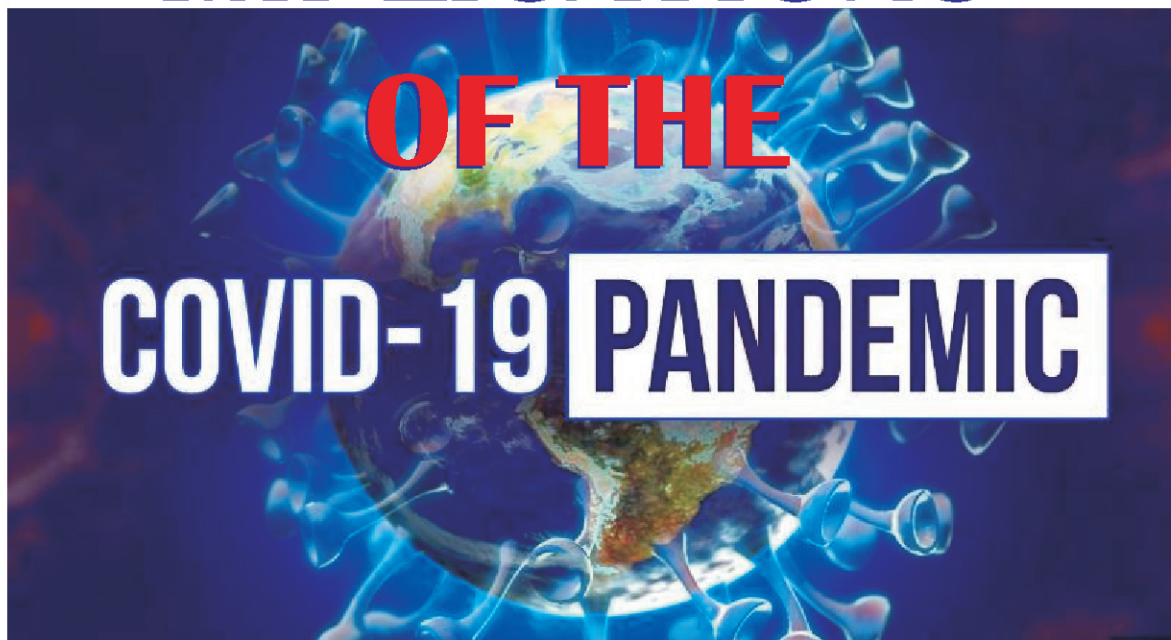


# TIT-BITS

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## COMMERCIAL AND LEGAL IMPLICATIONS



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The Corona Virus (Covid-19) Pandemic (the “**Pandemic**”) has disrupted virtually all recent commercial and business activities. This Article considers some of the issues arising from the occurrence of the Pandemic.

## 1. Non-Performance of Contractual Obligations

### (a) Frustration of Contract

A party to a contract may be of the view that the Pandemic may make the performance of such contract impractical, onerous or even impossible; and, on this basis, might argue that the contract has been frustrated. The effect of frustration in law is the termination of the contract so that the parties are excused from further performance thereunder. However, in order for a contract to be frustrated, the supervening event in question (such as the Pandemic) must be unforeseen; must have occurred without the fault of either party and it must either make the continued performance of the contract impossible or it must destroy the fundamental essence of the contract. Most importantly, the contract must not contain provisions contemplating the occurrence of the supervening event, otherwise there can be no frustration on the basis that the contract has already allocated risk in terms of the occurrence of the event.

Historically, it is difficult for parties to successfully argue frustration of contract before Nigerian Courts. The attitude of the Nigerian courts to this issue is captured in the statement of his Lordship, Rhodes Vivour, J.C.A. (as he then was), in *Diamond Bank Limited v. Ugochukwu* (2008)1 NWLR, (Pt.1067), at page 28; and the decision of the Supreme Court per Adekeye, J.S.C., in *Nwaolisah v. Nwabufoh* (2011) LPELR-SC 211/2003.

### (b) Force Majeure

In view of the reluctance of Nigeria courts to find that a contract has been frustrated, many commercial contracts incorporate force majeure (“**FM**”) clauses. FM clauses are typically inserted in contracts to allocate risks in the event that a party to the contract is prevented from performing its obligations under the contract. FM clauses operate to suspend the performance of a party's obligations under the contract where such a party is prevented from doing so by circumstances beyond its control, which circumstances could not have been reasonably foreseen.

In the context of the Pandemic, where FM events under a contract are defined to include epidemics, pandemics, diseases, travel ban, or government restrictions (the “**Trigger Events**”), the party that is prevented from carrying out its obligations under the contract would be able to invoke the benefit of FM clause in the contract. The position of the law is now well settled that the occurrence of a FM event will generally only result in a delay in the performance of the affected party's contractual obligations; and does not immediately trigger a right to terminate the contract in question.

## 2. Impact on Employer/Employee Relationships

### (a) Employers Must Be Careful Not to Expose Employees to the Virus

A number of State Governments in Nigeria have commenced the implementation of certain corona virus preventive and mitigation measures (the “**Preventive Measures**”). For instance, Lagos State Government recently issued directives which prohibit certain gatherings in excess of twenty-five (25) people. As held by

the Supreme Court per Muhammad, J.S.C (as he then was), in *Iyere v. Bendel Feed and Flour Mill Ltd* (2008) 18 NWLR (Pt. 1119) 300, employers are under a duty to take reasonable care for the safety of their employees in all circumstances so as not to expose them to any unnecessary risk. Private sector establishments are obligated to introduce measures that will support the government's efforts at curtailing the spread of the Pandemic. The argument could, thus, be made that workplaces at which more than 25 people are gathered are deemed unsafe. Employers who act in defiance of extant Government directives could incur liability for a breach of the implied duty to provide a safe workplace for their employees.

### (b) The Duty to Work and Pay Wages May be Suspended

The need to incorporate FM clauses into contracts has been highlighted above. We have also discussed the Preventive Measures. The respective obligations of the employee (duty to render services) and the employer (duty to provide work and pay remuneration) will remain intact to the extent that the employer is effectively able to adopt a work-from-home policy.

However, in the event that a contract of employment contains a FM clause which is drafted to cover the Trigger Events, the respective obligations of the employee and the employer may be suspended to the extent that the FM event occasioned by the pandemic does not exceed one (1) week as stipulated by Section 17(1)(a) of the Labour Act Cap. L5 Laws of the Federation of Nigeria 2004 (the “**Labour Act**”). Where, as it is expected, the Pandemic exceeds a period of 1 week, Section 17(1)(a) of the Labour Act requires the employer to procure the extension of the FM period through the sanction of a public officer in the Ministry of Labour and Productivity or an officer in the public service of a State (Sections 77 and 91 of the Labour Act). By Section 17(1)(a) of the Labour Act, employers are obligated to pay their employees only for the first day of the period during which the Pandemic subsists. Where the contract of employment does incorporate a FM clause, the parties to the contract of employment are required to consider the implications of Section 17(1)(a) of the Labour Act as discussed above.

Although Section 17 of the Labour Act does not specify whether the application to extend the 1-week period must be sought prior to the expiration of the said period, we are of the view that it will be impracticable for employers to apply for the said extension given the current state of play. In this regard, it may be necessary to consider an urgent review of Section 17 of the Labour Act. The 1-week period stipulated by the Act is no more realistic and should be reviewed to suit current realities of the global world of work.

## 3. Impact on the Constitutional Right to Freedom of Movement

Section 41(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) guarantees the freedom of every Nigerian to move and reside in any part of Nigeria. Furthermore, the section provides that “... *no citizen shall be expelled from Nigeria or refused entry or exit therefrom*”.

However, a combined reading of Sections 41(2) and 45(1)(b) of the Constitution reveals the authority of the government to make laws limiting the rights highlighted above in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons. Consequently, certain Preventive Measures such as the restriction of movement as well as the cancellation of flights to and from Nigeria may be considered reasonably justifiable within the context of Section 45(1)(b) of the Constitution.