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Can the DPR Rightly declare the Covid-19 Pandemic a *Force Majeure* Event?

Okechukwu Okoro
okechukwu.okoro@gelias.com

Fidelis Oguche*
fidelis.oguche@gelias.com

INTRODUCTION

The Department of Petroleum Resource (the "**DPR**") has, in its capacity as the foremost regulator of the Nigerian oil and gas sector (the "**Industry**"), recently issued certain circulars and directives in response to the Covid-19 pandemic (the "**Pandemic**"). These circulars and directives are intended to guide operations in the Industry during the period of the Pandemic. Some uncertainties arise regarding the issues of the legal effectiveness and scope of the directives, as well as their fairness.

THREE DIRECTIVES

The key circular was issued by the DPR on March 30, 2020 and is entitled "Re: Management of Covid-19 Outbreak – Update 2" (the "**March 30 Circular**"). Its key clauses provide thus:

"*i. All operators and their contractors are to ensure strict compliance with relevant Government directives and limit the number of personnel at project/construction sites accordingly.*

ii. The current situation is considered "force majeure" to ensure the safety and welfare of all personnel and to contain the spread of COVID-19.

iii. All operators and their contractors are to comply with the directives of Government authorities on Social Distancing, Curfew, Lockdown, etc. as may be applicable.

iv. Consequently, we expect demobilization of personnel from these sites to the extent required to satisfy the above requirements".

The March 30 Circular was issued as a follow-up measure to DPR's circular issued on March 20, 2020 (the "**March 20 Circular**"). The March 20 Circular was mainly to intimate the general public of some of the internal health and safety measures which had been put in place by the DPR in the wake of the Pandemic. The March 30 Circular which was directed to all Industry operators, contractors and service providers ("**Actors**") prescribed measures to be taken at operations locations and construction sites in the Industry.

By the March 30 Circular, the DPR declared the Pandemic a "*force* majeure" event and accordingly directed Actors to ensure the safety and welfare of personnel and curtail the spread of the virus. Actors are also required by the March 30 Circular to (A) limit the number of personnel at operations locations and construction sites and (B) comply with the directives of Governmental authorities on social distancing, curfews and lockdowns.

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* *Okechukwu Okoro is a Senior Associate at G. Elias & Co. and Fidelis Oguche is an Associate at G. Elias & Co.*

More recently, on April 2, 2020, the DPR issued another directive reiterating its position declaring the Pandemic a "*force majeure*" event. The DPR further directed Actors to demobilize personnel from their sites to the extent required to satisfy Government directives on social distancing, curfews and lockdowns.

From a social standpoint, the March 30 Circular is commendable in view of the obvious health risk and challenges posed by the Pandemic. However, from a legal standpoint, the extent to which Actors can rely on the March 30 Circular declaring the Pandemic a *force majeure* is controversial.

EFFECTIVENESS QUESTIONS

One set of questions arising is whether an Actor can rely on the March 30 Circular to call on a *force majeure* where (AA) the contract does not provide for *force majeure at* all or (BB) situations such as the Pandemic are not contemplated as a *force majeure* event under the contract.

On (AA) and (BB) above, by the principles of privity of contract and the freedom of parties to contract, the government and/or regulatory authorities (including the DPR) would typically not intervene in private commercial transactions. Similarly, provisions not expressly covered in an agreement cannot be implied into the agreement. However, legislation (including subsidiary legislation) can and does rewrite contracts.

It is not entirely clear whether the March 30 Circular will suffice as a subsidiary legislation. The March 30 Circular is intended to be legally binding. However, the March 30 Circular on its face did not emanate from the Minister (nor pursuant to any of the powers of the Minister) under the Petroleum Act (1969). It is, therefore, arguable on this basis that the March 30 Circular is not a subsidiary legislation able to vary the terms of contracts entered by the Actors.

To put this wrinkle to rest, ideally the March 30 Circular should have carried the *imprimatur* of the Minister for Petroleum from the start. The Petroleum Act (1969) s. 12(1) says that <u>*only*</u> the Minister can make "orders and regulations" under the Act. In any event, it is confusing to call an excuse of contractual performance when it was not agreed by the parties and was imposed by legislation in circumstances where (as will be shown shortly) contractual performance was in fact very possible.

Another issue arising is whether the terms of the March 30 Circular can be relied on to vary a contract between an Actor who is regulated by the DPR and a third party who is not regulated by the DPR. To the extent that the March 30 Circular is effective as secondary legislation, an Actor in the Industry can rely on it to vary the provisions of a contract between the Actor and such a third party.

SCOPE QUESTIONS

Other Issues are (X) whether the operative *force majeure* event is the Pandemic or the actual lockdown orders made pursuant to the Pandemic that actually make contractual performance in issue impossible and (Y) how the March 30 Circular will work alongside contractual *force majeure* clauses and frustration.

With respect to (X), it should be important that the performance of the contract has become temporarily at least near-impossible, either because of the Pandemic or lockdown orders. The mere fact that there is a Pandemic or that there is a lockdown situation in other places should in principle be immaterial if the performance of the given contract is still very possible. However, the March 30 Circular on its face implies otherwise thus, "*[t]he current situation is considered "force majeure" to ensure the safety and welfare of all personnel and to contain the spread of COVID-19 …You are to ensure immediate compliance with the above".*

On (Y), to the extent there are no inconsistencies in the existing contractual *force majeure* and frustration clauses, the provision of the March 30 Circular declaring the Pandemic a *force majeure* event should ordinarily supplement the terms of the existing contract. In the event of inconsistency between the terms

of the contract and those of the March 30 Circular, the terms of the March 30 Circular should prevail to the extent that it is effective as secondary legislation.

In addition to declaring *force majeure* under the March 30 Circular, a party affected by the Pandemic can rely on the common law doctrine of frustration. The doctrine applies where an unforeseen event beyond the control of the parties renders a contract substantially impossible to perform or makes the outcome of the performance fundamentally different from what was agreed by the parties at the time of contract.

Whether the doctrine of frustration can be used as a defence will largely depend on the nature of the obligation to be performed under the contract. If the obligation is not such that its performance is rendered impossible by the Pandemic (*e.g.* a contract to review an agreement), then the doctrine will not avail the party seeking to rely on it.

CONCLUSION

It is advisable that Actors, rather than simply invoke *force majeure* based on the March 30 Circular, engage their counterparties to negotiate the effect of the Pandemic on existing contracts. In principle, a solution that neither the classical doctrine of *force majeure* nor the March 30 Circular contemplates is to ask the parties to share the losses arising equally rather than simply excuse performance by one party with the effect of asking the other party to bear the losses alone. Parties negotiating solutions should bear this option to share losses in mind. Without that, Actors will have to contend with a Circular which is, with all due respect, inelegantly conceived, authored and scoped *albeit* clearly intended to be legally binding.