

COVID-19 – BUSINESS ADVISORY NOTE

The Covid-19 pandemic inevitably affects the day-to-day flow of business operations and raises issues amongst business entities with respect to the performance of Contractual Obligations, the fulfilment of statutory Corporate Governance requirements, Human Capital and Employment matters. This article provides practical advice for businesses as they navigate the issues highlighted.

1. Contractual Obligations

The lockdown across various states has made it almost impossible for most businesses within the country's commercial hubs to perform their commercial obligations. Businesses may inevitably be forced to rely on contractual provisions and principles of contract law which protect a non-performing party from the consequences of its non-performance.

Force Majeure

A key contractual provision available to contracting parties is the Force Majeure (FM) clause; a FM clause relieves a party from liability for the non-performance of its contractual obligations where the party is prevented from fulfilling its contractual obligations by specified (or implied) events outside of its control. Events that constitute a FM are typically defined and restricted under the contract and are usually interpreted within the definition in the contract; thus, it will be useful to review existing commercial contracts to ascertain how the FM clauses can be extended to cover a global pandemic or epidemic.

In order to rely on COVID-19 as an FM event, the party must be **completely unable** to perform its obligations. A party will therefore not be excused simply because it has become more expensive or more difficult to carry out a contractual obligation.

Material Adverse Change Clause (MAC)

The pandemic may also constitute a material adverse change (or material adverse effect) (MAC) under certain existing agreements. A MAC clause typically gives one contracting party the right to terminate an agreement or trigger the other party's outstanding obligations where there has been a material adverse change in or effect on the business, operations, financial condition, properties or liabilities of a contracting party.

Like the force majeure clause, the drafting of the MAC clause will determine whether the pandemic will constitute a material adverse event under the agreement. Generally, MAC clauses are worded to specifically exclude economic or market conditions and may sometimes specifically exclude events which affect the entire economy.

Frustration

Frustration is a premature determination of an agreement caused by the occurrence of an event which could not have been reasonably contemplated by the parties at the time of the agreement. An event is deemed in law to be a frustrating event where it occasions a destruction of the state of affairs and renders performance impossible.

There is a very high threshold to be met for an event to be deemed a frustrating event. Events such as an outbreak of war; subsequent legal changes; destruction of the subject matter; or a cancellation by an unexpected event have been held to be frustrating events. It can be argued that a contract has been frustrated due to the occurrence of the pandemic which was an unexpected event or that the enactment of the COVID-19 Regulations is a change in law which frustrates a party's performance of its obligations under the contract.

Tax Obligations

On 26 April 2020, the Federal Inland Revenue Service (FIRS) issued a statement inviting corporate bodies to make “special arrangements” to fulfil their tax obligations. These special arrangements include taking steps to make annual returns earlier than their respective due dates.

As part of its efforts to mitigate the impact of the COVID-19 pandemic, the FIRS extended the timeline for filing of value added tax (VAT) and withholding tax to the last working day of the month, following the month of deduction. The due date for filing Companies Income Tax returns has also been extended by one month. The Lagos Inland Revenue Service (LIRS) has also granted a two-month extension of the deadline for filing of Annual Tax Returns for individual taxpayers including self-employed persons from 1 April 2020 to 31 May 2020.

2. Corporate Governance/ Reporting Obligations

AGMs & Board Meetings

In response to companies' compliance issues, the Corporate Affairs Commission (CAC) recently released guidelines on holding and attending meetings through proxies. This is in line with S.230 of CAMA where appointed representatives of a company can attend a meeting on behalf of the members. Some companies have obtained permission from the CAC to hold meetings virtually and through the use of proxies. Guaranty Trust Bank (GTB) and First City Monument Bank (FCMB) have recently taken advantage of these guidelines.

Companies may also hold AGMs through video conference or other audio-visual means. The only provision of CAMA with respect to the manner in which AGMs may be held is to the effect that all AGMs must be held in Nigeria. This provision would be satisfied where meetings are hosted at a location in Nigeria with member-participation through the use of audio-visual technology. In any event, there is a fair degree of uncertainty and it is expected that further guidelines or directives from the CAC would clear up any such ambiguities.

Companies may also obtain the permission of the CAC to postpone their AGMs where more than 15 months have elapsed since their last AGM provided that the extension does not exceed a period of 3 months from the expiry of the initial 15 months.

Securities & Exchange Commission

The Securities and Exchange Commission (SEC) issued a directive on 24 March 2020 granting a 60-day extension for public companies and capital market operators to file their 2019 annual reports and first quarter 2020 reports. The SEC has provided means through which applications and returns may be filed electronically.

In addition, all public companies, capital market operators have been advised to monitor the real and potential risks the pandemic may have on their business operations and to make material disclosures to investors on the impact of the pandemic on their business operations.

3. Human Capital and Employment Matters

With the consequent economic impact of the virus, businesses may unfortunately be forced to trim the costs of labour in the form of reduced wages and benefits or a reduced workforce. Nigeria's labour laws, which do not extend to all current employer-employee relations, do not contemplate the impact of a pandemic on employer-employee relations and the employer-employee relationship is almost entirely governed by the employment contract.

Employment contracts may need to be renegotiated for the period of the pandemic and thereafter and terms of the employment contract on remuneration, benefits, and notice periods for termination may need to be reviewed and renegotiated. Where there are statutory requirements such as termination of contracts by notice as contained in the Labour Act, or compulsory obligations contained in trade union agreements, employers are bound by such statutory obligations and trade union agreements.

Alternatively, businesses may also take advantage of a furlough scheme for essential employees. An employee furlough is a mandatory suspension from work without pay. It is usually implemented as a cost saving measure, when the employer does not want to lay off employees but lacks the resources to continue paying them. A furlough differs from a lay off as there is an expectation that the employees will return to work. Employees are usually given a specific date or condition for returning to work. Also, furloughed employees retain their employment benefits such as healthcare and pension fund contributions to be resumed once they start work. In respect of the employer's statutory obligations to deduct and remit the employee's taxes and other statutory contributions, employers are advised to promptly notify all applicable authorities of the status of the employee for the furlough period. It is important to note that the furlough scheme is not governed by any extant Nigerian laws and as such will be based of the mutual agreement of the parties.

The Nigerian government has introduced a number of palliatives to address the economic impact of the pandemic in the country. The Federal House of Representatives' passed the Emergency Economic Stimulus Bill to provide aid to businesses and individuals in Nigeria. The Bill provides for a 50% income tax rebate on the total amount due or paid as Pay As You Earn (PAYE) for employers duly registered under CAMA that maintain the same employee workforce status, without retrenching any employees employed as at 1 March 2020 till 31 December 2020.

4. Dispute Resolution

In respect of commercial disputes, the Lagos State High Court issued practice directions for the remote hearing of cases commencing on Monday, 4 May 2020. Other dispute resolution mechanisms such as arbitration and mediation which are largely party-driven may also continue remotely subject to the agreement of the parties.

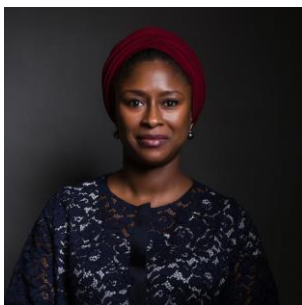
Business Continuity Plans

Business continuity plans are a major way of managing and mitigating risks of both economic and legal natures. Businesses are advised to engage to take steps to review contracts related to the supply chain, delivery schedules on both products and service delivery. Investments in back-up systems and cloud storage arrangements are also advised. Finally, it is important businesses carry out periodic financial/economic assessments and put in place stabilisation plans to aid the flow of business.

Conclusion

It is essential that all organizations continue to appraise the effects of this pandemic on their operations and follow up with solutions tailored for them. When in doubt, professional opinions and assistance should be sought.

For more detailed advice on any of the issues raised in this article, please contact any of the persons listed below.



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