

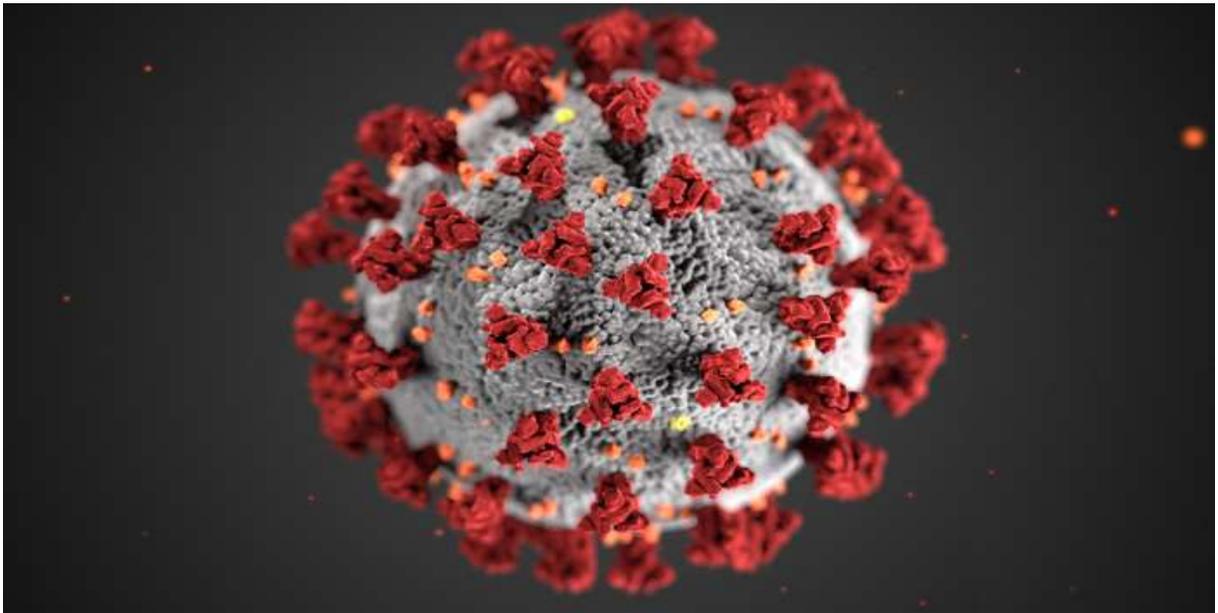
**GREY MATTER**

**COVID-19 LEGAL ADVISORY SERIES**

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**BANWO & IGHODALO**



# **COVID-19 and Commercial Transactions: Some Emerging Legal Issues**

## 1. PREFACE

By the time the World Health Organization (“WHO”) upgraded the status of the novel Coronavirus Disease (officially known as **COVID-19**) outbreak from an epidemic to a global pandemic on 11<sup>th</sup> March, 2020, the virus had already travelled beyond Wuhan, China, its point of original outbreak in December 2019 and crossed international borders<sup>1</sup>. Given the rapid rate of infection and increasing number of deaths in the wake of the unprecedented spread of the virus, various emergency measures have been deployed by municipal, local, state, national and multilateral authorities to contain the outbreak.

Besides being a public health crisis, COVID-19 continues to trigger severe social and economic consequences for individuals, corporates and governments across the world. Specifically, markets and industries are reacting negatively to the pandemic. Global stock and commodity prices (especially crude oil) have plummeted to unprecedented levels in recent weeks, with grave multiplier effects on economies. The general consensus is that this trend is not expected to reverse anytime soon, given the impact of current border closures, international travel restrictions, and lockdown of large swaths of movements of persons in many cities, countries and regions of the world.

The sudden collapse of industrial and commercial activities is, in many respects, unforeseen. This may also not have been within the reasonable contemplation of most entities, investors, industry & financial market players; who are parties to existing commercial arrangements across several jurisdictions. To date, a sizeable number of domestic and international contractual obligations have been frustrated while many others face possible and imminent performance crisis.

This article analyses the key socio-economic consequences of COVID-19 and offers legal options for mitigating its impact on the operations of commercial entities, as well as technical guidance on including provisions in future commercial agreements, against any similar unforeseen pandemic.

## 2. KEY ISSUES FOR COMMERCIAL ENTITIES AND TRANSACTIONS

Massive disruptions in global supply chains are affecting commerce in every sector and jurisdiction. In the circumstances, business organizations are confronted with existential risks for which many do not have contingency plans in place, and which are affecting how they can deliver on their contractual obligations. For enterprises such as manufacturing (production & assembly plants), construction, mining, marketing and consultancy firms with operations largely dependent on imported raw materials, semi-processed or finished products, as well as imported services (skilled labour & expertise); the various responses to COVID-19 worldwide (particularly in the most affected economies) have either crippled their operations or adversely affected the international value chain for their products.

We have considered a few enterprises/contractual arrangements below:

### a. Financing

The COVID-19 outbreak will likely have a negative impact on the ability of many companies with existing loan/debt financing obligations to meet their obligations to their lenders/creditors. The need to assess the

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<sup>1</sup> As at Wednesday, March 25, 2020, there were about 440, 359 reported cases in more than 150 countries with death toll reaching 19,753, according to the World Health Organization. These numbers are expected to increase by the day.

impact of the COVID-19 outbreak on obligations under relevant financing agreements is now of significant importance. For instance, have provisions relating to material adverse change/event been triggered? Are the representation and warranties made by the borrower still accurate? Will there be need to seek waivers or extension of time to comply with obligations?

#### **b. Employment**

One of the side effects of the various measures against COVID-19 is the inability of several employees (especially those whose work require physical delivery) to perform their duties for lengthy period. The liability of employers to still pay salaries in such circumstances is now in question. Indeed, several employers may be unable to meet their salary obligations to their employees due to possible challenges in receiving payments from clients by reason of non-delivery of services. Thus, the ability of employers to terminate the services of the employees under current circumstances have come up for discussions. Can the employers convert the period to paid or unpaid leave? Can an employer implement a reduction in salary without the consent of the employees?

Also, several employers currently allowing their employees to work remotely do not have provisions in their contracts of employments or staff handbook governing such work-from-home arrangements. Can accidents occurring whilst working from home be considered an occupational accident? Can an employee who refuse to come to work due to high level of anxiety be penalized?

#### **c. Aviation, Shipping & Logistics**

The restrictions on international air travels and the closure of land and coastal borders in many countries have grounded business for many enterprises in the transport sector. This has resulted in many impromptu cancellations of flights and trips along international air, water and land routes. There have also been consequential implications for enterprises expecting delivery of shipments, consignments, cargoes, and arrival of expatriate workers from foreign countries. This also holds for business entities, persons, and business executives travelling for previously scheduled business meetings and conferences across international borders. The determination of the party to bear the losses or liabilities arising under the relevant contracts is now a major consideration for parties.

#### **d. Tourism & Entertainment**

With lockdown placed on major cities across the globe and directives to maintain the WHO-recommended social distancing protocols, COVID-19 outbreak has had serious toll on global tourism and entertainment. In the circumstances, legal questions arise as to the status of previously scheduled events and paid bookings for hotel accommodation and event venues; particularly if the pandemic persists for a period longer than envisaged.

#### **e. Construction & Mining**

Operators in the construction sector and their clients have had to face serious interruptions to the performance of their contractual obligations. In most cases, importation of construction materials has been stalled with material adverse effects on building projects and concession contracts. This will either elongate agreed durations for, or completely frustrate the performance of, infrastructure projects earlier awarded. In the same vein, mining agreements such as leases and licenses are expected to suffer serious performance crisis, particularly where expatriate workers from foreign countries are required or where heavy machinery are required to be imported for exploration and exploitation purposes. Will they still be entitled to payments and/or liable for delayed performance?

## **f. Healthcare**

Enterprises engaged in the health sector are significantly affected by the pandemic. With hospitals running out of drugs, test kits and protective masks, and pharmaceutical companies (particularly in Africa) unable to either import drugs or raw materials from affected producing countries around the world; there is pressure on the supply side of the market with many pre-COVID-19 arrangements/orders disrupted. Will health care providers be liable for negligence arising from inability to provide adequate treatment to patients due to shortages caused by COVID-19?

## **g. African Trade**

The ravaging impact of COVID-19 is becoming increasingly felt in Africa only about three (3) months to the take-off date of the African Continental Free Trade Area. The Agreement establishing the AfCFTA was signed on March 21, 2018, in Kigali, Rwanda and it came into force on May 30, 2019. As highlighted in a [Special Issue of our Grey Matter Tax Alert in January 2020](#), the AfCFTA created a single market for the free movement of goods, services and persons within the continent, with the vision that capital, investments and technology will flow across the continent unimpeded. The COVID-19 pandemic is likely going to affect the take-off as well as the objectives of the AfCFTA, should the pandemic persists.

As a consequence of all of the foregoing, the nature/scope of the provisions in underlining contracts for business entities' obligations have come to the fore of the conversations, as consequential adjustments to the various commercial arrangements/agreements becomes imperative.

## **3. POSSIBLE / RECOMMENDED APPROACHES**

### **a. Force Majeure**

Most commercial agreements contain force majeure clauses, included to protect the positions of parties to such agreements, in case certain events (defined in the agreement) occur to prevent performance of contractual obligations. Such circumstances usually include natural disasters, otherwise known as "acts of god", such as earthquakes, tsunamis, plagues or "serious epidemic". Force majeure events can also include "acts of man" which are reasonably unforeseeable and disruptive in nature, such as an industrial action.

In effect, a force majeure event will relieve a commercial entity, that is unable to perform under a contract due to circumstances outside of its control from obligation. Thus, commercial entities who have failed to perform any of their contractual obligations, as a result of the COVID-19 pandemic, may be able to invoke the force majeure clauses in their commercial agreements; to avoid liability for non-performance. However, where "Coronavirus outbreak" is not contained in the list of defined events in a contract, it is assumed that the current pandemic should qualify as a force majeure event under the umbrella "serious epidemic", a phrase commonly inserted in commercial agreements.

For contracts containing no force majeure clauses, commercial entities could result to invoking the common law principles of supervening impossibility or frustration, to avoid huge liability for non-performance. However, the availability of this principle would depend on the applicable law to such contracts.

Whether COVID-19 will find application under the general term, "serious epidemic" or will be adjudged a supervening event by operation of law, depends substantially on the construction of the underlining contract, the applicable laws and the unique facts and circumstances of each case. At any rate, commercial

entities should consider specifically including a pandemic, such as Coronavirus, in the definition of force majeure events in future contracts.

### **b. Insurance Policy**

Commercial entities having “All-Risks Insurance” and “Special Perils Insurance” as well as “Consequential Loss Insurance” and the like, should review the terms of such policies or seek appropriate professional advice, on whether the current Coronavirus scourge could be accommodated in the risks insured against.

For instance, insured manufacturing companies may benefit under a “Plant-All-Risk Insurance Policy”, as a result of the lockdown in many cities of the world, preventing their operations. In like manner, construction companies may be able to make claims under a “Contractor-All-Risk Insurance Policy”.

However, for “Special Perils Insurance Policies”, it is not clear whether the damage/disruptions caused by the COVID-19 outbreak could amount to special perils. Similarly, it is not clear whether insured commercial entities who have suffered loss of revenue/profit in the wake of the Coronavirus pandemic could claim under a “Consequential Loss Insurance Policy”.

The quantum of claims possible under the various insurance policies will depend on the construction of the insurance contracts. It is necessary that commercial entities negotiate future insurance policies, with a pandemic like the COVID-19 in mind.

### **c. Business Continuity Plan**

The COVID-19 pandemic is changing the world of work. For enterprises without a contingency plan, the economic adverse effect of the pandemic could be extremely devastating. In view of present realities, commercial entities should invest in system automation whereby services can be provided remotely to their clients or customers, in times of natural disasters, widespread plaques or lockdown. For entities relying on delivery of services, the inclusion of provisions in the contract obliging the service provider to have a robust business continuity plan will be important.

Well negotiated commercial and insurance contracts, that will adequately take care of business disruptions and ensure continuity of businesses in the post-crisis period, without losing vital business relationships are crucial. This is imperative for commercial entities, particularly those whose services may not be possibly rendered virtually; such as enterprises in the construction, manufacturing, transport & logistics sectors.

## **4. CONCLUSION**

In conclusion, commercial entities are enjoined, in the light of the global reach of the COVID-19 pandemic and the attendant unprecedented disruptions to businesses, to consider seeking proper legal advice on:

- Which existing contracts may be impacted by the ubiquitous restrictions and lockdown on businesses, or where a counterparty may lawfully seek to terminate or suspend a contract;
- The employment obligations and/or liability that may crystallize by reason of the current pandemic and how to mitigate against same;
- Appropriate steps to mitigating the risks associated with Coronavirus or outbreak of similar epidemic in future contractual relationships/commercial arrangements;

- Building an effective Business Continuity Plan within the context of extant applicable laws; and
- Whether a force majeure event applies to specific contracts to which they are parties or what reliefs may be available, in the circumstance.

**The Grey Matter Concept is an initiative of the law firm, Banwo & Ighodalo**

**DISCLAIMER:** This article is only intended to provide general information on the subject matter and does not by itself create a client/attorney relationship between readers and our Law Firm or serve as legal advice. Specialist legal advice should be sought about the readers' specific circumstances when they arise.

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