

An Appraisal of the Legal Effect of Contractual Obligations during the Period of Lockdown Occasioned by the Covid 19 Pandemic in Nigeria

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Abstract: *The emergence of Covid 19 has changed the face of virtually everything not only in Nigeria but the entire globe. The spread of the Corona Virus had impacted negatively in every facet of life in the most devastating nature to the extent that same has resulted to shutting down of the economy which is gradually sliding Nigeria back to recession. This paper seeks to analyze the legal effect of contractual obligations during the period of the lockdown imposed by the federal and state governments to curb the spread of the Corona Virus and the implications of the measures, directives and guidelines issued by the government with a view to preventing an outbreak of the pandemic on subsisting contractual dealings.*

Keywords: Covid 19; Contract; Arbitration; ADR;

1.0 INTRODUCTION

The first outbreak of the Covid 19 popularly referred to as the Corona Virus was reportedly said to be in Wuhan, China in the late 2019. On the 31st December, 2019, China reported to the World Health Organization (WHO) country office in the country of the existence of the virus. Covid 19 is a global pandemic that affects the public health and the World Health Organization (WHO) declared the virus a pandemic on 30th January 2020, as it had spread to various countries in the world resulting to numerous deaths. Nigeria is definitely not an exception having regard to the fact that numerous cases having been reported in different states by the National Centre for Disease Control (NCDC) which has led to the Federal Government and the respective states to take various measures with a view to preventing the continuous spread of the virus in order to safeguard life, protect and improve the environment.¹

The preventive measures taken by both the Federal and State Governments to curb the spread of the Corona Virus which has led to lockdowns and restriction of movements within states and interstate borders² has no doubt affected the economy locally and globally with negative consequences on subsisting contractual obligations. This paper seeks to examine the legal effects of such contracts with a view to proffering possible solutions that will prevent respective parties from incurring unnecessary liability for no fault of either party to the contract.

2.0 EFFECT OF COVID 19 ON CONTRACTUAL OBLIGATIONS

The nature of the lockdown order due to the Covid 19 has resulted to an increased reliance on telecommunication and the internet, as business seek to continue operation and individuals need to communicate from their respective homes. Without any doubt, the closure of business as a result of the lockdown by the Federal Government of Nigeria has affected the entire economy with the price of oil dropping in the global market has raised multiple concerns. Such issues relating contractual obligations that are subsisting, the administration of justice and legal effect of Covid 19 on contracts. These concerns have been further goaded by the lockdown of some other states³ and the prohibition of interstate movement unanimously agreed and adopted by Governors of the respective states within the Federation. Almost all the State Governors have also issued stay at home orders to civil servants and private employees in their respective states with the exception of states like Cross River, Kogi and Bauchi. The issue for determination at this juncture is whether the lockdown order or restriction of movement order has the potency of affecting subsisting agreements legally executed between parties?

To prevent the growing numbers of infected persons and deaths, countries all over the world including Nigeria have put in place various regulations. These regulations have had a negative impact on businesses which has inturn had direct impact on various sectors of economy. Apart from the financial impact, Covid 19 is likely to pose legal implications as individuals are confronted with inability to comply with their respective obligations arising from such contracts. The implication of the pandemic on contractual transactions cannot be over emphasized as contractual duties cannot be fulfilled which could lead to series of law suits post Covid 19 with the capacity to stream business relationships. Let's examine a few of such types of contracts that may be affected or has been affected by the Covid 19.

2.1 Employment Contract

It has been implied that many employers would want to cut costs due to Covid 19 implications on businesses either by laying off employees or by reduction of salaries. However, the pertinent question to ask is whether an employer has the right to terminate employment of workers at this stage during the period of pandemic and or if pay cuts could be affected without the employees' consent?⁴

2.2 Trade and Supply

With the restriction of movement arising from the stay at home/lockdown order, contracts for supply of goods which has already been entered into, which the other party due to the restrictions on movement and transportation cannot perform which is of no fault of the party. Would such a party be liable for breach of contract?

2.3 Entertainment and Event Planning Centers

In the light of the social distancing regulations by the government and the lockdown order, event centres, public parks, bars, hotels, halls and all other places where large crowds could gather which has previously been booked for events and artists who have entered into contracts with partners and sponsors of a show. What are the respective liabilities of the parties to the contract?

2.4 Landlord and Tenant Relationship

The scourging effect of the pandemic on the formal and informal sectors of the economy has made it impossible for some companies to pay its workers' salaries. Also for people who fall under the informal sector who cannot make a living unless they go out to work daily. Therefore will a Landlord be right to eject a Tenant who cannot pay his rent during this period of the Covid 19 Pandemic?

2.5 Construction

Even though some State Governors have exempted the construction sector from the restriction of movement order, including workers in essential services such as health workers, the fire services, water corporation etc contracts relating to construction have also been disrupted as contract stipulations cannot be met due to the lockdown. Also, materials needed for the constructions which are largely imported cannot be gotten during the period of the pandemic and even if same is available, same can only be gotten at exorbitant prices due to the scarcity of supply which may affect the initial price agreement. Therefore, there is no doubt that parties to contractual transactions will likely breach the terms and conditions of their respective contracts due to factors beyond their power and control.

3.0 THE WAY FORWARD TO PREVENT CONTRACTUAL CATASTROPHE

It is trite law that parties are bound by the conditions and terms in a contract they freely entered into. The meaning to be placed on the contract is that which is the plain, clear and obvious result

of the terms used.⁵ Every standard commercial agreement has certain clauses that are embedded to prevent parties from incurring liability for no just cause or for no fault of either party and in the absence of such clauses, there are implied doctrines of equity that have evolved overtime to mitigate the hardship that may be visited on parties to a contract arising from circumstances beyond their control.

3.1 Force Majeure

Force majeure is defined as an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g. flood and hurricanes) and acts of people (e.g. riot, strikes and wars)⁶. It also means unlikely or unforeseen occurrence. Force majeure clause on the other hand is defined as a contractual provision allocating the risk of loss if performance becomes impossible or impracticable especially as a result of an event or effect that the parties could not have anticipated or controlled.⁷ Most commercial contracts usually include a force majeure clause which contains events which will relieve parties from performing their duties in a contract should such events occur. This is normally done to protect parties from incurring liabilities where events beyond their control hinder the performance of their respective duties and obligations.

In order to take benefit of the force majeure claim as a defense for any claim arising from the Covid 19 lockdown, it is expedient that same is captured in the contract agreement within the contemplation of the parties. It will suffice if phrases like “pandemic” or “epidemic” or “Act of God” etc are included in the force majeure clause of the contract agreement. The force majeure clause is usually captured thus:-

“None of the parties herein shall be under any liability whatsoever for non-performance in whole or in part of his/its obligations under this agreement, due to causes beyond the control of such party including but not limited to war (whether an actual declaration of war is made or not), sabotage, insurrection, riot or acts of any Government, or Government Agency, Labour strikes, walkouts, Epidemics, Act of God or any other natural disasters.”

In order for a party to successfully take advantage of the force majeure clause in an agreement as a mitigating element, such a party must prove the following:-

1. The specified event was beyond the power of the affected party.
2. The specified event must have rendered the performance or continuity of the contract impossible.

3. The affected party must have exhausted all possible alternatives in the process of performing the contract to no avail.⁸

Therefore, for a party to rely on the force majeure clause, such a party must prove to the court that the outbreak of the Covid 19 pandemic falls within the above criteria and the regulations and orders made by the government since the outbreak has rendered the performance of the contract impossible thereby avoiding liabilities.

3.2 Frustration

This is also a common law doctrine which provide for the discharge of a contract where after its formation a supervening event occurs which makes it legally or physically impossible to fulfill the contract. Parties to such a contract become automatically discharged (excused) from further performance of their obligations if some unexpected events occur, during the currency of the contract, without the fault of either party, which make further performance impossible.⁹

Frustration is the prevention or hindering of the attainment of a goal, such as contractual performance.¹⁰ Frustration may be defined as the premature determination of an agreement between parties lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If therefore the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally if the terms of the agreement shows that the parties contemplated the possibility of such an intervening circumstance arising, frustration does not occur. Neither of course, does it arise where one of the parties had deliberately brought about the supervening event by his own choice. But where it does, frustration operates to bring the agreement to an end as regards both parties forthwith and quite apart from their violation.¹¹. There are three types of frustration. Commercial, self-induced and temporary frustration. The type of frustration envisaged by the Covid 19 pandemic falls within commercial frustration or economic frustration as an excuse for a party's non-performance because of some unforeseen and uncontrollable circumstances.

Self-induced frustration which is a breach of contract caused by one party's action that prevents the performance of the contract is not covered by the Covid 19 pandemic. The phrase is something

of a misnomer, since self-induced frustration is not really a type of frustration at all but instead a breach of contract. Temporary frustration is a recurrence that prevents performance and legally suspends the duty to perform for the duration of the event. If the burden or circumstances is substantially different after the event, then the duty may be discharged.¹² It is the duty of the court to state whether and when frustration has occurred; in other words, to determine the existence of frustration. Frustration occurs whenever the court recognizes that without default of either party a contractual obligation has become incapable of being performed. Such situations or events like subsequent legal changes, outbreak of war, destruction of the subject matter of contract, government requisition of the subject matter of the contract and cancellation of an expected event. A court would recognize that a contract is frustrated where after the contract was concluded, events occur which make performance of the contract impossible, illegal or something radically different from that which was in the contemplation of the parties at the time they entered into the contract. A contract which is discharged on the ground of frustration is brought to an end automatically by the operation of law, irrespective of the wishes of the parties.¹³

The doctrine of frustration has been restricted to situation where the supervening event destroys a fundamental assumption and where force majeure clauses are drafted into the contract. There must be an event which significantly changes the nature of the contractual rights of the parties that it would be unjust to expect the parties to perform those rights. Some examples are:-

1. Where the subject matter of the contract has been destroyed, or is no longer available.
2. Death or incapacity of a party to a contract.
3. The contract has become illegal to perform as a result of new legislation.
4. A contract can be frustrated on the outbreak of war.
5. Where the commercial purpose of the contract has failed.¹⁴

4.0 INVOCATION OF THE DOCTRINE OF “QUANTUM MERUIT”

The term “Quantum Meruit” literally means “as much as he has earned” i.e. so much as the party doing the services deserves. It arises where a party has expressly or impliedly requested another to render him a service without specifying any remuneration but the circumstances imply that the service is to be paid for, there is an implied promise to pay on Quantum Meruit or where the contract is to do certain piece of work for a lump sum and he does only part of the work, he may be able to claim on Quantum Meruit.¹⁵ These may arise in circumstances where a party has partly

performed the contract but due to supervening circumstances like the Covid 19 pandemic unable to complete the contract. In the event of any dispute arising from the respective obligations of the parties, the doctrine of Quantum Meruit may be an alternative claim to prevent total loss from such a contract. In awarding a sum as compensation, the court is expected to give an amount which it considers to be reasonable compensation for services rendered by a party for the benefit of the other party. In doing that, the court must guide itself by the pleadings of the party contending that services have in fact been rendered and the evidence led in proof of the services.

In the case of Savannah Bank of Nigeria Plc Vs Opanubi¹⁶ Uwaifo JSC (as he then was) made the point that:-

“.... In compensating a legal practitioner upon a Quantum Meruit for services he has actually rendered, it will be more realistic to make an assessment on the basis of the particulars of the nature of work done by him to arrive at what can be considered a reasonable compensation. It is then a sum which the judge appears to have arrived at on conclusion of all necessary factors would be a reasonable remuneration in all the circumstances”

A situation may arise where a party had rendered partial services before the restriction or quarantine orders or stay at home directives by the State or Federal Government was made but completion become practically impossible due to the lockdown order, such a party may invoke the doctrine of Quantum Meruit as basis for a claim for partial services rendered arising from the contractual obligation with a view to recover such a claim without necessarily frustrated in losing out completely due to the Covid 19 pandemic.

4.1 Alternative Dispute Resolution

In the event parties are unable to invoke the force majeure clause or doctrine of frustration, alternative dispute resolution mechanisms like Arbitration, Medication, Conciliation etc as specified in the contract can be used in line with the extant laws with a view to settling the disputants of post Covid 19 pandemic.

5.0 RECOMMENDATIONS

In the event of any post Covid 19 conflict arising from contractual obligations, parties are enjoined to invoke the force majeure clause as embedded in the commercial agreement as a defense. The Frustration is a mode of discharge of contract and same can be invoked in situations where Commercial contracts do not contain any force majeure clause. An aggrieved party in a contract

agreement who has partly performed or rendered partial services before the restriction of movement or lockdown order occasioned by the Covid 19 pandemic can invoke the doctrine of Quantum Meruit with a view to recovering the amount payable as compensation for work actually done or services actually rendered. Finally, the parties should bear their respective losses occasioned by no fault of either party or explore alternative dispute resolution mechanisms to settle any conflict that may arise post Covid 19.

END NOTES

- 1) The Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice and the security and welfare of the people shall be the primary purpose of government. See Section 14(1)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Furthermore, the Environmental objectives of the state shall be the protection and improvement of the environment and safeguard the water, air and land, forest and wild life of Nigeria as enshrined under Section 20 of the same constitution.
- 2) See the Covid 19 (partial lockdown) order otherwise known as the Quarantine Orders, and the Infectious Disease (prevention) Regulations available at <https://kdsg.gov.ng/covid19-partial-lockdown-order-2020> and <http://kdsg.gov.ng/kadunastate-infectious-diseases-regulation2020>.
- 3) Pursuant to and in exercise of the powers vested in the Governor by Section 45 of the 1999 Constitution of the Federal Republic of Nigeria (as amended), Sections 2 and 8 of the Quarantine Act 1926 now known as Cap. Q.2 Laws of the Federation 2004 and the Public Health Law of Kaduna State 2017, the Deputy Governor of Kaduna State made a broadcast on the 26/3/2020 for the lockdown of Kaduna State for 30 days and same extended for another 30 days on the 26/4/2020.
- 4) See Banwo & Ighodalo, Covid 19 and commercial transactions. Some emerging legal issues published on the 29th March 2020 available at www.monday.com, accessed on 12th April 2020.
- 5) See NIKA FISHING CO. LTD VS LAVINA CORP (2008) 16 NWLR (PT. 1114) Pg. 509 at 542 G – A.
- 6) See Blacks Law Dictionary, 9th Edition by Bryan A. Garner at page 718.
- 7) Ibid at 718.
- 8) Ibid at Endnote 4.
- 9) See An Introduction to Business Law in Nigeria by Abiola Sanni, Department of Commercial & Industrial Law, University of Lagos, Malthouse Press Limited at page 59.
- 10) Blacks Law Dictionary, 9th Edition by Bryan A. Garner at page 740.
- 11) Per Viscount Simon, L.J. in the English case of Cricklewood Property & Investment Trust Ltd Vs Leightons Investments Trust Ltd (1945) 1 All E.R.252 at page 255.
- 12) Ibid at 740
- 13) A.G. Cross River State Vs A.G. Federation (2012) 16 NWLR (Pt.1327) 425 at 480 B – G.
- 14) Diamond Bank Ltd Vs Ugochukwu (2008) 1 NWLR (Pt.1067) 1 at 28 C – F.
- 15) See Trioversal Design Associates Vs Comm. H & H.S Yobe State (2020) 4 NWLR (Pt.1714) 243 at 273 F – G. Warner & Warner International Vs Federal Housing Authority (1993) 6 NWLR (Pt.298) 148. Ebla Construction Limited Vs Costain (West Africa) Plc

- (2011) 6 NWLR (Pt.1242) 110. First Bank of Nigeria Plc Vs Uzokowre (2014) 3 NWLR (Pt.1398) 439.
- 16) (2004) 15 NWLR (Pt.896) 437 at 458.