



**DOES COVID-19 CONSTITUTE
FORCE MAJEURE? | TAXWISE
AFRICA COMMENTARY**

Business contracts are sacrosanct in nature, therefore, enforcing them should never be a subject of negotiation, however difficult the circumstances might be.

Contract obligations must be performed, with the sanction of a potentially painful trip to the courts, arbitration or adjudication standing behind them for failure to perform. No ifs, no buts. Unless, that is, something out of the ordinary happens. And now, many are asking, is that something the **Covid-19 Virus**?

In this article we analyze the impact of COVID-19 on execution of contracts and if the effects of COVID-19 may be sufficient grounds to prevent fulfillment of contract obligations.

What is Force Majeure?

Under English Common law (which Kenya ascribes to), there are two obvious mechanisms to be considered when the discharging a contract can be contemplated, more so if the non-performance is occasioned by Covid-19 or its peripheral effects.

- i. Discharge by *Force Majeure* &
- ii. Discharge by Frustration

Force Majeure clauses are contract provisions that excuse a party's non-performance when "**acts of God**" or other extraordinary events prevent a party from fulfilling its contractual obligations.

These clauses are currently gaining attention due to the COVID-19 outbreak which has significantly impacted the global economy and businesses' ability to manufacture, distribute and sell their products.

Due to the risks that COVID-19 poses to ongoing business operations, companies should proactively consider the potential impacts a global pandemic could have on their operations, take steps to mitigate their operational risk, and assess the availability of insurance coverage in the event that risk materializes.

Taking these proactive measures will decrease the likelihood of *Force Majeure* disputes in the future; it will also help any party asserting a claim of *Force Majeure* to establish that it took reasonable steps to avoid contractual interruption.

Where a contract includes a force majeure clause, this will usually provide that, where a certain event takes place which is beyond the control of both of the parties, each party will be entitled either to discharge the contract and be excused from performance, and/or to suspend and extend the time for performance.

Because there is no general doctrine of force majeure, the law is clear that no term will be implied into a contract which does not contain an express provision to this effect. In other words, the intention of the parties shall be the center of focus.

Equally, the precise wording of the term is vital to establishing whether the clause will apply to an event, and what constitutes a *Force Majeure*, an 'Act of God', or a '*Vis Major*' will often be expressly qualified.

Typically, *Force Majeure* clauses are supposed to cover events which can be deemed as unforeseeable; however, the courts, when looking into the applicability of a Force Majeure clause looks into three (3) elements;

- i. Whether the event qualifies as a Force Majeure under the contract;
- ii. Whether the risk of non-performance was foreseeable and able to be mitigated
- iii. Whether the performance of the contract is truly impossible

The primary focus is on whether the clause encompasses the type of event a contractual party claims is causing its nonperformance. *Force Majeure* clauses are generally interpreted narrowly; therefore, for an event to qualify as *Force Majeure* it must be outlined in the clause at issue. Even when a potential *Force Majeure* event is encompassed by the relevant clause, however, a party is under an obligation to mitigate

any foreseeable risk of nonperformance, and cannot invoke *Force Majeure* where the potential non-performance was foreseeable and could have been prevented or otherwise mitigated. The burden of proof of establishing that performance is indeed impossible shall strictly lay with the party invoking the clause.

Risk Exposures

The coming weeks and months will bring many assertions of *Force Majeure* in response to quarantines, business closures and travel restrictions. Whether such assertions of *Force Majeure* will be successful will be heavily dependent on the facts relevant to the particular contracts and businesses at issue.

For example, the China Council for the Promotion of International Trade (CCPIT) issued its first “*force majeure* certificate” to a manufacturing company in Zhejiang Province to help stem the firm’s losses arising from its inability to meet its contractual obligations with Peugeot’s African plant, potentially exposing it to a damages claim of approximately \$4.27 million (Sh437 million).

Contract Drafting

Whether or not the Covid-19 outbreak will be considered a *Force Majeure* event will heavily depend on the drafting style contained in the contract. The drafting of the clause should take into consideration the following issues;

- I. Scope- Does your clause contemplate a global health emergency, pandemic or epidemic?
- II. Reasonable foreseeability- most of those that will be affected by the invocation of this clause will argue that the previous SARS outbreak of 2003 could have set the stage for the Coronavirus outbreak and thus the argument that it was reasonably foreseeable.
- III. Notification- Does the clause contemplate that in the event of such a happening notification ought to be relayed to the other party(ies) prior to invocation?
- IV. Obligation to mitigate- Does the clause assign you an obligation to mitigate the

consequences of a *force majeure* event, including reasonable expenditure of funds, rescheduling resources, and minimizing resulting delay? Can you show you have taken reasonable steps to mitigate/avoid the effects of a *force majeure* event?

It is virtually certain that economic and business impacts of the type seen already in China, Korea, Italy and Japan will spread to other jurisdictions. In response to this, companies—wherever their operations—should be taking proactive steps to ensure continuity of operations sufficient to meet existing contractual obligations and be evaluating whether their counterparties are also taking steps such that they will not have the need to invoke *Force Majeure* clauses.

What Practical Steps Companies Can Take?

Taking affirmative steps now is especially important given the ability that companies currently have to foresee and attempt to mitigate any potential operational impacts in advance of the likelihood of a looming lockdown ordered by the state in a bid to curb the rising cases of infections in the country.

Ideally, businesses will be able to plan accordingly to avoid any disruptions in their operations if the virus continues to spread.

Examples of steps companies might actively consider taking now (and seek to ensure that counterparties are taking) include:

- I. Securing alternate supply streams in the event a supplier’s operations are impacted;
- II. Planning for how employees can continue working remotely, or how functions can be transferred to other locations i.e. Corporate Re-structuring & Re-organisation;
- III. In the event that some firms may opt to continue operations they should provide meals for their employees from vetted and trusted catering services providers to minimize staff exposures.
- IV. For the firms that will opt to have staff operate remotely then travel advisories and

routine roll calls to ensure the well-being of their personnel.

Even if such steps are not successful in avoiding the need to declare a force majeure, a company's attempt to mitigate its risk in advance will be highly relevant to a court's determination of whether reasonable steps were taken to continue to satisfy contractual obligations, and whether performance was truly impossible. Affirmative measures to help ensure a company is prepared

Let's talk

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for the possibility of business interruption resulting from COVID-19 include a careful review of insurance policies that may cover such an event.

Conclusion

We intend to closely monitor the legal and business implications associated with the global fallout from the COVID-19 outbreak, and will continue to report developments.