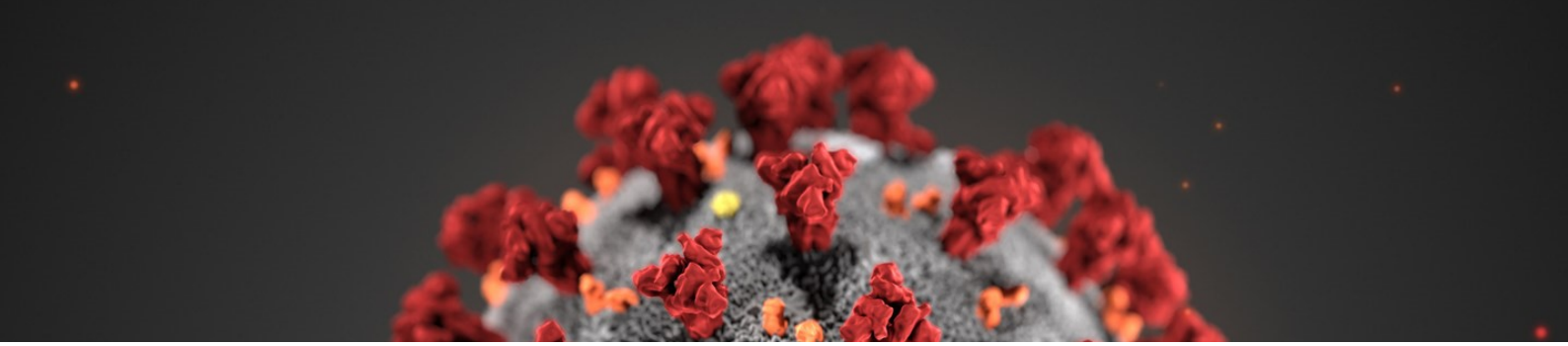
BANWO & IGHODALO

MITIGATING THE IMPACT OF THE COVID-19 PANDEMIC AND COLLAPSE OF CRUDE OIL PRICES ON DEBT FINANCING ARRANGEMENTS



The recent plunge in the price of crude oil globally (arising from disagreements among major international crude oil supply countries), coupled with the outbreak of the coronavirus disease ("**COVID-19**") which culminated in the declaration of COVID-19 as a global pandemic (collectively the "**Recent Events**"), have had far-reaching and significantly adverse effects on global social and economic activities. In particular, COVID-19 is widely acclaimed to have led to unprecedented disruptions in global supply chains, sharp reduction in the global prices of commodities (including crude oil), turmoil in global financial markets, international travel restrictions, and cancellation of several international and other events.

Companies involved in petroleum related activities, be it upstream, midstream, and possibly the downstream, and in particular, those party to subsisting debt financing arrangements, are currently reeling from the impact of the Recent Events. Thus, it has become expedient to examine the financing arrangements to which these companies are a party, and in particular, the loan and other documents in respect thereof ("**Finance Documents**"), in the light of policies and other intervention measures put in place by the Federal Government of Nigeria and its affiliated entities (collectively "**FGN**") aimed at ameliorating the adverse effects of the Recent Events on key sectors of the Nigerian economy (the "**FGN Intervention Measures**"), and also applicable laws, with a view to identifying potential contractual and other reliefs that may result in, among other viable outcomes, extension of tenor of loan facilities; deferral of timelines for payment of interest and repayment of principal; review, waiver or amendment of covenants, assumptions and ratios; as well as waiver of fees (the "**Objectives**").

Some of the possible options for attaining the Objectives are cursorily discussed below. However, this briefing note only highlights some of the key issues, largely from an English law perspective (since English law is commonly adopted as the governing law of Facility Agreements and considering that Nigerian law, mirrors and adopts English law principles and practices in material respects), as well as having regard to Nigerian laws and regulations. **The precise terms of each agreement and/or financing transaction, as well as the factual circumstances in relation thereto, will need to be considered, in more detail. Further, each potential relief mentioned herein has its unique nuances**. Thus, it is imperative that you seek legal advice before resorting to and adopting any of the options. We remain available to render support in that regard.

Force Majeure

Most commercial agreements contain force majeure provisions, which by and large protect an affected party, and affords time and performance relief following the occurrence of certain specified events or circumstances,[1] which would typically be outside the control of the affected party, which hinders or interferes with that party's ability to fulfill or perform its contractual obligation(s), and which could not have been prevented or overcome by the affected party, even with the exercise of reasonable diligence.
Instructively, there is no implied application of the doctrine of force majeure. **Thus, a party's ability to claim relief on account of force majeure depends upon the terms of the underlying contract in question**. Where same is provided for, in a contract, force majeure typically relieves the affected party from liability (sometimes entailing forbearance or deferral/ extension of timelines for performance of obligations). Thus, depending on the scope of the force majeure clause contained in a contract, a party

1. Such circumstances usually include "acts of god" or natural disasters (such as earthquakes, landslides tsunamis, plagues or epidemics), or "acts of man" which are reasonably unforeseeable and disruptive in nature (such as strikes, boycotts, lockouts and other industrial disturbances).

who defaulted in the performance of a specified obligation(s) as a result of the outbreak of the COVID-19 pandemic may be able to avoid or mitigate its liability by claiming force majeure relief.

However, loan facility agreements typically do not contain robust force majeure provisions that may avail a borrower. Indeed, it is common practice for the obligation to make payments (when due) to be specifically excluded from the remit of force majeure. Therefore, it will rarely be the case that a borrower can successfully assert that the Recent Events constitute an event of force majeure, and as a consequence thereof seek a deference or other relief (s) that could result in attainment of the Objectives. Nevertheless, it may be useful to review the relevant Finance Documents in order to reach such a determination.

Frustration

The English common law doctrine of frustration recognizes that a contract can be terminated, by operation of law, where a change in circumstances renders it impossible to perform such contract, as conceptualized and contemplated, or such supervening event results in a radical change in the nature of the obligations originally agreed by the parties.

Unlike force majeure, frustration does not necessarily need to be provided for in the contract. The courts however apply a very strict test in construing and determining whether or not a contract can be deemed to have been frustrated and incapable of being performed, as contemplated. In particular, **it is not sufficient to establish that it has become difficult, expensive or uneconomic to perform the contract, or that a degree of hardship or inconvenience will be involved in the performance of the contract**. Further, a party must carefully evaluate the circumstances in question before canvassing frustration in order not to result in unintended consequences, including the possibility that the counterparty claims damages on account of a repudiatory breach by the party seeking frustration.

Disruption Events Provisions

The loan market association's ("**LMA**") model form loan facility agreement (which is widely adopted for documenting and implementing loan transactions (locally and internationally)), typically empowers the Facility Agent to make changes to the operation or administration of the facility, following the occurrence of a "Disruption Event", which is usually defined to cover **(a)** material disruption to payment/ communications systems or financial markets, which are required to operate in order for payments to be made in connection with the Facility; or **(b)** disruption of a technical or systems-related nature to the treasury or payments operations of a party, preventing the performance of its payment obligations or communications with other parties.

It is debatable whether the Recent Events would qualify as, and fall within the definition of "Disruption Events" under relevant loan facility agreements. A review of the documents that govern each financing arrangement will be relevant in determining this issue.

Material Adverse Effect Provisions

A party can contend that the Recent Events constitute material adverse events ("**MAE Events**"), which significantly and materially affect its financial condition, assets or business and, consequently, its ability to perform its payment obligations under applicable Finance Documents. In this connection, a borrower may inform its lenders of the occurrence of the MAE Events, with a view to commencing good faith discussions, which may culminate in a remedial

plan (to be implemented within a prescribed timeline), which achieves the Objectives. However, it is useful to bear in mind that this option carries with it the risk that the lenders may take the view that the MAE Events are not capable of remedy within the framework of the Finance Documents (without amendments or waivers thereof), thereby constituting events of default, and may, on that basis, commence acceleration processes, in line with the provisions of the Finance Documents.

FGN Intervention Measures

As part of the FGN Intervention Measures, the Central Bank of Nigeria ("**CBN**") issued a circular, dated March 16, 2020,[2] which specified certain policy measures and other interventions aimed at ameliorating the impact of the COVID-19 outbreak (the "**CBN COVID-19 Circular**"). Further, the CBN has, as of the date hereof, issued two (2) additional guidelines, which expatiate on steps and provide guidance for the implementation of some of the policy measures mentioned in the CBN COVID-19 Circular. Although most of the policy measures contained in the CBN COVID-19 Circular and the aforementioned additional guidelines are generally targeted at beneficiaries of subsisting CBN intervention facilities, households, small and medium scale enterprises and healthcare practitioners, **we note that CBN granted leave to deposit money banks ("DMBs") to consider temporary and time-limited measures for the restructuring of the tenor and other terms of loans availed businesses most affected by the COVID-19 pandemic, including (specifically) businesses in the oil and gas industry**. **In our reasonable contention, we believe that the CBN dispensation may afford borrowers (particularly those operating in the oil & gas industry) an opportunity to initiate discussions regarding the terms of the Finance Documents with a view to achieving the Objectives, especially where the lenders are Nigerian DMBs**. However, it is useful to mention that the regime is discretionary, and that each applicable DMB is enjoined to ensure that – **(a)** any forbearance it grants is targeted, transparent and temporary; **(b)** and that same does not adversely impact its financial strength; and **(c)** does not trigger or cause any material disruption to the stability of the Nigerian banking system.

Emergency Economic Stimulus Bill 2020

The House of Representatives of the Federal Republic of Nigeria ("**HOR**") recently passed the Emergency Economic Stimulus Bill 2020 (the "**Stimulus Bill**"), which seeks to provide relief with respect to corporate tax liability, suspension of import duties otherwise applicable to selected goods, deferral of residential mortgage obligations owed to the Federal Mortgage Bank of Nigeria for a fixed term, protection of jobs and general alleviation of financial burden on citizens, in response to the economic downturn occasioned by COVID-19.

It appears however that the drafters of the Stimulus Bill intend to specifically exclude oil and gas exploration and production companies from the relief package provided there under. Nevertheless, the Stimulus Bill is yet to be considered and passed by the Senate of the Federal Republic of Nigeria ("**Senate**") and, as such, is susceptible to change before it is enacted into law. In this regard, **we believe that oil & gas companies, under the aegis of the Oil Producers Trade Section of the Lagos Chamber of Commerce, Independent Petroleum Producers Group, or through other means, can constitute themselves into a pressure group to lobby the Senate with a view to seeking reliefs to be contained in the Stimulus Bill which will facilitate attainment of the Objectives.**

2. Ref. FPR/DIR/GEN/CIR/07/049

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