

Coronavirus **COVID-19**

FORCE MAJEURE & THE EFFECT ON BUSINESS

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As we may all be aware, there is an outbreak of a virus, Corona or COVID-19. COVID-19 was declared a pandemic by the World Health Organization and the Government of Uganda is working around the clock to analyze data, provide advice, coordinate with partners and scale- up aggressive measures to combat COVID-19.

World over with the increasing travel restrictions, quarantines and fears surrounding the outbreak of the Coronavirus (COVID-19), inevitably, many businessmen, suppliers, contractors and service providers are or will be unable to fulfill their contractual obligations. Undoubtedly, there is a profound impact on supply chains across various industries such as fashion, entertainment, e- commerce, manufacturing, food processing among so many others.

This brief shall focus on the two key legal issues that may rise as a result of the outbreak on business operations: Firstly, conventional contractual obligations and how they are affected by the outbreak. Secondly, the effect on e commerce business and how to scale operations and manage the impact on electronic transactions during this critical time.

Conventional contractual obligations and how they are affected by the outbreak

While negotiating contractual and finance documents, there are unprecedented measures being taken by governments worldwide in order to combat the outbreak. In Uganda large weddings, conferences, religious gatherings, bars, cinemas and places that accommodate large congregants have been banned with immediate effect.

Uganda's contract law and common law make provision for unforeseeable circumstances under a contract.

"Force majeure" is a term adopted by common law that is applied in Uganda through our Judicature Act Cap. 13. **A Force Majeure Clause** excuses a party from not performing its contractual obligations due to an event that makes the performance of said obligation impossible.

Under the law, force majeure leads to frustration of a contract [without default of either party and for which the contract makes no sufficient provision] which so significantly changes the nature of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution, that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances. Thus, the law declares both parties to be discharged from further performance as stipulated under **Section 66 of the contracts Act, 2010.**

Events that amount to **Force Majeure** are; "acts of God", "government restrictions" and "any other cause beyond the reasonable control of the party whose performance is affected." It is therefore a right interpretation that the declaration of COVID-19 as a global pandemic by World Health Organization, and the restrictions announced by H.E the President, make COVID-19 an "act of God", "government restriction" and "a cause beyond the reasonable control of the party whose performance is affected."



A contract is frustrated when an event occurs that makes the contract simply impossible to perform, or the obligations become fundamentally, materially and or radically different to those originally undertaken. An event that triggers force majeure should be one that can be proved to adversely affect one's performance such that they cannot in any feasible way meet their obligations.

Consequently and by example, a ban on congregation in bars, cinemas and other social gatherings will negatively impact cashflows of those affected and allows those parties to enforce force majeure.



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insight



Material Adverse Change clauses

Simply put, these give a party the right to walk away from a contract if unforeseen circumstances arise which undermine the basis on which it entered into that commitment. This clause essentially supplements the doctrine of frustration and force majeure as if there is a drastic change in the party's position or circumstances. Although a material adverse change clause may not operate automatically, the affected party may have to apply and it may not terminate other subsisting obligations under the contract.

Because of the freedom of contract, it is generally the contracting parties that determine the terms of the contract. Parties have to construe their contracts carefully and those executing new contracts have to be careful to avoid ambiguous drafting. If the language used in contract drafting lacks precision, it may be capable of an interpretation which attributes to the parties an intention that does not make business sense.



The effect on E-commerce businesses

For Uganda, it is important to note that over 70% of the supply chain is controlled by China and this has undoubtedly had a profound impact on supply chains across many industries. For an e-commerce business, it is important to solidify the supply chain, and come up with clear strategies to monitor the team on ground in the implementation of pragmatic modes of delivery. Online businesses have to monitor consumer trends and keep updated with the laws and regulations that may come into force during this time. Quality control is also important as a high demand may press suppliers in quality delivery.

Customer support is very vital during this outbreak and the Electronic Transactions Act, 2011 makes provision for consumer protection. An e-commerce business should provide information to consumers on their website or platform. This information may include their full names, physical addresses, code of conduct they subscribe to, the physical address, manner of payment, main characteristics of goods, dispatch time, return policies among others. These are meant to protect the interests of consumers. E-commerce businesses should be open to change in demand from non-Chinese products.

Recommendations

The ULS recommends that all stakeholders are considerate of the effect of this pandemic and specifically;

- 1.** Businesses with force majeure clauses should prudently review them and be able to serve the respective parties with written and adequate notices in time. It is strongly advisable to notify the receiving party at your earliest opportunity and not assume that they shall consider evoking force majeure on your behalf. Communication on force majeure should ideally happen when the enforcer reasonably becomes aware of any delay that may arise due to the outbreak.
- 2.** Government should consider rental waivers for individuals and businesses affected by the pandemic. Government should also ban any private rental/business evictions during the pandemic.
- 3.** To make sure rental bans do not exacerbate the suffering of landlords and other businesses affected by the corona pandemic, Government may consider putting in place a temporary hiatus on mortgage payments.
- 4.** With the Bank of Uganda consumer protection guidelines in place, the objectives of fairness, reliability and transparency through clear, guided communications have to be emphasized during this critical time. A Government resolution would ask banks to stop foreclosures during the coronavirus outbreak. In the USA, the Central Bank has cut interest rates by half a percentage point, its biggest single cut in more than a decade, as a pre-emptive move to protect the economy from the coronavirus. We recommend the same for Uganda.
- 5.** Electronic money/Mobile money & other digital payment systems should be utilized during this time and Bank of Uganda should implement emergency measures such as, no charge for digital money/mobile money transactions, increase in transaction limits, advocating for cashless/mobile money wallets, elimination of charges for transfers between digital/mobile money wallets and bank accounts.
- 6.** Government should also make the use of key online government services mandatory in order to avoid crowding.

Recommendations

7. In a bid to encourage companies to implement work from home policies, Government should also consider temporarily unblocking Virtual Private Networks (VPNs). This will allow businesses & individuals to securely transact remotely.

8. Bank of Uganda should also strongly consider resolutions in line with their objectives of promoting fair and equitable financial services practices by setting minimum standards for financial services providers in dealing with consumers.

9. For employees, Government should emphasize adherence to the Employment Act, 2006 and also put measures in place to protect employees. For issues like sick leave, employees shouldn't have to use up their limited sick days because of the pandemic. Many people are losing work because of the measures announced to curb COVID. Section 55 (1)(b) of the Employment act, 2006 provides for termination of a contract of service of an employee who is sick for more than two (2) months. We recommend that Government provides clear guidance on sick leave and enlarges/extends the time for sick leave to a period commiserate with directions on quarantine.

10. Government should also re-emphasize payment of paid leave so that anyone presenting with symptoms of COVID, or who has a family member or other dependent presenting with the symptoms of coronavirus, can get fully paid time off of work to see a doctor, get treatment, or provide care.

11. Provide tax/social security holidays for people and businesses who can't afford to pay. China is easing the tax burden for firms in the most vulnerable regions and sectors, including transportation, tourism, and hotels. Korea is providing income and VAT tax extensions to businesses in the affected industries. China, Italy, and Vietnam are offering tax extensions to cash-strapped businesses. Iran is simplifying taxation for corporations and businesses. China is allowing for a temporary suspension of social security contributions for firms.



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