfully invoked, it has the consequence of either excusing the affected party from performing the contract in whole or in part, excusing that party from delay in performance or giving them a right to terminate the contract.

Whether the covid-19 pandemic would qualify as a "force majeure" event as to excuse a party from performing their contractual obligations would largely depend on the construction of the clause in the contract and whether the list of events included in the contract to constitute a force majeure event was intended by the parties to be exhaustive or non-exhaustive. Where the words used do not suggest that the list is non-exhaustive, it would be difficult to argue that the covid-19 qualifies as a force majeure event because the courts would not read into a contract what is not contained therein. See ***Shayi v. Baba (2017) LPELR-43147(CA).***

A party who intends to rely on the clause must also activate same in accordance with the conditions stipulated by the contract for the exercise of the clause. Such conditions may include, among other things, obligation to notify affected parties within a specific time period following a force majeure event and to take steps to minimise its impact.

If a contract does not contain the force majeure clause or the clause does not provide for the Covid-19 situation, the applicable law is decisive in determining the rights and liabilities of parties under the contract. In some countries, the laws provide for either a specific form of force majeure or corresponding alternatives, for example, the "force majeure" in French law, the "impediment" provisions in the Vienna Sales Convection and the "force majeure"

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and "material adverse change" under the People's Republic of China laws. In addition, where contracts are governed by the United Nations Convention on Contracts for International Sales of Goods (CISG), non-performance may be excused under Article 79 of the CISG.

In the absence of an effective force majeure provision, the contract could be argued to have been frustrated. Where the doctrine of frustration is successfully invoked, it would result in the termination of the contract. Being an implied term, the tests for applying the doctrine by the courts are especially high. In the absence of a contradictory term in the contract, the courts have amongst other considerations usually favored the "officious bystander" test in assisting parties achieve the intendments of their contract. By the test, the doctrine of frustration will only avail a party seeking to rely on it where it is so obvious that if a bystander had suggested to parties at the time they were contracting to insert a clause which would either terminate the contract or excuse the performance of any obligation under the contract upon the occurrence of the Covid-19 pandemic, the response of the parties would have been "oh of course". See *Marks and Spencer v. BNP Paribas Securities Services Trust Company (Jersey) Ltd [2015] UKSC 72., Okonkwo v. Zurmi & Anor (2018) LPELR-46855(CA).*

It is not suggested that the doctrine of frustration will serve as an automatic shield to prevent parties from carrying out their contractual obligations as the nature of transaction and other varying considerations will still have to be made by the court. See ***Gold Link Insurance Company Ltd v. Petroleum (Special) Trust Fund (2008) LPELR-4211 (CA). In Li Ching Wing v. Xuan Yi Xiong [2004] 1 HKLRD 754***, where a tenant of a 2-year lease sought to invoke the doctrine of frustration when the premises was affected by an isolation order by the Department of Health due to the epidemic.

This argument was rejected by the court, which decided that a 10-day period was insignificant in view of the duration of the lease, and although SARS was arguably an unforeseeable event, it did not "significantly change the nature of the outstanding contractual rights or obligations" of the parties to the case. Thus, whether the Covid-19 pandemic would have significant impact as to excuse a party from the performance of their contractual obligations would be determined by the nature of transaction and its attendant peculiarities.

COVID-19 SCENARIOS

The scenarios below set out an application of the principles discussed above to hypothetical Covid-19 related situations and their likely outcomes. The scenarios are not exhaustive and only provide a basic analysis of likely contractual disagreements to rise as a result of the pandemic.

Scenario 1

Ade and Sammy are residents of Kogi State. Sometime in November 2019, Ade contracted Sammy to prepare and print wedding invitation cards towards his wedding coming up on the 9th of May, 2020. It was agreed by parties that, Sammy would deliver the invitation cards to Ade on or before the 17th of April, 2020.

On the 16th of April, 2020, Sammy called Ade to enquire about his availability to receive delivery of the invitation cards. However, Ade informed Sammy that in view of the ban on public gatherings and social distancing directives of the Federal Government, the wedding had been cancelled and postponed indefinitely. Sammy insists that he has performed his obligations under the contract and is entitled to the full payment of his balance.

To resolve this dispute, the court would examine the contract between the parties to determine whether it makes provision for a force majeure clause which covers the covid-19 pandemic. Where the contract does not contain a force majeure clause, other options such as the defence of frustration of purpose may still potentially be available to excuse Ade's obligations under the contract.

In Diamond Bank Ltd. v. Ugochukwu (2007) LPELR-8093(CA), the Court of Appeal held

that, the defence of frustration will avail a party where, by the supervening event, the commercial purpose of the contract has failed. Put differently, if the performance of a contract depends on the continued existence of a state affairs the unavailability of that state affairs, without the default of either of the parties, will discharge them from the contract.

In the instant scenario, Ade could argue that at the time of the formation of the contract, both parties were aware that the purpose of the contract was that the invitation cards would be distributed to guests to inform them of the date of the wedding and request their attendance. Although there are no restrictions on movement in Kogi and the delivery is still possible, the invitation cards are now worthless to Ade as the weddings has to be cancelled following the Federal Government's regulation banning gatherings.

In ***Araka v. Monier Construction Co. Ltd. (1978) 2 L.R.N 59***, where the appellant had leased his house to the respondent on the understanding that the house was to be occupied by the defendant's expatriate employees. The house became unoccupied when the Biafran authorities expelled all expatriate personnel in the territory under their control during the subsistence of the contract.

In excusing the respondent from her obligations, the Court held that the understanding of the parties that the house was at all material times to be occupied by the expatriate employees of the respondent formed the foundation of the tenancy agreement. It further held that the action of the Biafran government made it impossible for the expatriate staff of the company to occupy the house and as such, the foundation of the agreement was frustrated by the actions of the rebels' regime.

On the strength of the above, Ade's purpose of making the contract with Sammy has been frustrated due to an intervening circumstance which was not within the contemplation of the parties at the time of forming the contract. To insist that Ade takes delivery of the invitation cards and pay up the balance owed, is to impose on him a radically different obligation from that which he had undertaken, when he entered into the contract.

Where the court finds as a fact that the contract had been frustrated, Ade is discharged from his obligations under the contract and the court may order that losses lie where they fall.

This defence would however not be available to Ade where for instance, the contract was formed sometime in April and the Kogi State Government made a regulation restricting movement in May. This is because, where an event is foreseen or reasonably foreseeable, a defendant cannot rely on frustration.

It could be argued that at the time of forming the contract, Ade was aware that gatherings had been banned in some other states within the country and there was a high likelihood that the same could be done in Kogi state, yet he proceeded to make the contract.

Scenario 2

Bisi is a major trader in tomato and major food items in Abuja. She contracted XYZ Logistics Services Ltd. in January 2020 to supply her tomatoes from Kano state over a period of 4 (four) months.

The company has supplied her according to the terms of the contract in February and March but has failed to deliver for the month of April.

Upon Bisi's enquiry as to why the company has failed to deliver for April, she was informed that the default is as a result of the government's directives restricting movements. Not satisfied by the excuse, Bisi is desirous of instituting an action for breach of contract. In response, the company is determined to plead the defence of frustration.

Given the facts of this scenario, it is submitted that the defence of frustration will not excuse the logistics company from performing its contractual obligations. In ***G.N Nwaolisah v. Paschal Nwabufoh (2011) 12, NWLR (Pt. 1268) 600 at 630***, the Supreme Court stated that frustration occurs wherever the law recognizes that without default of either party, a contractual obligation has become incapable of being

performed because the circumstances in which performances is called would render it radically different from what was undertaken by the contract.

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Can it be said that from the facts of this scenario the contractual obligation of XYZ Logistics Services Ltd. has become incapable of being performed? The response is in the negative. This is because although the government has restricted movement, trucks carrying essential goods including food are exempted from the restrictions. Thus, the company being aware of this fact rather than perform its obligation chose to hide under the cover of a self-induced frustration to breach its contract. Where the court finds as a fact that the frustration relied on by XYZ Logistics Services Ltd. is self-induced, the company is liable to pay damages for the breach of contract.

Scenario 3

Adopting the scenario above, can the company validly excuse performance of its obligations on the basis that logistics during the period of the pandemic has been more expensive and inconvenient?

Save for where a force majeure clause which covers the scenario is contained in the contract between Bisi and the company, the response again, is in the negative.

It is the law that, mere hardship, inconvenience, increased cost and material loss, originally unexpected in the performance of the contract cannot constitute frustration. As pointed out above, the company relying on the defence of frustration must sufficiently demonstrate in addition to fact that the supervening event was not contemplated by the parties, that the circumstances has rendered the contract radically different from what was undertaken.

See ***Thames Valley Power Ltd. v. Total Gas & Power Ltd. [2006] Lloyds's Rep. 441***, where by a Gas Supply Agreement (GSA) entered into by the parties, it was agreed that Total would be the sole suppliers of gas to Thames for a period of 15 years. Total's attempt to rely on a force majeure clause in the contract because of a rise in gas prices was rejected by the court. The court relying on a long line of cases on force majeure and frustration held that the mere fact that a contract has become more

expensive to perform and was less lucrative for Total Gas (who stood the risk of losing about £9 million) is not a ground to relieve a party on the grounds of force majeure or frustration.

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Scenario 4

Bisi is an interior decorator. She has been the contracted by Mrs. Umar to handle the interior decoration of her house in Lagos State. By the contract, it was agreed that Mrs. Umar would immediately pay 50% of the contract sum and Bisi would in turn order the necessary materials from the United Kingdom. It was further agreed that Bisi would complete the decorations within four months after the contract is executed.

The said four months has now elapsed and Mrs. Umar is furious that Bisi has not performed her obligations. What are the defenses open to Bisi?

As a general rule, where a contract makes provision for a period within which parties must perform their obligations, failure by a party to play their role within the time provided by the contract will entitle the other party to repudiate the contract and the defaulting party liable in an action for the breach of contract.

In this scenario, the response to the poser would depend on whether the contract makes provision for a force majeure clause which covers the scenario. The rights of the parties will be determined under the clause where the contract makes provision for it. Where the contract does not contain a force majeure clause however, Bisi may rely on the doctrine of frustration to argue that as a result of restrictions on flight, it has become impossible for her to fulfill her obligations.

In *Pulseline Services Ltd. v. Equitorial Trust Bank (2010) LPELR-4886(CA)*, the court held thus:

> *"The law is now settled, that where whole or part performance of an agreement becomes impossible by reason of some act which occurs after the formation of the agreement, as in this case, the supervening impossibility will in most cases automatically bring the contract to an end as regards both parties and discharge parties of all obligations thereunder. In other words, where a contract has been frustrated, the question of breach will not arise, as none of the parties can be held responsible for what has happened."*

It is clear from the scenario that at the time Bisi entered into the contract with Mrs. Umar to handle the interior decoration of her house, she had reason to believe that she could execute the contract.

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It is the pandemic which has resulted in flight restrictions and closure of borders that made it impossible for Bisi to perform her obligation under the contract and the contract has thus become frustrated.

What remedies are available to Mrs. Umar and Bisi?

Where the court upholds Bisi's defence and holds that the contract has indeed been frustrated, the remedies available to the parties would be determined by whether or not Bisi had placed the orders for the materials before flights were restricted. If she had not placed the orders, Mrs. Umar is entitled to recover the sums of money paid to Bisi. See ***Section 8 (2) of the Law Reform (Contracts) Law of Lagos State.***

Mrs. Umar may however not be entitled to recover monies paid where Bisi has expended money towards the performance of the contract. By Section 8(3) of the Law, if a party whom payment was made to has incurred expenses for the

performance of the contract before the contract was frustrated, the court may, if it considers it just, allow the retention of the portion of the sums paid to her that have been expended.

CONCLUSION/RECOMMENDATIONS

The outbreak of the covid-19 has been rapid and there is still so much uncertainty surrounding it. It remains unpredictable how much damage will be suffered by businesses around the world, and by extension their commercial dealings and undertakings. But if anything, it has shown that businesses will need to be more cautious going forward as regards eliminating risks from commercial transactions they involve themselves in.

Most of the cases arising from the inability to fulfill contractual obligations by parties due to the negative effects of the covid-19 pandemics will turn out to be messy and drag on endlessly in court. Going forward, the need for parties to take due care when drafting clauses relating to their position in the event of unforeseen contingencies and the method of resolving any dispute that arises as a result of the inability of a party to fulfill their obligations has never been more important.

Parties must now make sure to insert more precise force majeure clauses as against the usual generic clause to cover all categories of unforeseen contingencies.

Other clauses which parties may want to make sure to include in future contracts are price review clause which affords parties the opportunity to equitably revise their agreement to suit the realities of prevailing market circumstances, material adverse change clause (usually inserted in mergers and acquisitions transactions) which gives a party the right to walk away from the contract where between the signing and closing of a transaction the target experiences a material change to the business and the exclusion and limitation clauses. The exclusion/limitation clauses exempt a party from a liability which he would have borne had it not been for the clause. The clauses are however usually construed strictly against a party who would benefit from them. In ***MTN Communication Ltd. v. Amadi (2012) LPELR-21276(CA)***, the court held that for the exclusion and liability clauses to be effective, they must pass through three (3)

tests, to wit: They must be incorporated in the agreement, the wording of the clauses must cover the liability in question and the clauses must not be prohibited by statute or other law.