IS COVID – 19 "ACT OF GOD"?

Due to the disruptions caused by COVID-19, many businesses are constrained to explore the possibility of invoking Force Majeure clauses in response to their contract performance difficulties caused by the disruptions.

As the duty of courts in interpreting contracts dwells upon the specific wordings used, the question would naturally arise whether a concerned clause can be interpreted as encompassing COVID-19. In a situation where the Force Majeure provisions are wide and non-exclusive, they would ordinarily apply. However, as is common practice and pursuant to the legal maxim *"expression unius est exclusion alterius" (i.e. the express mention of one thing excludes all others),* where the approach entailed the listing of specific events and or consequences which constitute Force Majeure events, the question arises whether Force Majeure clauses would cover the consequences of man-made pandemics like COVID – 19. This is so in view of the omnibus "Act of God" clauses usually inserted into contracts as a catch all phrase to cover unforeseen circumstances, which could frustrate or thwart the performance of the contract. The question thus is can "COVID-19" be classified as an "Act of God"?

By definition, "Act of God" is "…limited to an occurrence which is outside human agency and could not be reasonably anticipated. It amounts to interference in the course of nature that is so unexpected that any consequence arising from it must be regarded as too remote to be a foundation for legal liability."[i] In other words, for an act to be classified as an 'Act of God', the accepted view is exclusively that it must be a natural event in the nature of storms, floods, lightning, etc.[ii] Such event must have been of an extraordinary nature outside both the reasonable contemplation and control of the parties such that it could not have been provided for.

Despite the foregoing, arguments can effectively be advanced that COVID-19 can be classified as an "Act of God" despite the fact that it is in essence a man-made pandemic and by that virtue, ordinarily outside the accepted view of what constitutes "Act of God". The basis for this argument would appear to hinge on the remoteness of the cause of pandemic, the widescale disruption which the pandemic has had on commercial activities worldwide and the consequent inability of parties to foresee and provide for such an eventuality. The question of foreseeability is of course dependent on or tied to the time when a contract was entered into.

The counter argument that COVID-19 does not fit the known concept of a natural event, being both man-made and involving the spreading agency of human beings, could be declined on basis that its cause was too remote to be within the contemplation of the parties at the time of contracting. Similar basis exists for rejecting the admittedly

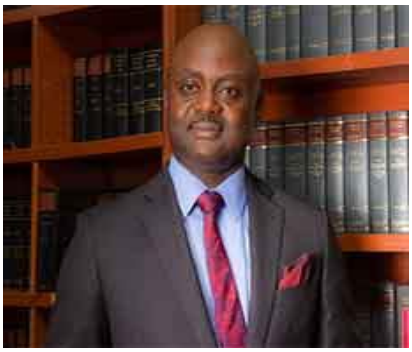
plausible argument that COVID-19 itself cannot be classified as a disruptive event it not being the regulatory or legislative activity causative of lockdowns, social distancing and associated disruptions.

The genius of the law is that it is a living, fluid and evolving being; able to adapt or expand even its prescriptive form. The catalyst for its evolution being the facts of a given case. It would accordingly be necessary for needing businesses to obtain specific advice.

Please contact our Emonye Adekwu at emonye.adekwu@twentyfour-law.com for specific legal advice.

[i] Eviro v. Obi (1993) 9 NWLR (Pt. 315) 60

[ii] Nugent v Smith [1876] 1 CPD 423



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