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Coronavirus in Africa and its effect on contract performance: a checklist

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As Africa in turn is hit by the extreme situation caused by the coronavirus, many businesses are likely to face important practical difficulties. This comes as a second impact for many: with African trade remaining more heavily inter-continental than other continents, many African companies will have already felt a first shock-wave from the impact of the coronavirus on international trade generally.

A key question for African businesses is whether the coronavirus outbreak can excuse them or their counterparts from performing their contractual obligations, such as by triggering a force majeure clause.

Civil law and common law systems address this issue in similar but different ways, and this is therefore an important starting point to the analysis, whether in a civil law jurisdiction, (such as Egypt, Morocco, Algeria, or OHADA jurisdictions including Côte d'Ivoire and Senegal) or a common law jurisdiction (such as Nigeria, Kenya, Ghana and Tanzania) or in the case of South Africa drawing on elements of both.

Although mechanisms in both legal systems excuse performance of obligations in some circumstances, the hurdles are high and it is advisable that you seek advice at an early stage. As a preliminary step, here's our checklist on what to do in the immediate future:

1. Check your contract's governing law

Common law countries: For common law governed contracts, the actual words used in the contract are what determine whether there may be a valid excuse for non-performance.

Civil law countries: For civil law governed contracts, the law generally provides for criteria to characterize force majeure which apply when the contract doesn't address the issue (e.g. the OHADA Uniform Act on General Commercial Law applicable to sales of goods). However, if specific contractual provisions are included, these will habitually take priority. Also note that public law contracts are subject to a special regime (in particular with regard to compensation claims): here we only address private law contracts falling within the jurisdiction of the courts.

2. Find the force majeure clause or other useful contractual provisions

Check carefully whether there is a force majeure clause in your contract: it could be buried somewhere unexpected or refer to "exceptions", "unforeseen events" or "acts of God" rather than force majeure.

There may also be other provisions which can provide protection when performing a contract becomes difficult. One possibility is a hardship clause, which might apply when an unforeseeable event makes the performance of the contract excessively burdensome, and can lead to an adjustment of the commercial terms. The exact wording of the clause is important to determine its scope.

Other useful clauses could include material adverse change, price adjustment, liability limitations and exclusions, extensions of time, variations or changes in law (for example, laws prohibiting employees from working, or transportation controls, which slow down the supply chain).

If there is no force majeure clause, under common law parties will not be able to rely on force majeure, although the common law doctrine of frustration may apply to discharge a contract if it has become illegal or impossible to perform or performance has become radically different. However, in civil law jurisdictions, you may be able to fall back on the force majeure protections in the law. The application of these laws, such as the OHADA Uniform Act on General Commercial Law, is generally subject to the satisfaction of three criteria:

a) there is an impediment which is

b) beyond the parties' will and control and which

c) the parties could not have reasonably foreseen. One exception to be stressed is that, even where the above conditions are met, force majeure does not apply to a payment obligation.

3. Identify the events covered by the provisions

Once you have determined the clause or law to apply, you will need to establish the events it covers. Look closely at how events are defined in the force majeure, hardship or other clauses, and decide whether coronavirus fits the definition.

For example, in a force majeure clause, epidemics and pandemics – even if specifically covered by the clause – generally aren't defined precisely. However, coronavirus's classification as a global pandemic is likely to leave room for little doubt. In addition, some governments have also officially certified coronavirus as a force majeure event in their jurisdiction, which may support a party’s force majeure claim.

If neither epidemics nor pandemics are mentioned, the clause could still be triggered where it covers labour and supply shortages (which are caused by coronavirus) or broadly defines events as exceptional, beyond one party's control, unavoidable and not attributable to the other party.

Given the exceptional nature of the current situation, coronavirus will generally fulfil such contractual or legal definition, although for very recent contracts – entered into after extreme measures were already put in place in certain parts of the world – there could be debate about whether such events were foreseeable.

4. Notify the contractual excuse

To rely on contractual provisions that excuse performance of obligations, the event that you rely on must be the only one affecting contractual performance (unless clearly stated otherwise). In other words, "but for" coronavirus, a party must have been willing and able to perform.

If the link between the event and the non-performance is clear, you need to understand the effects of notifying a contractual excuse to your counterparty. These will differ from contract to contract. Once a force majeure event is notified, for example, the effects will vary depending on how long the performance is affected. The contract may allow for the right to suspend, seek an extension of time, or for either party to terminate it.

5. Comply strictly with contractual notice requirements

Whether you decide to trigger a force majeure or hardship clause, you must ask yourself:

- Is an initial notice of the force majeure / hardship event needed?
- Must you supply supporting details and evidence of the event and its effects?
- By when and in what form should notices (initial and subsequent) and supporting documents be served?

You must also respond quickly to notices received from your counterparty, as failure to respond to a notice within stipulated time limits may constitute acceptance of the counterparty's force majeure or hardship claim.

6. Document evidence which supports your claim and highlights your mitigation efforts

Properly record and store evidence of all communications with your counterparties about the disruption and its effects, including order or service cancellations.

Under common law, you must mitigate the effects of a force majeure event, so document reasonable steps taken to do so. Although there is no specific doctrine of mitigation across all civil law jurisdictions, there are sometimes specific regimes - for example, the OHADA law governing the sale of goods - where the principle of mitigation, which states that a party must have taken all reasonable steps to limit its losses or preserve its gains, has been included.

7. Prepare for the ending of the obstructive event

If force majeure has been claimed, agree with your counterparty a date when obligations will resume after the event and its effects have ended, especially if the contract is unclear.

The supply chain will need time and resources to resume operations or clear backlogs and the party claiming force majeure won't want to be in breach once the event is over. There may, in limited cases, be room to explore (or a contractual right to request) a further extension of time for performance. However, you are more likely to get relief during the remobilisation period by highlighting to your counterparty that the event is over but the preventing effects are still being felt.

As the effects of coronavirus are felt at different times, force majeure notices could continue to be issued after it is downgraded from a pandemic. Is the location of the force majeure event mentioned? For example, would your clause be triggered if there were still an epidemic at the place of delivery but not the place of manufacture?

8. Learn lessons for future disruptions

Assess your supply chain contracts so you know which counterparties are likely to be affected by coronavirus (if they haven't already) and by other future obstructive events. Engage with them early to plan how to manage these situations.

Do force majeure clauses in your existing and future contracts clearly and expressly allocate force majeure risk? Do you have a hardship clause in your contract and have you considered its effects? Depending on your relationships with counterparties, think about amendments to prepare for future outbreaks.

As the above checklist shows, there are simple steps that African businesses and their legal counsel can take to check whether the coronavirus outbreak can excuse them or their counterparts from performing their contractual obligations. When taking these steps, it is important to be aware of the law applicable to the contract, as there will be specificities depending on whether the contract is governed by civil or common law. It is also useful to bear in mind the alternatives to a force majeure claim: while force majeure excuses performance, a hardship provision for instance might enable parties to adapt performance where this remains possible, rather than simply ceasing performance entirely.

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