TADESSE KIROS LAW OFFICE

IMPACT OF COVID-19 ON CONTRACTS: FORCE MAJEURE AND RELATED REMEDIES UNDER ETHIOPIAN LAW

Dadimos Haile, Tadesse Kiros Law Office
Addis Ababa, Ethiopia
Dadimos.h@tadessekiros.com

The outbreak of COVID-19 is having a wide-ranging impact on lives and livelihoods around the world. While Ethiopia has thus far been spared from the high level of infection and deaths witnessed in other parts of the world, the economic impact of the pandemic and the countermeasures taken both at home and abroad is substantial. A recent policy paper circulated by the Ethiopian government identifies loss of market for Ethiopian products abroad, loss of revenue as a result of a virtual freeze in the tourism industry and dwindling foreign direct investment among the most significant consequences.[1] It recommends a set of measures aimed at assisting businesses that are most affected by the pandemic to continue their operations and protect private sector employees from lay offs.[2]

At a more micro level, many individual businesses are likely to find themselves struggling with uncertainties regarding their ability to meet their obligations and/or claim their rights under existing contracts. The propose of this note is to provide an overview of the main remedies available under Ethiopian Law of Contracts[3] for businesses whose contractual rights and/or obligations may have been affected by the pandemic as well as the response at the global and national levels. The latter includes the various restrictions and obligations imposed by the Emergency Proclamation, such as the closure of schools, and prohibition of large gatherings and mandatory 14 day self-quarantine for passengers arriving via international flights.[4]

Force majeure, adverse changes and act of government

There are three types of remedies under the 1960 Civil Code that may be variously invoked by parties whose performance is rendered impossible or more onerous by circumstances such as those that arise in the context of coronavirus outbreak. These are *force majeure, the hardship doctrine or adverse change of circumstances* and *act of government* and we shall review them in that order.

[1] Recommendation on measures that need to be undertaken to alleviate the impact of Corona virus on the economy, Council of Ministers, April 2020.
[2] One of the recommended measures was tax relief which has led to the adoption of adoption of a directive by the Ministry of Finance (The Tax Relief Directive issued to minimise the impact of Covid-19 on tax payers, Directive No. 64/2012)
[3] Ethiopia has a codified legal system with substantive laws modelled after the French/civil law system and procedural laws inspired by the common law tradition.
[4] A State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact, Proclamation No. 3/2020; Council of Minsters Regulation to Implement the State of Emergency Proclamation No. 3/2020, adopted on 11 April 2020

a) Force majeure

Force majeure under Ethiopian Law is implied by the operation of the law and can be invoked even if it is not stipulated in a contract (Civil Code Arts 1792-1794). Accordingly, a party would not be liable for non-performance under the provisions of the Civil Code if it can establish that it has been *absolutely prevented* from discharging its obligation by an occurrence it *could not normally foresee*. The pandemic and some of the regulatory measures in place can arguably qualify as such occurrences even though pandemics or epidemics are not included in the list of events provided in the Civil Code by way of examples of *force majeure*. The latter includes natural catastrophe such as an earthquake, lightning or flood and international or civil war but also *an official prohibition preventing the performance of the contract*.

Force majeure, however, does not exist where the event could normally have been foreseen or where it merely renders performance more onerous. The latter observation also applies to contexts where the enactment of laws, such as the emergency legislation in Ethiopia, aimed at countering Covid-19 made the fulfilment of contractual obligations more onerous (Art 1794).

b) Adverse changes in the conditions for the performance of a contract or the hardship doctrine

The second type of remedy is one that is comparable to the hardship doctrine which enables either party to seek variation where performance became more onerous because of adverse changes in the conditions of the performance of the contract (Civil Code Arts 1764, 1770, 1766 and 1767 and Arts 3131ff).

Unlike *force majeure*, the latter remedy is generally available if it is expressly provided in the contract. The general rule is that a contract shall remain in force notwithstanding any adverse changes in the conditions of its performance unless stipulated otherwise in the contract. Where such a stipulation is made, a party whose performance is made more onerous for example by travel restrictions, self quarantine or control measures imposed at work place (such as working in shifts, limiting the number of employees working in close proximity) can obtain a grace period of up to 6 months.

An *important exception to the requirement of an express contractual stipulation* applies where the contract is concluded with a public authority or agency, which falls within the special category of contracts referred to as *Administrative Contracts* (Civil Code Art 1767, 1768 and 1769 *cum* 3183-3189). A party having contracted with a public authority can apply for variation of the contract on the basis of adverse change of circumstances even in the absence of contractual stipulations to this effect.

The applicable test consists in: a) whether the contractual balance between the parties has been upset i.e. whether the party seeking remedy had to assume additional obligations that are beyond the extreme limits which could be expected by the parties; and b) whether this is caused by circumstances that could not be foreseen at the conclusion of the contract.

Where the above test is satisfied, the private party would still be required to perform its obligation to the extent this is materially possible but can request the assistance of the other side (the contracting public authority) to overcome the difficulties and share the costs.

c) Act of government

Finally, we have a third type of remedy, which is linked to the notion of *act of government* (derived from the French administrative law doctrine of *fait du prince*) and applies solely in relation to contracts with public authorities (Civil Code Arts 3190-3193). Accordingly, a party

to an administrative contract can bring an action for variation of the contract and compensation if it can show that *the provisions of the contract have been directly modified* or *are rendered unenforceable* or *performance was terminated prematurely* by *legislation or other measures of general application* taken by public authorities (Civil Code Arts 1767 and 3190). A claim for compensations can only be denied if it is expressly excluded by the relevant legislation or measure.

However, there is no implied right to compensation where such legislation or measures only have the effect of making the obligation more difficult or onerous to perform. Moreover, apart from the challenges of satisfying the stringent tests and causation requirements of Article 3190 referred to above in the context of the Emergency Proclamation, an action for compensation may not offer a robust remedy since it is subject to the discretionary power of the courts to apply considerations of equity and the preservation of the balance of the contract (Civil Code Arts 1769 and 3188).