

BUSINESS AND COVID-19 (The legal implications)

As the coronavirus (COVID-19) pandemic continues to affect every aspect of global life, businesses operating within the country or from abroad are having to respond to a fast changing landscape and are feeling the adverse effects of a downturn in the economy. A yearlong state of emergency has been declared and as a consequence restrictions have been imposed which impact upon the way business is conducted. Current restrictions include the closure of the land and sea borders to all but essential or emergency traffic, travel restrictions and a dusk to dawn curfew. The strategy for fighting the outbreak currently includes periodic short term lockdowns.

Given the inevitable and unavoidable disruption of “normal” business life, many businesses are anxious to understand the legal implications and the permissible mitigating steps. The following addresses some of the challenges that flow from the pandemic.

Employer’s Responsibilities

Employers are under a legal duty to take steps to avoid subjecting their employees to unnecessary risk. There is a duty to ensure that the working environment is safe for all employees and not harmful to their health.

In Sierra Leone employees fall into two categories namely those below supervisory level and those at or above supervisory level. It would be prudent for employers to review contracts so as to familiarise themselves with the relevant collective bargaining agreement as these agreements automatically incorporate rights and obligations into the contracts of employees below supervisory level. These may include providing insurance coverage, paying for medical care or allowing for paid sick leave for a certain length of time.



If an employee contracts Covid-19 in the course of his/her employment due to unsafe working conditions, it will expose the employers to the risk of a claim being brought against them, especially if a death results from the infection. Some African countries are introducing legislation in respect of COVID-19 which would result in the death of an employee from COVID-19 being treated as an occupational disease. This would have significant civil liability consequences for employers. Although such legislation has not yet been signalled in Sierra Leone it cannot be excluded as a possibility.

Employers should consider additional protective measures for those who are most at risk if exposed to the virus because they have underlying health conditions as well as asthmatic employees, pregnant employees and disabled workers. It is advisable to do a risk assessment of working conditions in order to evaluate the risks to vulnerable employees, new or expectant mothers or their babies.

If an employee refuses to go to work because they fear contracting the virus the employer must consider the risks and consider whether the employee is vulnerable. If there is no increased risk for the employee, the employer is entitled to ask them to attend work. If the employee continues to refuse to attend in these circumstances they may be subject to disciplinary action for unauthorised absence. It must be emphasized that this is predicated on it being safe for them to attend work. If a large number of employees are absent it may be possible to ask the remaining employees to work extra hours during the period. This will depend on the terms of their contracts of employment and any relevant collective bargaining agreement. A fair and reasonable approach should be adopted and care should be taken to ensure that employees are not required to exceed permissible hours.

It would therefore be prudent for employers to implement systems to ensure the proper screening of all entrants into the working environment, the provision of adequate hand and general cleaning facilities, suspending group activities or field work, where social distancing is not possible, and providing



safety advice to all employees and visitors. Wherever possible remote working arrangements should be introduced. It is also the employer's responsibility to ensure that IT systems support remote working and that internal structures are in place regarding data protection and confidential information.

COVID-19 and Contractual Obligations

The Global shut down has made it increasingly difficult for contractual obligations to be fulfilled as originally intended by the contracting parties resulting in financial loss or loss of opportunity. This has resulted in some parties seeking to release themselves from their contractual obligations. The solutions to the potential disputes depends on a variety of factors and the starting point is an examination of the contract in order to determine how best to avoid potential damages and costs. The first consideration is the governing law of the contract as that will ultimately determine issues of liability.

Under Sierra Leonean Law contractual obligations are binding and give rise to mandatory obligations which cannot be circumvented simply because performance has become more expensive or non-profitable for one of the parties. The COVID-19 outbreak is unlikely therefore to be an acceptable reason for not performing contractual obligations. There are exceptions to the general rule, one of which is where the contract contains a *force majeure* clause.

Force Majeure

Depending on the terms of the contract, parties may be relieved from their contractual obligations if the current Pandemic can be construed as constituting a force majeure event. The consequences of such a clause will normally be specified by the contract and may include extending the time for performance, temporary suspension of the obligation, enforced renegotiation or termination of the contract.



It is important that the contract be scrutinized closely as the *force majeure* clause may impose additional requirements such as a notice period. Each clause will need to be interpreted on its own specific facts and circumstances. The party seeking to rely on the clause will need to show that:

- (1) One of the events identified in the clause has occurred;
- (2) As a result of the event performance of that party's contractual obligations is no longer possible due to circumstances beyond the party's control; and
- (3) There are no reasonable steps that could have been taken to avoid non-performance.

It is important to note that in order to rely on a *force majeure* clause it must be established that it has become physically or legally impossible to perform the contractual obligation. It will not be sufficient merely to demonstrate that performance is more difficult or not profitable.

In reviewing current contracts Employers should consider whether any new contracts should include a force majeure clause or whether such clauses in existing contracts need to be amended.

If the contract does not contain a force majeure clause then there are other options that can be considered such as the doctrine of *frustration*.

Frustration

Frustration may apply if due to no fault of the parties the current outbreak has made it impossible to perform the contractual obligations or the performance would be radically different to that contemplated when the contract was entered into. Frustration has a much narrower application than a *force majeure* clause and results in the contract being terminated. In common with force majeure in order to successfully raise frustration the party seeking to rely on the doctrine must show that COVID-19 has made the contractual obligation fundamentally different. It is not enough to show that it is significantly more expensive and/or onerous than originally contemplated. If the contract is terminated any money paid in advance of



performance must be refunded but a party may retain or recover payments in respect of expenses. Where there is no force-majeure clause and the parties wish to continue a previously mutually beneficial long term relationship instead of terminating the contract it is open to them to explore alternatives such as renegotiation.

Renegotiation

We would advise that a non-confrontational approach is taken during any renegotiations. It is important to avoid making any statements which may have adverse consequences if the negotiations are unsuccessful. For example you should not assert that is impossible for you to perform your obligations as that might be construed as an admission of liability in the event of a contractual dispute. It should be possible to amicably renegotiate certain terms such as the rates of payment, dates for payment, the dates for delivery and the number of hours to be worked during the outbreak. It may also be possible to suspend the operation of some of the contractual terms or to furlough staff during the outbreak. Valuable relationships are capable of being preserved by renegotiation but you must be very aware of any potential liability and ensure that you do not waive your contractual rights or the right to terminate if necessary. Renegotiation avoids the uncertainty and risks of litigation and potentially avoids the risk of your business relationship being irretrievably damaged after the current crisis has passed.

Corporate Governance

Companies must continue to fulfil their obligations to statutory bodies such as the Corporate Affairs Commission (CAC), the National Revenue Authority and other regulatory bodies. Shareholders and directors must continue exercising powers of governance over companies. In light of the health risks and government guidelines on the holding of large gatherings, legal advisers should check the relevant provisions in the Companies Act or the company's



Articles of Association for provisions relating to remote participation in Annual General Meetings and other formal meetings, or postponement of such meetings to the maximum time allowed by statute. Companies should also contact the CAC for guidance on this issue while the COVID-19 pandemic persists. In the absence of emergency legislation it would be prudent for companies to obtain written advice from their accountants or financial advisers on what steps need to be taken to comply with audit and reporting requirements.

Corporate Securities, M&A & Other Transactions

Companies issuing securities such as equity and debentures must take care to completely and accurately disclose the impact of the COVID-19 pandemic on the company. The issuer of a security, and any auditors or financial adviser representing the investing party is under a legal obligation to disclose all material information in respect of the proposed investment/facility to the investor/creditor. This includes the present or estimated future impact of COVID-19 on the value of the proposed investment.

If a party to a proposed facility agreement or M&A transaction is severely affected by the impact of COVID-19, the other party to the transaction may at this stage consider invoking the material adverse change (MAC) clause if the contract includes one and it is still possible to do so. A materially adverse change clause gives a party the right to terminate the agreement before it is finalized if events occur which are detrimental to the target company or the borrowing company.

Lawyers and financial advisers conducting due diligence exercises in respect of such transactions should include a comprehensive assessment of the company's exposure to the impact of COVID-19.



Human Rights Considerations

The state of Emergency means that some rights are necessarily suspended and some restrictions are in place in order to effectively combat the pandemic. Notwithstanding this, it is important for public bodies and private entities to respect the human and civil rights of individuals. Any measures introduced must be in accordance with the Public Health Act 1960 (as amended) and the Constitution and must be reasonable and proportionate so as not infringe constitutional rights such as freedom from inhuman and degrading treatment and freedom from discrimination. For instance, it would be unlawful for an employer to force an employee to perform work in a place where there is a large crowd of people if there is the risk that by so doing the employee may contract the infection. Furthermore, the employer is not entitled to determine which employees are allocated risky field or client-facing work on the basis of colour, race, gender, religion or any other differentiating factor.

In the public sector, there is a duty to ensure that healthcare is equally available to all persons regardless of their identity or social standing, and restrictive measures should not be unnecessarily relaxed in favour of any select class of persons.

If you feel that you or someone you know has been unfairly treated in any regard, you should contact your legal representative as the affected person may possibly be entitled to a claim on that basis.

Insurance

Depending on the type of insurance coverage held by a company, losses as a result of the COVID-19 pandemic may be covered by the insurance provider. For instance, event insurance cover or business interruption cover may protect your business against some of the risks outlined above. Businesses should review insurance policies to determine whether this is the case. If so, they may be entitled to submit a claim to obtain payment from providers.



Conclusion

It is inevitable that there will be a new norm after the Pandemic. There will be greater reliance on technology as well as structural and societal changes. Handshakes may not return as a form of social greeting, and the importance of personal space may gain greater prominence and acceptance. Businesses in Sierra Leone should start preparing for life after COVID-19 by ensuring that their IT systems are upgraded and that there are sufficient measures in place for the protection of data. The changes will be significant and lingering, and the legal implications will be just as important, but, opportunities will present themselves and those who implement changes now will be best placed to take advantage of them.

This does not constitute legal or health advice. For more information or advice on COVID-19 contact your local and national health authorities.



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