NAKUDU LAW REVIEW

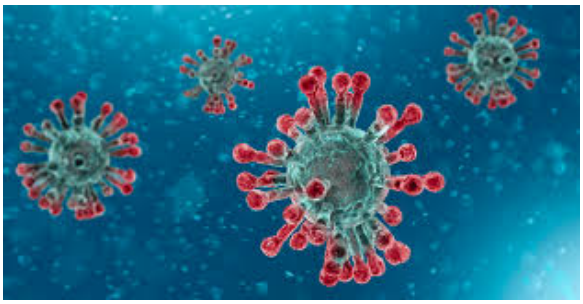
THE IMPLICATIONS OF THE CORONAVIRUS ON COMMERCIAL TRANSACTIONS IN NIGERIA

"If you are reading this, we hope your hands are duly sanitized and please do not sneeze into this article."

The ongoing global outbreak and spread of the Coronavirus (COVID-19) is a dramatic event of global proportions, with far-reaching implications for a wide range of countries and businesses alike. In the short time it has been around, the spread of COVID-19 has drastically affected many aspects of commerce and business – both domestic and international.

On the 30th of January, 2020, the World Health Organization (WHO) issued a declaration that the Coronavirus has become a 'Public Health Emergency of International Concern'[1]. By March, 2020, the WHO declared it a 'Global Pandemic'.

The rapid spread of COVID-19 has totally disrupted trade and commercial activities all over the world. Countries such as the United States of America, Spain, China, Italy, Iran, as well as other countries, have shut down educational, sporting and social institutions, and activities alike owing to the pandemic[2].



Legal Consequence of COVID-19 on Existing Contracts and Commercial Transactions

One peculiar consequence of the outbreak is the limitation it offers parties who have entered into certain transactions pregnant with contractual obligations.

The performance of contractual obligations undertaken by business entities which were still accruable as at the outbreak of COVID-19 may have become difficult, if not impossible, most especially obligations that have been intended by parties to be time bound.

There have been several solutions that have been prescribed by National and International jurisprudence in Statutes and Court judgements alike. They include:

[1] The statement was issued by WHO at the meeting of the International Health Regulations (2005) Emergency Committee.

[2] Coronavirus: Countries enforce mass closures to stem spread https://www.bbc.com/news/world-51862347

- The 'Approximate' or 'Cy-pres' doctrine.
- Restitutio ad Integrum.
- Variation of Contract.
- *Force Majeure* clauses in contractual agreements.
- The Federal Competition and Consumer Protection Act.
- The Doctrine of Frustration.



Approximate or Cy-pres Doctrine

International courts have developed the **'approximate performance doctrine'** (also known as the 'cy-pres doctrine' or 'as near as possible') as an equitable remedy for contracts that performance have been deemed by parties to be impracticable.

This doctrine provides that when it becomes impossible for one party to perform a contract as agreed, the other party is entitled to substitute performance that best approximates the consideration promised to it in the original contract[3].

Under this doctrine, a court may order a party that is precluded from performing a contract as agreed to perform it in a manner that reflects the parties' understandings as closely as possible.

Restitutio ad Integrum

'Restitutio ad integrum' or 'Restitutio in integrum' is a Latin term which means restoration to original condition.

This doctrine is where the court makes an order with the intention of returning the parties to where they were before the contract was entered into[4].

This is a viable solution for contracts which have been entered into and the obligations are such that either the parties or the courts can ensure the return of goods/services or payment of damages in such a way that both parties can discharge the contract and walk away with little or no loss.

An example is when a transaction is executed with an online retailer, e.g, Amazon, Alibaba, Jumia, Konga, etc. In this instance, once it is discovered that a commodity, paid for by a customer, cannot be delivered by virtue of the restriction of movements by certain government authorities, the said online retailer can offer a refund and discharge the obligation without incurring any major loss on either party.

Variation of Contract

At any point during the pendency of a contract, the rights and obligations of the parties can be mutually varied to meet

[3] Evans v. Abney - 396 U.S. 435, 90 S.

[4] Halpern & Ors v Halpern & Anor [2007] EWCA Civ 291, 3 April 2007.

circumstantial developments such as change in status, law or policy. Here, parties mutually decide to perform a portion of the agreement differently from the way they originally agreed, whilst the remainder of the contract otherwise operates unchanged[5].

In the instant circumstance, in a contract for the supply of goods, the parties might agree that the delivery time for the goods should be extended by such a time as they envisage the return to normalcy of trade and commercial activities, with the other terms remaining the same. Such an agreement, if valid, would amount to a variation of the existing contract.

Force Majeure clauses

Commercial contracts between sophisticated parties customarily include *force majeure* clauses to allocate risks between the parties in unforeseen circumstances.

In general, these clauses include a list (either closed or open) of agreed-on circumstances (typically, natural disasters, difficult weather conditions, war and terror events) that would amount to *force majeure*. When they occur, the parties subject to the *force majeure* are released (either temporarily or permanently) from their obligations under the contract or the contract as a whole could expire without imposing obligations on the parties. In general, when parties agree in advance on the circumstances that constitute *force majeure*, they also include various preconditions for applying the clause (eg, providing or receiving notices within a strict timetable)[6]. Parties that believe that the clause applies in a case must act accordingly.

Force majeure clauses can be the subject of disputes over interpretation. For example, historically, *force majeure* clauses generally have not included a global health emergency among the relevant circumstances, and thus a party disagreeing with a counterparty's assertion of *force majeure* may claim that such a situation is not *force majeure* if it does not appear in the defined list of events.

In general, the Nigerian courts tend to respect *force majeure* clauses as drafted and pay careful attention to the language of the specific agreement.

Thus, parties are encouraged to always insert *Force Majeure* clause in agreements. Furthermore, existing agreements can be varied to include *force majeure* contemplations.

Federal Competition and Consumer Protection Act

How should companies deal with their customers when the customers are forced to cancel a transaction? e.g, flights to various destinations and the cancellation of large-scale events, following orders from the government authorities.

[5] NPA v. AMINU IBRAHIM & CO. & ANOR (2018) LPELR-44464(SC).

[6] Diamond Bank Ltd v. Ugochukwu (2008) 1 NWLR (Pt. 1067) Pg. 1.

Section 120 of the Federal Competition and Consumer Protection Act, 2018 provides for consumers right to cancel advance reservations, bookings or orders.[7]

The section envisaged the problem of service providers penalizing customers without due regard to the reason behind such cancellation. It went further than merely envisaging; it provides a solution - eliminating said penalties on certain conditions[8]. However, the provision seems to be restrictive as it is limited to 'death' or 'hospitalization' of the contracting party, without due consideration of other extenuating circumstances, such as the outbreak of COVID-19 as well as the directive issued by government authorities restricting major commercial activities, especially air travel. The provision also fails to address situations where the consumer in question is a corporate entity. We recommend that the aforementioned provision be amended to effect new economic realities.

Frustration doctrine

Contract law views a contract as a mechanism for risk allocation between the contracting parties and, therefore, the parties' obligations are generally determined on entering into the contract.

However, in light of the inability to foresee all risks, the occurrence of some events may cause a contract to expire without being performed[9], thus, the doctrine of Frustration.

Contract is frustrated when there is a supervening event that changes the nature of the outstanding contractual rights to the extent that the parties could not have reasonably contemplated such change at the time of the execution of the contract[10].

Historically, Nigerian courts have made little use of this doctrine [11]

The doctrine of frustration leads to termination of a contract, rather than to its

[7] Section 120 of the FCCPA provides that: '*Consumer shall have the right to cancel any advance booking, reservation or Order for any goods or services, subject to a reasonable charge for Cancellation of the order or reservation by the supplier or service provider.*
(2) For the purpose of this section, a charge is unreasonable if it exceeds a fair amount in the circumstances, having regard to-Consumer's right to cancel advance reservation,
(a)The nature of the goods or services that were reserved, booked or ordered;
(b)the length of notice of cancellation provided by the consumer;
(c)the reasonable potential for the supplier or service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice, and the time of the cancelled reservation, booking or order; and
(d)the general practice of
The relevant industry.
(3)A supplier or service provider may not impose any cancellation fee in respect of a booking, reservation or order if the consumer is unable to honour the booking, reservation or order because of the death or hospitalisation of the person for whom, or for whose benefit the booking, reservation or order was made'.

[8] Section 120(3) of the FCCPA (supra).

[9] Mazin Engineering Limited v. Tower Aluminium (Nig.) Ltd (1993) 5 NWLR Pt. 295, Pg. 526.

[10] National Carriers Ltd v. Panalpina (Northern) Ltd (1981) AC 675.

[11] Emmanuel Oseloka Araka V. Monier Construction Co. (Nig.) Ltd (Sc. 314/1976) [1978] 10 (15 September 1978).`

change. The doctrine deals with circumstances under which the contract cannot be fulfilled and enforced.

The doctrine is not absolute, it presupposes the establishment of 2 fundamental elements. First is that the parties never contemplated the occurrence of the supervening event and as such did not provide for same in the agreement executed. Second is that the event went to the root of the contract and as such has rendered the agreement impracticable.

Once a party cannot establish both of the aforementioned, the party cannot claim that the doctrine of frustration has absolved him of his contractual responsibilities.

Furthermore, while the doctrine of frustration protects the violating party against a claim for enforcement of a contract (or for performance damages), it does not protect the breaching party from other claims, such as restitution of goods or payment that it has received from the injured party, or reliance damages (meant to compensate the injured party for expenses incurred in order to fulfil the contract).

The buck stops with the Court, as it is only the Court that can determine if a contract has been frustrated[12]. However, the parties are to assess the practicability of their contractual obligations and determine if there are no other options to the performance of the said obligations.

Conclusion

If transactions cannot be performed (including cancellations of flights and large-scale events) as the result of explicit Government policies in reaction to the COVID-19 pandemic, it is reasonable to assume, when a barrage of coronavirus related contractual disputes are presented for litigation, that the Nigerian courts would be open to applying any of the aforementioned solutions, while serving as a shield to prevent parties from relying on the global health crisis to escape contractual responsibilities.

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[12] Obayuwana v. The Governor of Bendel State (1982) Selected Judgement of the Supreme Court, Pg. 167.

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