
THE IMPACT OF THE COVID-19 PANDEMIC ON DEMURRAGE PROVISIONS IN CHARTER- PARTIES IN NIGERIA

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Introduction

In the wake of the coronavirus pandemic (“COVID-19” or “the pandemic”), both governmental and private agencies as well as regulators of various sectors - from manufacturing to professional services – have responded by amending or creating specific statutory provisions to tackle the ripple effects of the pandemic on the economy. In particular, the impact of the virus on shipping and trade is now becoming increasingly clear. As a result of this ongoing disruption, the rights and obligations of individuals and businesses under contracts are coming under increased scrutiny.

In addition to grounding local and international flights, commercial hubs in Nigeria such as Lagos, Kano, and Ogun States as well as the Federal Capital Territory, Abuja were also locked-down to curb the spread of this scourge. This has given rise to a number of questions regarding the implications of the pandemic on various aspects of the Nigerian economy including the shipping or maritime sector. A recurring question is whether a force majeure clause can excuse parties in charter-party agreements from performing their obligations or from doing so on time. Against the backdrop of Lagos State as the center of shipping activities in Nigeria, this article seeks to examine the effect of the pandemic on the Nigerian maritime space especially as it relates to charter-party agreements and the demurrage provisions therein.

Charter-party agreements in the Nigerian Shipping Industry

Charter-parties are usually the contracts drawn up by parties to cover transportation of cargoes using vessels. As a contract between ship-owners and shippers, charter-parties set out the terms and conditions of hiring a ship. Bills of lading are a form of receipt to ensure that the consignee gets the merchandise and the shipper is paid the amount stated in the contract.

Demurrage provisions in charter-parties

Demurrage is a charge on cargo paid by the owner of the goods for the extra days the cargo overstays in the port beyond the approved date. Demurrages are charges levied by the shipping companies on each of the cargo importer/shipper for their failure to lift, clear and/or take delivery of the cargo, after the statutory 5 days of free period allowed by the law to do.¹

Demurrage is also usually made payable at a given rate per day of the demurrage days taken by the charterer to load or unload. Most shipping companies have different categories of demurrage period charges which they place on different sizes of containers, delivered by the vessels at ports of discharge depending on the location and level of traffic within the confines of the operational modalities of the port in question.

Essentially, demurrage is a form of liquidated damages for breaching the lay-time as provided for in the governing contract (the charter party) and the bill of lading. These documents contain important

¹ <https://businesshighlights.com.ng/nigerias-demurrage-free-days-at-ports-lowest-among-neighboring-west-central-africa/>

factors that are used to determine the amount of demurrage payable by a cargo-owner such as the size of the container, berth-details and lay-days etc.

Specific provisions for shipping due to the pandemic

In the maritime sector, the Federal Government on 26 March 2020 issued directives to restrict cargo vessels in Nigeria, to the effect that only cargo ships which had been at sea for more than a fortnight were to be allowed to dock in Nigerian ports. However, this was subject to a physical screening of these vessels and medical tests conducted by the Port Health Authorities on the crew aboard. The directives however exempted cargo vessels carrying oil and gas due to its economic importance and the fact that there is usually a negligible amount of human interaction on these kinds of vessels.

The Nigerian Ports Authority also directed all terminal operators to suspend all applicable terminal storage fees (demurrage) on consignments for an initial period of 21 days effective 23 March 2020.² This demurrage-free regime was further extended on 13 April for another 14 days, essentially allowing a total demurrage-free period of 35 days.³

Pursuant to the Quarantine Act 2004, the President of the Federal Republic of Nigeria issued the Covid-19 Regulation 2020 on 30 March 2020. The regulation restricted movement of people except essential services in Lagos, Abuja, Ogun State (and thereafter in Kano State on 16 April 2020) and imposed a shelter-in-place policy among citizens. Although, the restrictions are now gradually being relaxed, the regulations mandated seaports in Nigeria to remain fully operational, alongside regular screening of cargoes by the relevant Port Health Authorities. On his part, the Lagos State Governor also issued the Lagos State Infectious Diseases (Emergency Prevention) Regulations 2020 (the state regulation), which declared Covid-19 a dangerous infectious disease capable of endangering and threatening the health of people in the local area.

Exclusion clauses in commercial contracts

Force-Majeure

Force majeure provisions are typically included in various commercial agreements especially the ones pertaining to the supply of goods and services such as *shipping*. The effect of a force-majeure clause is to suspend one or both parties' performance of the obligations in the contract under special conditions. Under the laws of the countries that practice the Common Law system, including Nigeria, to ascertain whether a force majeure clause can be triggered in charter-parties by Covid-19, the following considerations should be ideally made:

- Do the charter parties contain force majeure provisions?
- If the answer to the above is in the affirmative, does the force-majeure provision in the contract include pandemics either broadly or specifically defined?

² <https://nigerianports.gov.ng/2020/03/28/press-statement-coronavirus-npa-suspends-demurrage/>

³ <https://nigerianports.gov.ng/2020/04/21/press-statement-relief-measures-to-port-users-due-to-outbreak-of-covid-19-extension-of-relief-period/>

- Are there conditions precedent within a timeframe before a force-majeure clause can apply to shipping contracts?
- What are the consequences of declaring a force-majeure event in the agreement?

Force majeure clauses in charter-party agreements in Nigeria may not be easily ignited as the Federal Government has declared that maritime activities continue as usual, although subject to the guidelines issued by government maritime agencies, such as the Nigerian Maritime Administration and Safety Agency (NIMASA) which provided measures to be implemented by maritime stakeholders in relation to Covid-19. Force majeure clauses in charter-parties will therefore depend on the facts and circumstances of each case.

Frustration

Nigerian courts⁴ have held that frustration occurs wherever the law identifies that a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would be different from what was undertaken or envisaged parties during the contract. Some of these circumstances include outbreak of war, acquisition of the subject matter by the government, destruction of the subject-matter, etc.

What creates a quandary is that the effects of pleading frustration or force majeure are different under the law. For force majeure, the effect would largely depend on the contract but generally, most force majeure clauses do not outrightly excuse a party's non-performance but operate to defer the obligations of the parties for the duration of the causal event. On the other hand, frustration will likely bring the contract to an end if it can be demonstrated that neither part is responsible for the supervening event and the contract becomes radically different, although mere delay or even excessive delay on account of Covid-19 may not suffice. Typically, due to the fact that force-majeure clauses are tainted by uncertainties and the standard of proof is quite difficult to satisfy, it may be more prudent to rely on frustration, which are not to be specified in agreements. However, it remains to be seen if Nigerian courts will categorize the Covid-19 pandemic as an event capable of frustrating a contract given that it does not adequately fall within the category of events the court have considered in the past.⁵

It therefore follows that a successful plea of either of these defences allows a shipper to avoid the contractual obligation of paying demurrage or detention charges to the terminal operators and shipping companies while the various governmental orders operate to also exclude cargo-owners from paying demurrage to the port for the applicable period.

⁴ Mazin Engineering Limited vs. Tower Aluminum (Nig) Ltd. (1993) 5 NWLR Part 295 Page 526, A.G Cross Rivers State V. AG of the Federation and Anor (2012) LPELR-9335 (SC); Nwaolisah v. Nwabufoh (2011) LPELR-2115 (SC); Jacob V. Afaha (2012) LPELR-7854 (CA); WECO Engineering and Construction Company Limited V. Dufan Nigeria Limited & Anor (2019) LPELR-47211 (CA).

⁵ G. N. Nwaolisah v. Paschal Nwabufoh (2011) LPELR-SC 211/2003.

Conclusion and Recommendations

Despite the express orders noted above by the government, custom officers have reported that terminal operators and shipping companies continue to collect demurrages.⁶ It is recommended that the government co-ordinates activities and address this issue. It is also recommended that the Nigerian Shippers' Council (NSC), as the governmental body responsible for freight regulation and protection of shippers' interest, should by policy fix a uniform container demurrage rate for all terminal operators and carriers operating in Nigeria to address the disparity in demurrage rates.

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⁶ <https://www.thisdaylive.com/index.php/2020/04/24/customs-agents-decry-violation-of-fgs-order-on-demurrage-waiver/>